



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

FIRST SECTION

CASE OF BURSAĆ AND OTHERS v. CROATIA

(Application no. 78836/16)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Disproportionate burden on applicants ordered pay full costs of the State's representation in civil proceedings for damages brought in connection with their father's killing, a suspected war crime victim

STRASBOURG

28 April 2022

FINAL

28/07/2022

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

In the case of Bursać and Others v. Croatia,

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

Marko Bošnjak, *President*,

Péter Paczolay,

Krzysztof Wojtyczek,

Alena Poláčková,

Erik Wennerström,

Ioannis Ktistakis,

Davor Derenčinović, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 78836/16) 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 five Croatian nationals, Ms Bosiljka Bursać, Ms Đuka Damjanović, Ms Nena Damjanović, Ms Danica Dubajić and Ms Milica Vasiljević (“the applicants”), on 15 December 2016;

the decision to give notice to the Croatian Government (“the Government”) of the complaints concerning the criminal investigation into the killing of the applicants’ father and the order for the applicants to pay the costs of the civil proceedings to the State and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 22 March 2022,

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

INTRODUCTION

1. The application concerns the investigation into the killing of the applicants’ father in 1995, purportedly by Croatian soldiers. It also concerns a decision ordering the applicants to pay the costs of the State’s representation in the civil proceedings in which they sought damages in connection with their father’s killing.

THE FACTS

2. The applicants’ details are set out in the appendix. They were initially represented before the Court by Mr L. Šušak, and then by Ms S. Čanković, both lawyers practising in Zagreb.

3. The Government were represented by their Agent, Ms S. Stažnik.

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

I. BACKGROUND TO THE CASE

5. In 1991 the armed conflict escalated in Croatia. During 1991 and 1992 Serbian paramilitary forces gained control of about one-third of Croatian territory and proclaimed the so-called “Serbian Autonomous Region of Krajina” (*Srpska autonomna oblast Krajina* – hereinafter “Krajina”). At the beginning of August 1995, the Croatian authorities announced a military campaign to regain control of Krajina. The action was codenamed Operation Storm and lasted from 4 to 7 August 1995. Before that action, the vast majority of the population of Krajina had fled Croatia.

II. KILLING OF THE APPLICANTS’ FATHER AND THE SUBSEQUENT INVESTIGATION

6. The applicants’ father, I.D., was a civilian of Serbian ethnic origin who was eighty-six years old at the time of Operation Storm. He remained in his house in the village of K., in the occupied territory of Krajina, together with the applicants’ mother, Đ.D., and aunt, B.O.

7. He was killed on 6 August 1995 in the courtyard of his house. According to the written statements given by the applicants’ mother and aunt in 2005, when the Croatian soldiers had entered the village the three of them hid in an orchard near the house. At one moment I.D. went to feed the cows. Đ.D. and B.O. saw him talking to Croatian soldiers and then heard gunshots. When the soldiers had left, Đ.D. and B.O. went to the house and found his body.

8. On 23 September 1995 the fifth applicant came to the village and informed the police that her father’s body had been found lying in the courtyard of their house. On 25 September 1995 I.D.’s remains were buried in the G. cemetery.

9. On 5 November 1997 Croatia ratified the Convention.

10. On 20 May 2002 the investigating judge ordered the exhumation at the G. cemetery of 158 bodies of persons killed during Operation Storm, on account of a reasonable suspicion that the criminal offence of a war crime against the civilian population had been committed.

11. Body no. 622 was also dug up. The autopsy report of 9 October 2002 concluded that the cause of death had been gunshot wounds to the head, torso and limbs. On 16 May 2003 the fifth applicant identified the remains as those of her father.

12. In May 2011 the State Attorney’s Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*) submitted a list of persons killed during Operation Storm to the Karlovac County State Attorney’s Office (*Županijsko državno odvjetništvo u Karlovcu*) and asked it to investigate whether those persons had been victims of a war crime. The applicants’ father’s name was on that list.

13. In November 2011 the fifth applicant lodged a criminal complaint with the Karlovac County State Attorney's Office alleging that unknown members of the Croatian army had committed a war crime against her father.

14. On multiple occasions between 2012 and 2017 the Karlovac County State Attorney's Office asked the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*) to submit a copy of the case file of the civil proceedings which the applicants had instituted against the State in 2005 seeking damages (see paragraph 16 below). They explained that the criminal investigation had not led to any results and that an inspection of the witness statements and other evidence adduced by the civil court could help set a direction for the investigation. On each occasion the civil court replied that it could not submit a copy of the case file since the file was with the Supreme Court (*Vrhovni sud Republike Hrvatske*), following an appeal on points of law lodged by the applicants (see paragraphs 22 and 23 below).

15. Meanwhile, the fifth applicant frequently enquired about the progress of the investigation. She submitted written statements given by her mother and aunt in 2005 (see paragraph 7 above) and proposed, *inter alia*, obtaining information as to which Croatian army unit had entered the village of K. on 5 August 1995. In May 2017 the Karlovac County State Attorney's Office informed her that there had been no discoveries but that the investigation was still ongoing.

III. CIVIL PROCEEDINGS INSTITUTED BY THE APPLICANTS

16. On 12 September 2005 the applicants lodged a civil claim against the State, alleging that their father had been killed by Croatian soldiers. They relied on the Act on the liability of the Republic of Croatia for damage caused by members of the Croatian army and police in the performance of their duties during the Homeland War (*Zakon o odgovornosti Republike Hrvatske za štetu uzrokovanu od pripadnika hrvatskih oružanih i redarstvenih snaga tijekom Domovinskog rata*, Official Gazette, no. 117/2003, hereinafter "the Liability Act" – see paragraph 32 below). They sought 20,000 Croatian kunas (HRK)¹ in respect of pecuniary damage and HRK 220,000² each in respect of non-pecuniary damage. On account of their poor financial status, they also sought an exemption from having to pay court fees, which was granted.

17. On several occasions during 2008 and 2009 the Zagreb Municipal Civil Court asked the Ministry of Defence of the Republic of Croatia (*Ministarstvo obrane Republike Hrvatske*) which military unit had entered the village of K. on 6 August 1995 and whether there had been any warfare in the village on that day, but the Ministry did not reply.

¹ Approximately 2,600 euros (EUR).

² Approximately EUR 30,000.

18. At a hearing held on 12 July 2010 the State for the first time objected that the applicants' civil claim had been time-barred.

19. On 28 July 2010 the Zagreb Municipal Civil Court dismissed the applicants' civil claim as time barred. It found that the claim had been lodged outside the objective five-year statutory limitation period under section 376(2) of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette no. 53/1991, with subsequent amendments – see paragraph 29 below) and that the longer statutory limitation period under section 377 of that Act did not apply because there was no final criminal court judgment against the perpetrators. It added that, even if the civil court were allowed to examine in the particular case whether the applicants' father's killing had amounted to a crime, there would be insufficient evidence for such a conclusion since the applicants' aunt had not directly seen his killing, but had only heard gunshots.

The Zagreb Municipal Civil Court also ordered the applicants, under section 154 of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette no. 53/1991, with subsequent amendments – see paragraph 40 below), to pay the State HRK 60,000³ in costs, comprising the fees chargeable for the State's representation by the State Attorney's Office. Those fees related, in particular, to the preparation of a reply to the applicants' civil claim and to attendance of hearings on 19 September 2007 and 10 March 2010.

20. In their appeal the applicants contended that the case file clearly showed that their father had been a war crime victim. They argued that a claim for compensation for damage caused by a war crime could not become time-barred and that, since there had been no criminal judgment against the perpetrators, the civil court ought to have examined the matter as a preliminary issue. They also challenged the order requiring them to pay the costs of the State's representation in the civil proceedings, arguing that it was contrary to a Government decision of 28 May 2009 on the writing-off of claims for the costs of civil proceedings awarded to the Republic of Croatia in certain proceedings (see paragraph 43 below).

21. On 3 November 2011 the appellate court dismissed the applicants' appeal as unfounded. It added that without a criminal conviction it had not been possible to maintain that the applicants' father's death had been the result of a crime.

22. In an appeal on points of law lodged in January 2012, the applicants reiterated their arguments.

23. On 20 September 2016 the Supreme Court dismissed the applicants' appeal on points of law as unfounded. It agreed with the lower courts that the applicants' civil claim for damages had been lodged outside the general statutory limitation period under section 376 of the Civil Obligations Act, having regard to the fact that their father had been killed in August 1995 and

³ Approximately EUR 8,000.

they had lodged their civil claim in 2005. It also agreed with the lower courts that the longer statutory limitation period under section 377 of the Civil Obligations Act did not apply in the case since there was no criminal conviction. It reiterated that civil courts were allowed to examine, as a preliminary issue, whether the damage had been caused by a criminal offence only where, owing to certain procedural bars, such as the known perpetrator's death or his or her mental incapacity, it had not been possible to conduct the criminal proceedings. If the perpetrator had remained unknown, the civil courts were not allowed to do this.

The Supreme Court lastly declared inadmissible the applicants' appeal on points of law lodged against the decision on costs, noting that on 16 November 2015 the Civil Department of that court had decided that final decisions on costs were not decisions against which an appeal on points of law lay.

24. On 5 October 2017 the applicants lodged a constitutional complaint. They asserted that their father's killing had amounted to a war crime for which the prosecution could not become time-barred, and that therefore the civil courts ought to have allowed their claim.

They further complained, relying on *Cindrić and Bešlić v. Croatia* (no. 72152/13, 6 September 2016), that the order imposed on them to pay the costs of the State's representation in the civil proceedings was in breach of their rights of access to a court and to the peaceful enjoyment of possessions. They explained that they had lodged their civil claim shortly after the State had passed a new law concerning compensation for damage caused by Croatian soldiers during the war. At that time, they could not have known how the domestic courts would apply section 377 of the Civil Obligations Act to situations of unprosecuted war crimes. However, they had legitimately expected that the courts would rule in favour of the victims, so as to allow them to obtain redress for gross human rights violations. They contended that in circumstances where the State authorities had not prosecuted the perpetrators and where, without a criminal conviction, they had been unable to obtain damages for their father's killing, ordering them to pay the costs of the State's representation in the civil proceedings had amounted to their further victimisation by the State, in particular having regard to their poor financial status. They lastly complained under Articles 2 and 14 of the Convention that the investigation into their father's killing had been ineffective.

25. On 29 November 2017 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicants' constitutional complaint, finding that the Supreme Court's decision had not been arbitrary. It did not examine the applicants' complaint under Article 2 of the Convention that the investigation had been ineffective. That decision was served on the applicants' representative on 11 December 2017.

IV. PROCEEDINGS CONCERNING THE WRITING-OFF OF THE APPLICANTS' DEBT

26. The applicants submitted that in July 2014 they had asked the competent authority, relying on the Government's decree of 25 April 2013 (see paragraph 44 below), to write off their costs debt on account of their poor financial status, but that this had been denied. The Government made no submissions on this point.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Criminal law

27. Article 120 of the Basic Criminal Code of Croatia (*Osnovni krivični zakon Republike Hrvatske*, Official Gazette nos. 53/91 with further amendments), defining war crime against the civilian population, is quoted in the case of *Trivkanović v. Croatia* (no. 12986/13, § 39, 6 July 2017). Article 95 of the Code provided that prosecution for war crimes could not become time-barred.

28. The report on the work of the State Attorney's Office for the year 2012, submitted to Parliament in September 2013, states that in the period between 1991 and 31 December 2012 there were 13,749 reported victims of war crimes in Croatia, of whom 5,979 had been killed. At that point, the Croatian authorities had opened investigations in respect of 3,436 alleged perpetrators. There had been 557 convictions for war-related crimes.

B. Tort law

1. Relevant legislation

29. The relevant provisions of the Civil Obligations Act concerning statutory limitation periods (*zastara*), namely sections 360, 376 to 377, 388 and 392, are quoted in *Baničević v. Croatia* ((dec.), no. 44252/10, § 13, 2 October 2012).

30. Section 48 of the Act on Service in Military Forces (*Zakon o službi u oružanim snagama*, Official Gazette no. 23/1995) is quoted in *Fergec v. Croatia* (no. 68516/14, § 12, 9 May 2017).

31. Section 184(a) of the Act amending the Civil Obligations Act (*Zakon o dopunama Zakona o obveznim odnosima*, Official Gazette no. 112/1999), which came into force on 6 November 1999, provided that all proceedings instituted against the State in respect of damage caused by members of the Croatian army and police in the performance of their duties during the war in Croatia from 17 August 1990 to 30 June 1996 were to be stayed. The Act also

imposed an obligation on the Government to submit to Parliament special legislation regulating liability for such damage within six months of the Act's entry into force.

32. The Liability Act, which entered into force on 31 July 2003, provides that the State is liable, under general rules of tort liability, for damage caused during the war from 17 August 1990 to 30 June 1996 by members of the Croatian army and police forces in military or police service or in connection with that service, unless the damage in question constituted war damage. Section 5 of the Liability Act provides that if the statutory limitation period for a claim for damages began to run before 6 November 1999, it must continue to run after the entry into force of that Act, and the time that has elapsed before the suspension is to be counted in the statutory limitation period. The Liability Act does not require prior determination of individual criminal responsibility for the damage.

2. Civil courts' practice concerning the application of section 377 of the Civil Obligations Act

33. The Supreme Court, in its decision no. Rev-2563/1992 of 6 April 1993, examined the possibility for a court in civil proceedings to apply the statutory limitation period under section 377 of the Civil Obligations Act if criminal liability had not been established by a final criminal court judgment. The relevant part of the judgment reads as follows:

"The conclusion of the lower courts that section 377 of the Civil Obligations Act is applicable only if the criminal offence has been established by a final judgment of the criminal court is incorrect. This is because, according to the well-established case-law, if damage has been caused by a criminal offence but no criminal proceedings have been instituted or concluded against the perpetrator because of his death or mental illness, or the offence at issue has been exempted from prosecution by a pardon or amnesty, or if there exist some other circumstances preventing criminal responsibility from being established or barring the criminal prosecution, the fact that the damage was caused by a criminal offence may, if the defendant has invoked the statute of limitations, be established (as a preliminary issue) in the civil proceedings.

It is also to be noted that the longer statutory limitation period under section 377 of the Civil Obligations Act is applicable not only in respect of the perpetrator of the criminal offence but also in respect of the person responsible for the damage."

34. The Supreme Court's decision no. Rev 821/06 of 6 September 2007 appears to be the earliest decision available in the public online database of that court's case-law which concerns the application of section 377 of the Civil Obligations Act to a civil claim for damages against the State in connection with a killing allegedly perpetrated by Croatian soldiers during the war, where there had been no criminal conviction. In the civil proceedings in that case, in April 2004 the first-instance court ruled in favour of the plaintiffs. In June 2005 the second-instance court dismissed the claim as time-barred.

The Supreme Court upheld the second-instance decision. It held that the longer statutory limitation period under section 377 of the Civil Obligations Act was inapplicable to the case because there had been no final criminal conviction of the perpetrator. It further held that the civil courts were allowed to examine whether the damage was caused by a criminal offence only if there existed some circumstances barring a criminal prosecution, with the result that no criminal proceedings could be conducted against the perpetrator, which circumstances had not existed in that case.

35. The decision no. Rev 845/07-2 of 23 December 2008 was given in a case in which the plaintiff had sought damages from the State on account of the killing of her husband in 1991, allegedly by Croatian soldiers. In December 2005 the first-instance court held that it could examine whether the damage had been caused by a criminal offence since the perpetrator had been unknown and therefore the criminal proceedings could not be conducted. The Supreme Court, however, held as follows:

“Contrary to the lower courts’ findings, the fact that the perpetrator had not been identified does not amount to a circumstance which would allow the civil courts to examine as a preliminary issue whether the damage had been caused by a criminal offence.”

36. The Government relied on the Supreme Court’s decision no. Rev-1448/08 of 9 June 2010, given in a case in which the plaintiffs had sought damages from the State in connection with their allegation that the killing of their father in 1992 had amounted to a terrorist act. The Supreme Court upheld the lower courts’ decisions given in March 2006 and May 2008 rejecting the claim as time-barred. It held that the longer statutory limitation period under section 377 of the Civil Obligations Act did not apply to situations where the perpetrators had been unknown.

3. *Constitutional Court’s practice*

37. Decision no. U-III-3586/2016 of 23 April 2018 concerned a case in which the complainant had sought damages from the State on account of her husband having been taken from his home in 1991 by soldiers, after which his body had been found in a river with gunshot wounds. An investigation into the criminal offence of a war crime against the civilian population had been pending at the time, without leading to any indictments. The civil courts rejected her claim as time-barred, noting that it had been lodged outside the objective statutory period under section 376(2) of the Civil Obligations Act, and that the longer statutory limitation period under section 377 of the Civil Obligations did not apply because there was no criminal conviction.

The Constitutional Court upheld the civil courts’ decisions, noting that they were in accordance with the longstanding domestic practice, which had also been accepted by the Court in *Baničević* (cited above).

38. Three Constitutional Court judges, A.A., L.K. and G.S., gave a separate opinion in relation to that decision. They noted that the case concerned an unlawful killing possibly a war crime against the civilian population. In such cases the State was in a conflict of interests; on the one hand it had a duty to identify and prosecute the perpetrators, and on the other it avoided doing so in order not to have to pay damages to the victims. Consequently, victims of crimes who had trusted that the State would identify and prosecute the perpetrators ended up being unable to obtain damages since their civil claims had meanwhile become time-barred.

The three judges disagreed with the civil courts' interpretation of section 377 of the Civil Obligations Act and expressed the view that the longer statutory limitation period applied whenever the damage was caused by a criminal offence, regardless of whether the perpetrator had been identified. They deemed it absurd that a civil claim for damages became time-barred in a situation where the prosecution of the crime which had caused the damage had not become time-barred.

The three judges considered that in a situation where the investigative authorities had been passive, or where there were objective circumstances preventing the investigation from leading to any results, the civil courts should examine as a preliminary issue whether the damage had been caused by a criminal offence. The civil proceedings would thus be used as a tool to provide at least some form of reparation to victims.

39. Another Constitutional Court judge, I.A.M., disagreed with the civil courts' restrictive interpretation of the provisions concerning statutory limitation in cases of unprosecuted crimes. In her separate opinion in relation to the Constitutional Court's decision no. U-III-4842/2016 of 22 May 2018, she held that the purpose of the Liability Act enacted in 2003 (see paragraph 32 above) was to end the "culture of impunity" and enable victims of crimes perpetrated by Croatian soldiers and police officers during the war to obtain damages. In her view, section 377 of the Civil Obligations Act should be interpreted in favour of victims, so as not to render reparation unattainable and illusory.

C. Costs of proceedings

1. Relevant provisions

40. The relevant provisions of the Civil Procedure Act concerning costs of proceedings and the Scales of Advocates' Fees and Reimbursement of their Costs (*Tarifa o nagradama i naknadi troškova za rad odvjetnika*, Official Gazette nos. 91/2004, 37/2005 and 59/2007) are set out in *Cindrić and Bešlić v. Croatia* (no. 72152/13, §§ 43-44, 6 September 2016).

2. *Constitutional Court's decision*

41. Decision no. U-III-3689/2018 of 10 December 2019 concerned the complainants' allegation that ordering them to pay the costs of the State's representation in civil proceedings for damages in connection with the killing of their parents in 1991, allegedly by Croatian soldiers, had amounted to a breach of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. The Constitutional Court noted that in *Baničević* (cited above), the Court had found that the application of section 377 of the Civil Obligations Act had been clarified by the civil courts by 1999: the longer statutory limitation period applied only where there had been a final criminal conviction. The Constitutional Court thus held that the complainants ought to have known in 2004, when they had lodged their civil claim, that the claim was obviously time-barred and without any prospect of success.

3. *Supreme Court's decision*

42. Decision no. Rev 89/2021 of 2 March 2021 concerned a case in which the plaintiffs had sought damages from the State on account of their husband and father being detained in a police station and then taken to a forest and killed. Criminal proceedings for war crime had been instituted against several Croatian soldiers and police officers, without leading to any convictions. The civil courts rejected the applicants' claim as time-barred, noting that it had been lodged outside the objective statutory period under section 376(2) of the Civil Obligations Act, and that the longer statutory limitation period under section 377 of the Civil Obligations did not apply because there was no criminal conviction. They also ordered the plaintiffs, under section 154 of the Civil Procedure Act, to pay the State HRK 58,750 in costs, comprising the fees chargeable for the State's representation by the State Attorney's Office.

The Supreme Court examined the complaint concerning the costs of proceedings in the light of the criteria established in *Cindrić and Bešlić* (cited above, §§ 91-109). It considered that the plaintiffs' civil claim had not been manifestly unreasonable and that their expectation to obtain damages had not been entirely unjustified. The case had not concerned a classical civil dispute between private parties. The opposing party was the State, represented by the State Attorney's Office, which was financed from the State budget and thus not in the same position as an advocate. Lastly, it considered that the amount the plaintiffs had been ordered to pay in costs had been burdensome for them, having regard to their financial situation. It concluded that the costs order had amounted to a disproportionate burden on the plaintiffs, in breach of Article 1 of Protocol No.1. It accordingly overturned the lower courts' costs decision and ordered each party to bear their own costs of proceedings.

D. Other relevant material

43. The Government of Croatia's decision of 28 May 2009 on the writing-off of claims for the costs of civil proceedings awarded to the Republic of Croatia in certain proceedings (*Odluka o otpisu tražbina troškova parničnog postupka dosuđenih Republici Hrvatskoj u određenim postupcima*, unpublished) is set out in *Kresović and Others v. Croatia* ((dec.), no. 5864/12, § 18, 12 September 2017).

44. The Government of Croatia's decree of 25 April 2013 on the criteria, benchmarks and procedure for the deferral of payment, payment of debt in instalments and the sale, writing-off or partial writing-off of claims (*Uredba o kriterijima, mjerilima i postupku za odgodu plaćanja, obročnu otplatu duga te prodaju, otpis ili djelomični otpis potraživanja*, Official Gazette no. 52/2013), provides in Article 24 for the possibility of writing off in full or in part an individual's debt towards the State, where collecting that debt would endanger the livelihood of the individual and members of his or her household.

45. The Orientation Criteria and Sums for Determining the Level of Compensation for Non-Pecuniary Damage (*Orijentacijski kriteriji i iznosi za utvrđivanje visine pravične novčane naknade nematerijalne štete*), guidelines adopted by the Supreme Court on 29 November 2002 which specified the amounts in Croatian kunas to be awarded for various types of non-pecuniary damage, are set out in *Klauz v. Croatia* (no. 28963/10, § 31, 18 July 2013).

II. UNITED NATIONS

46. The relevant parts of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly on 29 November 1985, read as follows:

“2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted ... The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim ...

4. Victims should be treated with compassion and respect for their dignity. ...

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

...

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. ...”

47. On 16 December 2005 the General Assembly of the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy and

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the relevant parts of which read:

“II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

...

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

...

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

...

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

...

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. ...”

48. The relevant parts of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, adopted by the United Nations Commission on Human Rights (E/CN.4/2005/102/Add.1), read as follows:

PRINCIPLE 23. RESTRICTIONS ON PRESCRIPTION

“Prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available.

Prescription shall not apply to crimes under international law that are by their nature imprescriptible.

When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.”

PRINCIPLE 31. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

“Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”

PRINCIPLE 32. REPARATION PROCEDURES

“All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set forth in principle 23. ...”

49. Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, reads as follows:

“1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

50. The relevant part of General Comment No. 3 (2012) of the United Nations Committee against Torture – Implementation of Article 14 by States parties (CAT/C/GC/3) – reads as follows:

“21. States parties should ensure that their domestic laws provide that a victim who has suffered violence or trauma should benefit from adequate care and protection to

avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation.

...

29. The Committee highlights the importance of the State party affirmatively ensuring that victims and their families are adequately informed of their right to pursue redress. In this regard, the procedures for seeking reparation should be transparent. The State party should moreover provide assistance and support to minimise the hardship to complainants and their representatives. Civil proceedings, or other proceedings, should not impose a financial burden upon victims that would prevent or discourage them from seeking redress. ...

40. On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those whom have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.”

51. On 17 August 2015 the Working Group on Enforced or Involuntary Disappearances submitted a report on its mission to Croatia (UN Human Rights Council, document A/HRC/30/38/Add.3). The relevant parts of the report read as follows:

“VI. Right to justice

46. The Working Group notes that in 2011, Croatia adopted a specific strategy for investigating and prosecuting war crimes. Special war crimes departments were established in police administrations, located in accordance with the territorial structure of the attorney’s offices and courts. Since the beginning of the war, the Ministry of the Interior, in accordance with its legally binding obligations and competences, started collecting, processing and documenting information and evidence on crimes committed during the armed rebellion and aggression, especially events characterized as war crimes. Operation Phoenix was established with the aim of uncovering the fate and whereabouts of disappeared persons and collecting information on mass and individual graves, but also in order to collect information on prosecutions of crimes against humanity and international law. During that operation, the Ministry of the Interior, in cooperation with other relevant bodies and services, registered 1,857 offences and reported on 9,110 perpetrators of war crime.

...

49. However, the Working Group notes that there have been significant delays in the prosecution of war crime cases owing to the unavailability of witnesses or their unwillingness to testify. In this respect, various steps have been taken to increase cooperation between the Croatian State Attorney’s Office and its counterparts in neighbouring countries through the signing of agreements and memorandums. ...

50. An additional problem in the prosecution of war crime cases is the fact that many alleged perpetrators live in other countries and, despite the fact that their identities and addresses are well known, they cannot be prosecuted in Croatia given that they reside

in countries that do not permit the extradition of their nationals. This is particularly problematic with regard to the prosecution of war crime cases from 1991.

51. The Working Group was informed by relatives of the disappeared and representatives of victims' associations that many crimes allegedly committed by members of the Croatian Army and police forces in the course of 1995 have not been investigated or the perpetrators prosecuted. In addition, during its visit, the Working Group received reports that some perpetrators of war crimes still hold official positions in the Government, including in the administration of local communities in which victims and their families live. In some cases, alleged perpetrators even hold high positions. This represents a constant threat and source of intimidation for victims, particularly when they know that their disappeared relatives were taken by such individuals. ...

VII. Right to reparation

...

63. The Working Group notes that the Republic of Croatia has adopted the Act on the liability of the Republic of Croatia for damage caused by members of the Croatian army and police when acting in their official capacity during the homeland war, regulating the responsibility of Croatia for damages caused between 17 August 1990 and 30 June 1996. It constitutes a legal base for compensation for each person damaged by an act committed by a government official. The Act does not require prior determination of individual responsibility for the damage. Examples presented to the Working Group indicate that there have been problems with the implementation of the Act which have led to the majority of claims being rejected, except in cases of lawsuits in which criminal responsibility had already been established. The main reasons the claims were refused were the rejection by Croatia of responsibility for damage caused during the war on territory that was not under its control and the absence of criminal prosecution of perpetrators. At the same time, a practice has been established, particularly in cases of enforced disappearances, that shifts the burden of proof mainly onto the plaintiff."

III. COUNCIL OF EUROPE

52. Under Article 2 of the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116), adopted on 24 November 1983, the State should contribute to compensate the dependants of persons who have died as a result of an intentional crime of violence, even if the offender cannot be prosecuted or punished.

53. The relevant parts of the Guidelines on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011, read as follows:

"I. The need to combat impunity

1. These guidelines address the problem of impunity in respect of serious human rights violations. Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account.

...

II. Scope of the guidelines

...

3. For the purposes of these guidelines, ‘serious human rights violations’ concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court’s case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention)

...

XVI. Reparation

States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition.”

IV. EUROPEAN UNION

54. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims requires each European Union Member State to set up a national scheme of compensation to victims of violent intentional crime committed in their respective territories.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

55. The applicants complained that the authorities had not taken appropriate and adequate steps to investigate the killing of their father and to bring the perpetrators to justice. They relied on the procedural aspect of Article 2 of the Convention, the relevant part of which reads as follows:

“1. Everyone’s right to life shall be protected by law. ...”

A. The parties’ submissions

56. In their observations submitted on 8 February 2018 on the admissibility and merits of the application, the Government contended that the complaint fell outside the Court’s temporal jurisdiction and that it had been lodged out of time. In their submissions of 7 November 2019, they raised the objection that a constitutional complaint had become an effective domestic remedy for the applicants’ complaint and that they should be required to use that remedy.

57. The applicants submitted in reply that a constitutional complaint did not constitute an effective remedy for their complaint, relying on the Constitutional Court’s decisions quoted in *J. and Others v. Croatia* ([Committee], nos. 32343/16 and 750/17, §§ 8-11, 26 May 2020).

B. The Court's assessment

58. The Court does not have to examine all the objections raised but will focus on the Government's plea of non-exhaustion of domestic remedies.

59. For the same reasons as outlined in the decision in *J. and Others v. Croatia* (cited above, §§ 20-23), the Court is of the view that in the present case the Government raised the objection of non-exhaustion of domestic remedies in a timely manner.

60. Likewise, in *J. and Others v. Croatia* the Court dismissed as unfounded a similar objection by the applicants that a constitutional complaint was not an effective remedy for their complaint (ibid., §§ 24-26).

61. The Court therefore confirms the conclusion it reached in *Kušić and Others v. Croatia* ((dec.), no. 71667/17, 10 December 2019) to the effect that in 2019 a constitutional complaint became an effective domestic remedy for complaints under Articles 2 and 3 of the Convention concerning ineffective investigations (ibid., §§ 93 and 99).

62. The Court notes that in 2017 the applicants lodged a constitutional complaint in which they complained that the investigation into the killing of their father had been ineffective, but the Constitutional Court did not examine that complaint (see paragraphs 24 and 25 above). However, the Constitutional Court's decision in question was delivered in 2017, two years before a constitutional complaint became an effective remedy for such complaints (see paragraph 61 above and compare, for factual circumstances, *J. and Others v. Croatia*, cited above, and *Marić and Others v. Croatia* (dec.), no. 37333/17, 10 November 2020).

63. In that connection, since the investigation into the killing of the applicants' father is still ongoing (see paragraph 15 above), the Court holds, as in *Kušić and Others*, *J. and Others v. Croatia* and *Marić and Others* (all cited above), that the applicants in the present case are required to lodge a constitutional complaint, it being understood that the period during which the proceedings were pending before the Court should not be held against them.

64. Indeed, in accordance with the principle of subsidiarity, one of the fundamental principles on which the Convention system is based, the respondent State should be afforded the opportunity to put matters right through its own legal system before answering before an international body for its acts or omissions.

65. The Court would stress that it remains open to the applicants, following the termination of the proceedings before the Constitutional Court or if those proceedings become unreasonably protracted, to bring their complaints before the Court if they still consider themselves to be victims of a violation of the Convention.

66. Against the above background, the Court upholds the Government's objection. The applicants' complaint under Article 2 of the Convention must

therefore be rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

67. The applicants further complained that the excessive sum of the costs of proceedings they had been ordered to pay to the State had been in breach of their right to peaceful enjoyment of their possessions. They relied on Article 1 of Protocol No. 1, which reads as follows:

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

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

A. Admissibility

1. *The parties' submissions*

68. The Government argued that the applicants had failed to properly exhaust the domestic remedies in respect of their complaint. Before the domestic courts the applicants had complained only that the order to reimburse the State for the costs of the proceedings had been contrary to the Government's decision of 28 May 2009, which was inapplicable to their situation. As of 2017, the Constitutional Court had conducted an effective examination of complaints concerning costs of proceedings in the light of the criteria established in *Klauz v. Croatia* (no. 28963/10, § 31, 18 July 2013) and *Cindrić and Bešlić v. Croatia* (no. 72152/13, 6 September 2016). However, the applicants had failed to bring any relevant argument before that court.

69. The applicants disagreed.

2. *The Court's assessment*

70. The Court notes that in their appeal against the first-instance judgment and in their appeal on points of law and constitutional complaint the applicants challenged the decision ordering them to reimburse the State for the costs of the proceedings (see paragraphs 20, 22 and 24 above). In their constitutional complaint lodged in October 2017, they also relied on *Cindrić and Bešlić* (cited above), adopted one year earlier, and explained why they considered the decision on costs to be in breach of their rights of access to a court and peaceful enjoyment of possessions (see paragraph 24 above). Their arguments before the Constitutional Court correspond to those submitted to the Court (see paragraphs 74 and 75 below).

71. The Constitutional Court decided on the applicants' case on 29 November 2017. It did not, however, examine their complaint in the light of the *Cindrić and Bešlić* criteria, but held that the Supreme Court's decision declaring inadmissible the applicants' appeal on points of law in respect of the decision on costs could not be deemed arbitrary (see paragraph 25 above). In that connection, the Court notes that at the time the applicants lodged their appeal on points of law it was still possible to challenge final decisions on costs before the Supreme Court (see paragraphs 22 and 23 above), and therefore the applicants had been required to use that remedy.

72. The Court thus concludes that the applicants provided the domestic courts with a sufficient opportunity to remedy the alleged violation of their rights in respect of the decision on costs of proceedings. It follows that the Government's objection regarding the exhaustion of domestic remedies must be dismissed.

73. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

74. The applicants contended that they had lodged their civil claim against the State in 2005, shortly after the Liability Act had come into force. At the time, they could not have known how the domestic courts would apply the statutory limitation period to civil claims for compensation for damage caused by unprosecuted war crimes. Their civil claim could not have been regarded as manifestly unreasonable. They had legitimately expected that civil courts would apply section 377 of the Obligations Act in favour of victims of gross human rights violations, in order to allow them to obtain compensation as at least one form of redress, having regard to the fact that the authorities had never properly investigated their father's killing and that the perpetrators had remained unpunished.

75. Additionally, the amount of HRK 60,000 in costs that the applicants had been required to reimburse the State was an excessive burden on them, bearing in mind that they had been exempted from paying the court fees on account of their poor financial status and that the maximum amount awarded by the national courts in respect of non-pecuniary damage in connection with the death of a parent was HRK 220,000. The unjustifiable length of the proceedings before the first-instance court had led to a further increase in their costs.

(b) The Government

76. The Government submitted that the applicants' case should be distinguished from that of *Cindrić and Bešlić* (cited above). In particular, at the time the applicants had lodged their civil claim for damages, the domestic courts' practice regarding the statutory limitation period for lodging a civil claim had been entirely clear. The practice in question had consistently been applied in cases like that of the applicants, as proven by the Supreme Court's decision cited in paragraph 36 above. The applicants had not explained why they had not brought their claim within the general statutory limitation period under section 376 of the Civil Obligations Act. Accordingly, the applicants' civil claim against the State, lodged in September 2005, had been obviously time-barred and therefore manifestly unreasonable.

2. The Court's assessment**(a) Whether there was an interference with the applicants' right to peaceful enjoyment of their possessions**

77. The Court accepts that the order to pay the costs of the State's representation amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions. It finds it appropriate to examine the case in the light of the general rule under the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see *Cindrić and Bešlić*, cited above, § 92).

(b) Whether the interference was lawful

78. The Court notes that even though in the domestic proceedings the applicants challenged the lawfulness of the national courts' decisions ordering them to reimburse the costs of the State's representation by referring to the Government's decision of 28 May 2009 (see paragraphs 20 and 22 above), they did not reiterate that argument before this Court. Accordingly, the Court holds that the interference was lawful since the decision ordering the applicants to reimburse the costs of the State's representation was based on section 154(1) of the Civil Procedure Act (compare *Cindrić and Bešlić*, cited above, § 93).

(c) Whether the interference pursued a legitimate aim

79. The Court accepts that the costs order in the present case pursued the legitimate aim of ensuring the proper administration of justice and protecting the rights of others by discouraging ill-founded litigation and excessive costs (*ibid.*, §§ 94-97). It will proceed to examine the key issue, namely whether a "fair balance" was struck between the general interest and the applicants' rights under Article 1 of Protocol No. 1.

(d) Whether the interference was proportionate to the legitimate aim pursued

80. The Court would state at the outset that Article 1 of Protocol No. 1 does not create any legitimate expectation to commence and pursue litigation against the State cost-free, even in a situation where the plaintiff is in a financially precarious situation.

81. The Court further reiterates that the “loser pays” rule contained in section 154(1) of the Civil Procedure Act cannot in itself be regarded as contrary to Article 1 of Protocol No. 1, even when applied to civil proceedings to which the State is a party (see *Cindrić and Bešlić*, cited above, § 96). Rather, the Court must examine whether the manner in which that rule was applied in the particular circumstances of the case placed an excessive individual burden on the applicants (*ibid.*, § 100).

82. In *Cindrić and Bešlić*, which concerned a similar issue as the one arising in the present case, the Court took into account the following criteria when examining whether an interference in the form of the costs order had imposed an excessive individual burden on the applicants (*ibid.*, §§ 107-109):

(i) the applicants’ claim before the national courts was not devoid of any substance or manifestly unreasonable;

(ii) the State was represented by the State Attorney’s Office and the costs of the State’s representation were calculated in an amount equal to an advocate’s fee;

(iii) in the light of the applicants’ individual financial situation, paying the costs in issue appeared burdensome for the applicants.

83. In the present case the applicants were ordered to reimburse the costs of the State’s representation by the State Attorney’s Office because their claim for damages in connection with the killing of their father had been dismissed in its entirety on the grounds that it was time-barred. In particular, the domestic courts held that the claim had been lodged outside the general statutory limitation period under section 376 of the Civil Obligations Act, and that the longer statutory limitation period under section 377 of the Civil Obligations Act did not apply in their case (see paragraphs 19 and 23 above).

84. In previous cases where the applicants complained that the domestic courts had dismissed their claims for compensation for wartime damage as time-barred, the Court has found no breach of their right of access to a court (see *Bogdanović v. Croatia* (dec.), no. 72254/11, 18 March 2014; *Orić v. Croatia* (dec.), no. 50203/12, 13 May 2014; *B. and Others v. Croatia*, no. 71593/11, § 84, 18 June 2015; and *Zdjelar and Others v. Croatia*, no. 80960/12, § 103, 6 July 2017). However, the present case is the first case in which the Court has been called upon to examine whether the domestic authorities violated the applicants’ rights by ordering them to reimburse the costs of the State’s representation in such proceedings.

85. The central issue is thus whether the applicants ought to have known in 2005, when they lodged their civil claim, that their claim was obviously

time-barred and without any prospect of success (compare *Cindrić and Bešlić*, cited above, § 107).

86. The Court observes that section 377 of the Civil Obligations Act provides for a longer statutory limitation period if the damage was caused by a criminal offence. This longer statutory limitation period thus operates in favour of the victims of crime, allowing them to claim compensation within the longer statutory time-limit prescribed for the criminal offence at issue. The Court notes that the prosecution of war crimes is not susceptible to becoming time-barred (see paragraph 27 above).

87. According to the domestic case-law, developed outside the war context (see paragraph 33 above), the civil courts were allowed to examine as a preliminary issue whether the damage was caused by a criminal offence only if there existed some circumstances barring the criminal prosecution, with the result that no criminal proceedings could be conducted against the perpetrator (see *Baničević v. Croatia* ((dec.)), no. 44252/10, §§ 18, 19, 33 and 36, 2 October 2012). On the other hand, many investigations into grave crimes committed during the war did not lead to any results for different reasons, and the perpetrators frequently remained unknown (see paragraphs 28 and 51 above).

88. In the present case, the investigating judge held that there was a reasonable suspicion that the applicants' father had been a victim of a war crime against the civilian population (see paragraph 10 above). However, the perpetrators have to date not been identified and there have been no criminal convictions (see paragraph 15 above).

89. The Government cited one Supreme Court decision adopted in 2010 in a case comparable to that of the applicants, upholding the lower courts' decisions given in 2006 and 2008 (see paragraph 36 above). However, the applicants lodged their civil claim in 2005 (see paragraph 16 above). The Government did not submit any domestic judgments from before 2005 concerning the interpretation of section 377 of the Civil Obligations Act in relation to unprosecuted grave crimes allegedly perpetrated by Croatian soldiers during the war.

90. According to further case-law available to the Court, in a comparable set of civil proceedings, in 2004 the first-instance court ruled in favour of the plaintiffs (see paragraph 34 above). In another comparable case, in December 2005 the first-instance court applied the longer statutory limitation period under section 377 of the Civil Obligations Act, holding that it could examine whether the damage had been caused by a criminal offence because the perpetrator had been unknown. The Supreme Court disagreed with that conclusion in 2008 (see paragraph 35 above).

91. The Court is thus not convinced that, at the time the applicants lodged their civil claim for damages in 2005, the position of the domestic courts as regards the application of section 377 of the Civil Obligations Act to civil claims concerning unprosecuted grave crimes allegedly perpetrated by

Croatian soldiers during the war was entirely clear and consistent (compare *Cindrić and Bešlić*, cited above, § 106).

92. Even if the applicants should have been aware of the existing (pre-war) case-law concerning the interpretation of section 377 of the Civil Obligations Act, as the Government suggested, the Court does not find it unreasonable, in the light of the significant social changes brought by the war and its aftermath, as well as the developments in international human rights law at the material time (see paragraphs 47 and 48 above), that the applicants hoped that the domestic courts would apply the provisions concerning statutory limitation in a manner favourable to victims of gross human rights violations (see also the opinion of four Croatian Constitutional Court judges cited in paragraphs 38 and 39 above). By lodging their civil claim in 2005, the applicants afforded the civil courts an opportunity to do so, providing arguments emerging from key international instruments militating against employing statutory limitation in the case of civil remedies used by victims seeking reparations for gross human rights violations (see paragraphs 20, 24 and 47-50 above and compare, *mutatis mutandis*, *Vrtar v. Croatia*, no. 39380/13, §§ 76, 7 January 2016).

93. Indeed, the allegations in the civil proceedings instituted by the applicants involved the killing of an elderly civilian by Croatian soldiers and thus involved the right to life protected under Article 2 of the Convention and, arguably, the applicants' right under Article 3 of the Convention. In this connection the Court reiterates that Articles 2 and 3 rank as the most fundamental provisions in the Convention. They enshrine some of the basic values of the democratic societies making up the Council of Europe (see, among many other authorities, *Marguš v. Croatia* [GC], no. 4455/10, § 124, ECHR 2014 (extracts)).

94. While the present complaint does not concern alleged violations of Articles 2 and 3 of the Convention, but of Article 1 of Protocol No. 1 in relation to the costs of civil proceedings which the applicants were ordered to pay to the State, the Court reiterates that the Convention and its Protocols must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012).

95. In these circumstances it cannot be said that the applicants' civil claim for damages, lodged in September 2005, was from the outset manifestly unreasonable, or devoid of any substance (compare *Cindrić and Bešlić*, cited above, § 107, and the Supreme Court's decision cited in paragraph 42 above, and contrast *Marić and Others*, cited above, § 58). Where the official investigation into a possible war crime did not lead to any results, the Court finds it understandable that victims believed that this would be treated as "other circumstances preventing criminal responsibility from being established", leading the civil courts to examine as a preliminary issue

whether the damage had been caused by a criminal offence and, consequently, whether the longer statutory limitation period should apply to their civil claims for damages (see the Supreme Court's decision rendered in 1993, cited in paragraph 33 above).

96. As to the Government's argument that there was nothing preventing the applicants from lodging their civil claim within the general statutory limitation period under section 376 of the Civil Obligations Act, the Court notes that it is true that the applicants had such a possibility, as even before the Liability Act, the State had been liable for the damage caused by Croatian soldiers (see paragraphs 30-32 above). However, the civil court in the applicants' case held that, even if it had been competent to examine the matter as a preliminary issue, there was insufficient evidence to conclude that their father's killing had amounted to a crime because the applicants' aunt had not directly seen his killing, but had only heard gunshots (see paragraph 19 above). In several cases against Croatia the Court has criticised the unattainable burden of proof which the civil courts imposed on plaintiffs seeking compensation for wartime damage (see *Trivkanović v. Croatia* (no. 2), no. 54916/16, § 81, 21 January 2021, and *Baljak and Others v. Croatia*, no. 41295/19, § 41, 25 November 2021). Such criticism was also voiced by the United Nations Human Rights Council following its mission to Croatia (see paragraph 51 above). Furthermore, the Court notes that between November 1999 and July 2003 the applicants could not have lodged their civil claim because of changes in the legal provisions regulating the State's liability for wartime damage (see paragraphs 31 and 32 above).

97. It follows that the success of civil claims, even those lodged during the general statutory limitation period under section 376 of the Civil Obligations Act, depended on the efficient work of the investigative authorities, whereas investigations into grave crimes committed during the war were burdened by numerous challenges, often not leading to any concrete results even more than twenty years later (see paragraphs 15, 28 and 51 above). The latter cannot be attributed to the applicants, as it is the duty of the State authorities to conduct an effective official investigation (see *Kušić and Others*, cited above, §§ 72-74).

98. The Court observes that no international instrument explicitly prohibits ordering victims of grave breaches of fundamental human rights to bear the costs of related civil proceedings for damages in which they have been unsuccessful. However, such decisions appear to be at odds with the obligation of States to minimise the risk of re-traumatising victims of grave breaches of fundamental human rights, as set forth in key international instruments, including the United Nations Basic Principles and Guidelines on the Right to a Remedy and General Comment No. 3 on Article 14 of the Convention against Torture (see paragraphs 47-50 above).

99. The Court has held, with respect to Article 2 of the Convention, that where the applicants have an arguable claim that their family members have

been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to a thorough and effective investigation capable of leading to the identification and punishment of those responsible, the payment of compensation where appropriate (see *Kaya v. Turkey*, 19 February 1998, § 107, *Reports of Judgments and Decisions* 1998-I).

100. In the Court's view, in circumstances where the investigation into the killing of the applicants' father, an elderly civilian, never led to the identification or punishment of the perpetrators, and the applicants were unable to obtain compensation in civil proceedings as there had been no criminal conviction (see paragraphs 19, 21 and 23), requiring the applicants to pay the costs of the State's representation in the civil proceedings further exacerbated their traumatising, contrary to the spirit of the Convention and its Protocols.

101. Furthermore, in the civil proceedings complained of the State was represented by the State Attorney's Office and the costs of the State's representation were calculated in an amount equal to an advocate's fee. However, that office, since it is financed from the State budget, is not in the same position as an advocate (see *Cindrić and Bešlić*, cited above, § 108).

102. The Court also notes that it was not until July 2010 that the State first raised the objection that the applicants' claim of September 2005 had been time-barred (see paragraph 18 above). This, having regard to the fact that the civil courts are not allowed to consider statutory limitations of their own motion, undoubtedly caused unnecessary costs for the applicants (see paragraphs 19 and 75 above).

103. Another factor of importance is the applicants' individual financial situation (*ibid.*, § 109). Given their arguments in that regard (see paragraph 75 above), the Court accepts that having to pay the amount ordered by the national courts in respect of the costs of the proceedings at issue appears to have been burdensome for the applicants. This burden appears even greater in a situation where the applicants were possibly also required to cover the costs of their own legal representation in the civil proceedings. In this connection, the Court observes that the applicants' claim was not unjustifiably inflated but that it was in line with the Supreme Court's guidelines concerning amounts to be awarded for various types of non-pecuniary damage (see paragraphs 16 and 45 above and, *a fortiori*, *Klauz*, cited above, § 90).

(e) Conclusion

104. In the particular circumstances of the present case, the Court considers that ordering the applicants to bear the full costs of the State's representation in the civil proceedings amounted to a disproportionate burden on them.

105. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

106. The Court notes that, although in the present case the domestic courts failed to consider whether in the particular circumstances applying the “loser pays” rule without any flexibility placed an excessive individual burden on the applicants (see paragraphs 19-25 and 70-71 above), in 2021 the Supreme Court, in a case which concerned a similar issue, conducted such an assessment and ultimately ordered that each party should bear their own costs of proceedings (see paragraph 42 above). By way of observation the Court notes that in cases such as the present one the State has a number of additional possibilities to achieve the necessary flexibility. The Court first refers to the Government of Croatia’s decision and decree of 2009 and 2013 respectively, mentioned in paragraphs 43 and 44 above. Moreover, precisely because the State is a party to the civil proceedings in such cases, the State Attorney’s Office may opt not to claim costs or, if the costs order is issued, not to seek payment of those costs or enforcement of the costs order (see *Kresović and Others v. Croatia* (dec.), no. 5864/12, § 19, 12 September 2017).

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

107. The applicants brought the same complaint under Article 6 § 1 of the Convention.

108. Having regard to its findings under Article 1 of Protocol No. 1 above, the Court considers that it is not necessary to give a separate ruling on the complaint under Article 6 § 1 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. 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

110. The applicants claimed 143,790 euros (EUR) in respect of non-pecuniary damage. The Government deemed this sum excessive.

111. The Court considers it reasonable to award the applicants jointly EUR 5,000 on account of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

112. The applicants also claimed EUR 2,000 for the costs and expenses incurred.

113. The Government objected to the amount claimed.

114. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the procedural aspect of Article 2 of the Convention inadmissible and the complaint under Article 1 of Protocol No. 1 to the Convention admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (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;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

BURSAC' AND OTHERS v. CROATIA JUDGMENT

Done in English, and notified in writing on 28 April 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Bosiljka BURSAĆ	1940	Croatian	Apatin
2.	Đuka DAMJANOVIĆ	1942	Croatian	Apatin
3.	Nena DAMJANOVIĆ	1953	Croatian	Gračac
4.	Danica DUBAJIĆ	1948	Croatian	Srb
5.	Milica VASILJEVIĆ	1950	Croatian	Zagreb