

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

FIRST SECTION

CASE OF SMILJANIĆ v. CROATIA

(Application no. 35983/14)

JUDGMENT

Art 2 (substantive and procedural) • Positive obligations • Ineffective functioning of road traffic regulations framework in practice, through domestic authorities' failure to take appropriate deterrent and preventive measures against repeat offender who later caused a fatal collision • Deficiencies in authorities' response to collision, through mitigation of sentence without careful scrutiny of offender's prior conduct, and unjustified delay in enforcing sentence

STRASBOURG

25 March 2021

FINAL

25/06/2021

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



In the case of Smiljanić v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Linos-Alexandre Sicilianos,
Alena Poláčková,
Gilberto Felici,
Raffaele Sabato,
Lorraine Schembri Orland, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 35983/14) 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 three Croatian nationals, Mr Milenko Smiljanić, Ms Ljiljanka Smiljanić and Ms Saša Smiljanić ("the applicants"), on 6 May 2014;

the decision to give notice to the Croatian Government ("the Government") of the complaint under Article 2 of the Convention;

the parties' observations;

Having deliberated in private on 16 February 2021,

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

INTRODUCTION

1. The case concerns the alleged failure on the part of the domestic authorities to enforce the domestic legal framework of road traffic regulations by taking adequate measures with respect to the person who had caused a road collision in which the applicants' relative died.

THE FACTS

2. The first and second applicants were born in 1952 and the third applicant in 1981. They live in Zagreb. The applicants were represented by Ms I. Bojić, a lawyer practising in Zagreb.

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

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

I. THE CIRCUMSTANCES OF THE APPLICANTS' RELATIVE'S DEATH

5. The applicants are respectively the parents and sister of late S.S., who was killed in road traffic.

6. At around 2 a.m. on 7 July 2012 in Zagreb, D.M., a well-known businessman, drove through a red light in his sport utility vehicle (SUV) and hit the applicants' relative, who was driving his motorcycle through a green light at a junction. The applicants' relative died at the scene.

7. At the time of the incident D.M. was under the influence of alcohol and had to be taken to a police sobering-up detention unit.

8. An on-site inspection carried out by the police found that D.M. had a valid driving licence issued by Zagreb Police.

9. According to the available material, before the incident D.M. had been registered thirty-five times in police records for various traffic offences, including drink-driving, speeding and not obeying road signs. These records concerned the period between March 2000 and May 2012, the last conviction being for an offence committed in November 2010. The relevant details are the following:

- he was fined between 100 and 1,000 Croatian kunas (HRK, approximately 13 to 130 Euros (EUR)) for seventeen offences;
- on one occasion he was sentenced to a community sanction and had one reprimand by a police officer;
- his driving licence was temporarily confiscated on two occasions: between 24 November 2001 and 25 February 2002, and 20 and 23 May 2006;
- proceedings were discontinued for nine offences due to prescription while one set was halted owing to the police's improper processing of the case;
- he was either acquitted of the remaining offences or the outcome is unknown.

10. According to the available record of D.M.'s minor offences convictions, he was convicted twice of minor offences: in March 2010 he was found guilty of not obeying road signs (an offence committed in February 2010) while in May 2011 he was found guilty of speeding (committed in November 2010).

11. According to his criminal record, he has never been convicted of a criminal offence.

12. At about the time when the applicant's relative was killed, a set of minor offences proceedings was pending against D.M. for drunk-driving.

13. In particular, on 23 October 2010 the police issued a penalty notice to D.M. for drunk-driving and an order for the confiscation of his driving licence for a period of nine months. D.M. challenged the penalty notice in

the Zagreb Minor Offences Court (Prekršajni sud u Zagrebu; hereinafter: "the Minor Offences Court").

14. On 1 June 2011 the Minor Offences Court found D.M. guilty and fined him HRK 2,000 (approximately EUR 260). It considered that it was not necessary to confiscate D.M.'s driving licence as he had never been convicted before, which suggested that he was not a reoffender and that a fine was a sufficient and appropriate sanction.

15. Upon an appeal by D.M., this judgment was quashed by the High Minor Offences Court (*Visoki prekršajni sud Republike Hrvatske*) and a retrial was ordered. In the resumed proceedings, D.M. informed the Minor Offences Court that he had accepted and paid the fine imposed on him by the judgment of 1 June 2011. On 23 December 2013 the Minor Offences Court found D.M. guilty but stressed that the fine had already been paid.

II. INVESTIGATION INTO THE APPLICANTS' RELATIVES' DEATH

16. On 9 July 2012 the police lodged a criminal complaint against D.M. with the Zagreb Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Zagrebu*; hereinafter: "the State Attorney's Office") under Article 272 §§ 1 and 3 of the Criminal Code (see paragraphs 22 and 38 below).

17. In the course of its investigation, the State Attorney's Office questioned D.M. and a number of witnesses, and commissioned forensic expert reports concerning the exact cause of death and D.M.'s alcohol level at the time of the event.

18. The eyewitnesses, M.H., B.D., V.J., I.P and N.P., explained that D.M. had sped through a red light and had hit the applicants' relative, who had been driving his motorcycle through a green light.

19. An expert report found that the applicants' relative had died as a result of multiple injuries sustained in the accident. It also found that he had not been under the influence of alcohol. An expert report found that D.M. had had at least 1.89 g/kg of alcohol in his blood, which had significantly reduced his driving ability.

20. D.M. was remanded in pre-trial detention in the course of the investigation.

21. On 17 July 2012 the applicants, represented by a lawyer, informed the State Attorney's Office that they wished to participate in the proceedings.

III. CRIMINAL PROCEEDINGS AGAINST D.M. AND HIS CONVICTION

22. On 31 July 2012 the State Attorney's Office indicted D.M. in the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*;

hereinafter: "the Municipal Court") under Article 272 §§ 1 and 3 of the Criminal Code on charges of reckless driving in wilful or wanton disregard of the relevant regulations for the safety of others by driving through a red light while under the influence of alcohol and thereby causing a road accident which had resulted in a fatal outcome.

23. Following the submission of the indictment, the Municipal Court released D.M. from pre-trial detention and ordered the preventive measure of the confiscation of his driving licence until any judgment in the case became final.

24. On 10 October 2012 the indictment was confirmed and the case sent to trial.

25. At a hearing on 7 November 2012 D.M. pleaded guilty, following which the trial court commissioned an expert report concerning his mental condition. On 26 November 2012 an expert found that D.M. suffered from post-traumatic stress disorder related to the event.

26. On 5 December 2012 the Municipal Court found D.M. guilty as charged and, relying on the possibility under the Criminal Code to reduce the sentence below the statutory minimum (see paragraph 41 below), imposed a sentence that was less than the minimum provided for the offence at issue under the Criminal Code. It sentenced him to two years' imprisonment and imposed the safety measure of the confiscation of his driving licence for five years.

27. When sentencing D.M., the Municipal Court reasoned that he had confessed and had expressed a critical attitude towards his conduct. It also stressed that D.M. had not been convicted of a criminal offence before and that his conduct, before and after the commission of the offence, had been in compliance with the law. Moreover, the court took into account the fact that D.M. had a family and that he had been affected by the event.

28. The State Attorney's Office lodged an appeal against the first-instance judgment with the Zagreb County Court (*Županijski sud u Zagrebu*; hereinafter: "the County Court"). The applicants joined, arguing that the first-instance court had failed to take into account the fact that the death of their relative had been the consequence of continuous breaches of road safety regulations by D.M. and that he had been given a very lenient sentence.

29. The first-instance judgment was upheld by the County Court on 14 May 2013.

30. On 11 and 15 April 2014 the applicants complained to the sentence-execution judge of the County Court that the judgment of the Municipal Court had not been enforced and that D.M. was still at liberty. According to their submissions, he was manipulating the execution process by invoking difficult psychological condition. They pointed out that, according to the information available to them, despite the order for confiscation of his driving licence D.M. was still driving a car.

31. Meanwhile, the applicants also complained to the Minister of Justice suggesting that D.M. enjoyed privileges in the execution of the sentence.

32. D.M. started to serve his prison sentence on 12 May 2014.

33. On 18 June 2015 a parole commission found that D.M. should be released on parole on 31 July 2015.

IV. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

34. On 2 July 2013 the applicants lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) alleging numerous procedural flaws in the proceedings and findings of the lower courts. They argued that they had not been given an effective opportunity to participate in the criminal proceedings against D.M. and that they had been prevented from putting forward all their evidence and arguments. They further contended that D.M.'s sentence had been reduced below the statutory minimum under the Criminal Code. The applicants also argued that an appeal court judge, who participated in the examination of the first-instance judgment against D.M., had earlier adopted several procedural decisions in his favour.

35. On 16 October 2013 the Constitutional Court declared their constitutional complaint inadmissible on the grounds that the case did not concern any of their civil rights or obligations or any criminal charge against them.

36. The Constitutional Court's decision was served on the applicants' representative on 14 November 2013.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW AND STANDARDS

A. Constitution

37. The relevant provisions of the Constitution (*Ustav Republike Hrvatske*) and the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*), and the case-law of the Constitutional Court are set out in the case of *Bajić v. Croatia* (no. 41108/10, §§ 48-49 and 54-57, 13 November 2012).

B. Criminal Code

38. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, with further amendments) concerning forms of intentional causing of a road accident, as applicable at the relevant time, provided as follows:

Causing a road accident
Article 272

"(1) Whoever, by violating road safety regulations, endangers other road users in such a manner that it causes an accident in which another person sustains serious bodily injury or extensive material damage, shall be punished by a term of imprisonment of between six months and five years.

...

(3) If the offence referred to in paragraph 1 of this Article results in the death of one or more persons, the perpetrator shall be punished by a term of imprisonment of between three and ten years."

39. Article 272 §§ 2 and 4 of the Criminal Code provided for sanctions for causing a road accident by negligence.

40. Article 78 of the Criminal Code provided for a possibility of confiscation of a driving licence if there was a risk that the perpetrator might reoffend. Article 76 provided for a possibility of imposing an obligation of substance abuse treatment for those who had committed criminal offences under the decisive influence of alcohol or drugs.

41. Article 57 § 2 of the Criminal Code provided that the relevant court could exceptionally impose a sentence that was below the statutory minimum if it determined that, in view of the existence of particularly mitigating circumstances of the case, the purpose of punishment could be achieved even by imposing such a mitigated sentence. Pursuant to Article 57 § 4(c), for a minimum statutory sentence of three years of imprisonment, the relevant court could reduce such a sentence up to two years of imprisonment.

C. Minor Offences Act

42. Section 58 of the Minor Offences Act (*Prekršajni zakon*, Official Gazette no. 107/2007, with further amendments), as applicable at the relevant time, provided for the possible confiscation of a driving licence for between one month and two years for a minor offence if there was a risk of the perpetrator reoffending.

43. Moreover, section 130(2)(6) of the Act provided for a possibility for the minor offences court, acting *ex officio* or upon a request of the prosecutor, to seize the driving licence of a defendant in the minor offences proceedings if there was a risk that he or she might reoffend. This measure could be applied from the moment of the submission of an indictment until the finality of the judgment. Section 53 of the Act provided for the possibility of imposing an obligation of substance abuse treatment for those who had committed minor offences under the decisive influence of alcohol or drugs.

44. Section 77(2) provided that a perpetrator could not be considered convicted of a minor offence three years after the conviction has become final.

D. Road Traffic Safety Act

45. The relevant Road Traffic Safety Act (*Zakon o sigurnosti prometa na cestama*, Official Gazette no. 67/2008, with further amendments), section 286, provided for a possibility of annulment of a driving licence for repeated violations of road traffic safety regulations if the licence had already been temporarily confiscated because the driver had negative points and he or she got additional nine negative points in the further period of two years.

E. Enforcement of Prison Sentences Act

46. Pursuant to section 48(8) of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette no. 128/1999, with further amendments), as applicable at the relevant time, the relevant sentence-execution judge was required to take the necessary measures for the enforcement of a prison sentence within eight days of receipt of a final criminal court judgment. Under section 54, the enforcement of a prison sentence could exceptionally be postponed for a maximum period of twenty months.

F. National Road Safety Programme for the period 2011-2020

47. On 14 April 2011 the Government of Croatia adopted the National Road Safety Programme for the period 2011-2020 (Official Gazette no. 59/2011; hereinafter: "the Programme"). The Programme relies on a number of United Nations and European Union initiatives in ensuring road safety. It notes that some 1,300,000 persons in the world die every year in road accidents and that 50,000,000 are injured. It also refers to an estimate according to which road accidents will become the fifth cause of death of people by 2030 if the current trends would continue. In this context, it notes that children and young people between ten and twenty-five years of age are particularly vulnerable.

48. According to the Programme, the risks to life and physical integrity of participants in road traffic can be prevented. The Programme refers to evidence according to which the most effective prevention is based on, amongst other, control and punishment of drink-driving and speeding. It also notes the statistics according to which the majority of road accidents with serious consequences were caused by speeding. According to the Programme, this needs to be addressed by various measures, including the

sanctioning of the offenders. With regard in particular to drink-driving, the Programme notes that there is an increase of participation of drivers under the influence of alcohol in the total number of road accidents with a fatal outcome. Thus, the Programme requires that intensive measures be taken to punish and prevent drink-driving.

49. On 28 February 2018 a round table was held at the University of Zagreb, Faculty of Transport and Traffic Sciences, in order to evaluate the road safety in the country and the operation of the Programme. It was noted that there was an increase in road accidents in recent years. It was also stressed that, amongst other, effective punishment of minor offences and criminal offences related to public safety was required in order to address that issue.

II. RELEVANT INTERNATIONAL MATERIALS

50. Resolution A/RES/64/255 of 10 May 2010 of the United Nations General Assembly proclaimed the period 2011-2020 as the Decade of Action for Road Safety. The goal of the action is to stabilise and then reduce the forecast level of road traffic fatalities around the world by increasing activities conducted at the national, regional and global levels. In the relevant parts, the Resolution provides as follows:

> "*Expressing its concern* at the continued increase in road traffic fatalities and injuries worldwide, in particular in low- and middle-income countries, bearing in mind that the fatality rate within the road system is considerably higher than the fatality rate within other transport systems, even in high-income countries,
>
> ...
>
> 6. Calls upon Member States to implement road safety activities, particularly in the areas of road safety management, road infrastructure, vehicle safety, road user behaviour, including distractions in traffic, road safety education and post-crash care, including rehabilitation for people with disabilities, based on the plan of action;
>
> ..."

51. In its Global Status Report on Road Safety 2015, the World Health Organisation ("WHO") noted that 1.25 million people were killed each year on the world's roads, and that this figure has plateaued since 2007. The report stressed the need for action, which includes, amongst other, the following:

> "Lack of enforcement frequently undermines the potential of road safety laws to reduce injuries and deaths. More work is needed to explore the best ways to optimize enforcement of existing road safety laws. Social marketing campaigns need to be conducted to support and maximize the effects of enforcement."

III. EUROPEAN UNION MATERIALS

52. On 20 July 2010 the European Commission published the policy document "Towards a European road safety area: policy orientations on road safety 2011-2020" (SEC(2010) 903) aimed at the sharing of information and assisting the governments in their adoption of the road safety policies. The document notes that road safety is a major societal issue. It also expresses concerns over a high number of casualties in road accidents in the European Union.

53. On 29 March 2017 the transport ministers of the Member States of the European Union adopted a declaration (Valletta Declaration on Road Safety) by which they, by relying on the earlier EU and the WHO standards, reconfirmed their commitment to improving road safety. They noted the high number of casualties in road accidents and stressed that road accidents have become a major societal issue.

54. They also noted that fatality reduction rates had plateaued in recent year and that speeding and driving under the influence of alcohol or drugs were some of the major causes of road traffic collisions. On these grounds, the transport ministers undertook to ensure the implementation of a number of measures, including the following:

> "k) effectively enforce road safety rules and provide support to road enforcement bodies, including through cooperation and exchange of best practices, in particular with regard to speeding, driving under the influence of alcohol or drugs, failing to comply with traffic light and traffic sign rules, being distracted while driving, e.g. by using mobile devices, and failing to use protective equipment. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

55. The applicants alleged a failure on the part of the domestic authorities to enforce the domestic legal framework of road traffic regulations by taking adequate measures with respect to the person who had caused the road collision in which their relative died. They relied on Article 2 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone's right to life shall be protected by law ..."

A. Admissibility

1. The parties' submissions

56. The Government argued that there had been no reason for the applicants to lodge a constitutional complaint with the Constitutional Court. In the Government's view, the six-month time-limit had started running after the County Court's judgment of 14 May 2013, which meant that the

application had been lodged with the Court outside the six-month time-limit.

57. The applicants submitted, referring to the *Bajić v. Croatia* (no. 41108/10, 13 November 2012) case, that it could not be held against them that they had afforded the Constitutional Court, as the highest Court in Croatia, the opportunity to address their complaints related to the deprivation of the life of their relative.

2. The Court's assessment

58. The Court has already on many occasions addressed and rejected similar objections raised by the Government concerning applicants' compliance with the six-month time-limit (see, for instance, *Bajić*, cited above, §§ 65-69; *Pavlović and Others v. Croatia*, no. 13274/11, §§ 27-39, 2 April 2015; and *Kušić and Others v. Croatia* (dec.), no. 71667/17, 10 December 2019). It sees no reason to hold otherwise in the present case. The Government's objection is therefore rejected.

59. The Court further notes that the applicants' complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

60. The applicants contended that the State had failed to react in an adequate manner to D.M.'s persistent unlawful conduct and breaches of road safety regulations. In the applicant's view, such a failure of the State ran counter to its obligations under Article 2 to avert the risk to the general public created by D.M.'s repeated unlawful conduct. In this connection, the applicants argued that the fact that the police had on numerous occasions identified D.M. as an offender under road traffic regulations, but that that had not resulted in any concrete and effective actions against him, demonstrated a failure by the domestic system to adequately deal with the threat he had posed. Moreover, the minor offences proceedings which had been pending at about the same time as D.M. had killed their relative, had been protracted and ineffective as the court dealing with the case had failed to apply the preventive measure of confiscating his driving licence. It was also not clear to the applicants why D.M.'s record had not shown several of his minor offences convictions for the period between September 2009 and October 2010. In the applicants' view, those minor offences proceedings had only been one illustrative instance of the failure of the domestic system

to prevent D.M. from endangering public safety by his repeated unlawful and dangerous conduct in road traffic.

61. The applicants also argued that the investigation and criminal proceedings concerning the killing of their relative had been ineffective. In their view, the police had not collected all the evidence properly, particularly that related to the speed of D.M.'s vehicle when he had hit their relative. They also contended that they had not had an effective opportunity to present all their evidence and arguments in the criminal proceedings and that some of the judges had lacked objectivity. Moreover, they complained that D.M. had been treated leniently, without any justified reason, being given a prison sentence that was below the minimum provided for under the relevant domestic law. They also argued that D.M.'s prison sentence had not been adequately and effectively executed.

(b) The Government

62. The Government submitted that the domestic authorities had reacted in a diligent manner to D.M.'s unlawful conduct by instituting the relevant proceedings against him in accordance with minor offences legislation. In the Government's view, there had been no failures in the manner in which the minor offences courts had conducted the proceedings against D.M. at the time of the incident in which the applicants' relative had been killed. In particular, D.M. had not had a minor offences or criminal record at the time and there had been no reason to confiscate his driving licence. It could not therefore be held that any other steps should have been taken in the minor offences proceedings in order to protect the applicants' relative's right to life. The Government also stressed that it was not clear what else the State could have done to prevent D.M. from causing the traffic accident and killing the applicant's relative, apart from the various minor offences proceedings instituted against him.

63. The Government further submitted that the procedural obligation was a requirement of means and not results. In their view, the proceedings related to the killing of the applicants' relative had been prompt, thorough and effective. The applicants had been given the possibility to participate effectively in the proceedings and there had been nothing arbitrary or manifestly unreasonable in the actions and decisions of the domestic authorities. In that connection, the Government argued that the relevant courts had provided sufficient reasons for giving D.M. less than the minimum sentence. The Government also stressed that D.M. had started serving his prison sentence following the criminal proceedings against him and that his driving licence had been confiscated.

2. The Court's assessment

(a) Substantive aspect of Article 2

(i) General principles

64. Article 2 ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe. It requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 48, ECHR 2002-I, and *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 104, 31 January 2019). In this context, the absence of any direct State responsibility for the death of an individual or for placing his or her life in danger does not exclude the applicability of Article 2 (see *Cavit Tınarlıoğlu v. Turkey*, no. 3648/04, § 61, 2 February 2016).

65. The Court has recently, in the case of *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, 25 June 2019), elaborated on the scope and nature of the domestic authorities' duties under Article 2 in the context of road traffic. It explained, in particular, the importance of putting in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (ibid., § 135). In this connection, it should further be stressed that in view of the fact that the object and purpose of the Convention requires its provisions to be interpreted and applied in such a way as to make its safeguards practical and effective (see, amongst many others, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 69, ECHR 2004-XII), Article 2 requires the domestic authorities to ensure the effective functioning of the relevant road safety regulatory framework (see *Fatih Çakır and Merve Nisa Çakır v. Turkey*, no. 54558/11, § 40, 5 June 2018, and *Marius Alexandru and Marinela Ştefan v. Romania*, no. 78643/11, § 99, 24 March 2020).

66. The Court has already addressed the issue of effective functioning of the relevant regulatory framework in different contexts under Article 2. The common thread of this case-law is that the duties of the domestic authorities entail above all the primary obligation to have in place an appropriate set of preventive measures geared to ensuring public safety. This entails a primary duty on the part of the State to adopt and implement a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. In this regard, the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement. In sum, the States' positive obligation under the substantive limb of Article 2 extends to a duty to ensure the effective

functioning of the regulatory framework adopted for the protection of life (see *Kotilainen and Others v. Finland*, no. 62439/12, § 66, 17 September 2020, with further references).

67. This positive obligation under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake. Thus, in the context of activities which may pose a risk to human life due to their inherently hazardous nature, States are required to take reasonable measures to ensure the safety of individuals as necessary. In this regard, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. The regulatory measures in question must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (Ibid., § 67, with further references).

68. In the context of road safety, the Court has held that the participation in road traffic is an activity potentially liable to result in serious threats to a person's life. Over the years, driving has become a strictly regulated activity and considerable efforts have been made to improve road-traffic safety. Moreover, road safety depends on many factors, including the quality of the roads and the training provided to prospective drivers. Although, having regard to the extent of the regulations in place and the prevalence of this activity in daily life, driving can nowadays be seen by many as an activity that ordinarily is not particularly dangerous, the Court does not lose sight of the fact that this may be dependent, among other things, on the quality of law enforcement in this area. Notwithstanding the efforts made, the reality remains that road-traffic incidents, including car accidents, do happen and can result in serious physical injury and even loss of life (see *Nicolae Virgiliu Tănase*, cited above, §§ 146-147).

69. Thus, in the context of road safety, the above-discussed positive duties of the domestic authorities entail, first, the obligation to have in place an appropriate set of preventive measures geared to ensuring public safety and minimising the number of road accidents (see *Nicolae Virgiliu Tănase*, cited above, § 135 *in fine*) and, secondly, to ensure the effective functioning of those measures in practice (see paragraphs 65-66 above).

70. It should, however, be emphasised that the positive obligation is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. The extent of the positive obligations in a given context depends on the kind of risks concerned and the possibilities of mitigating them. Thus, where a State has adopted an overall legal framework and legislation tailored to the protective requirements in the

specific context, matters such as an error of judgment on the part of an individual player, or negligent coordination among professionals, whether public or private, could not be sufficient of themselves to make the State accountable from the standpoint of its positive obligation under Article 2 (see *Kotilainen and Others*, cited above, §§ 67-68).

(ii) Application of the above principles to the present case

71. At the outset, the Court finds that the central issue of the present case is the alleged deficient functioning of the relevant road safety regulatory framework to address a repeated and habitual unlawful conduct in road traffic by a person who has eventually caused the fatal road collision in which the applicants' relative lost his life. This case therefore concerns, specifically, the allegations of deficiencies in the implementation of the regulatory framework, which also sets it apart from other cases which concern, more specifically, the substantive positive obligation to take preventive operational measures to protect an identified individual from another individual in case of the existence of a real and immediate risk to life, which is a distinct aspect of the State's positive obligations under Article 2 (see *Fernandes de Oliveira*, cited above, § 103; *Nicolae Virgiliu Tănase*, cited above, § 136; and *Kotilainen and Others*, cited above, §§ 69 and 78).

72. The question whether there has been a failure by the State to comply with its above-mentioned regulatory duties calls for a concrete rather than an abstract assessment of any alleged deficiency. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant or the deceased gave rise to a violation of the Convention. Therefore, the mere fact that the regulatory framework may be deficient in some respects is not sufficient in itself to raise an issue under Article 2. It must be shown to have operated to an individual's detriment (see *Fernandes de Oliveira*, cited above, § 107). Moreover, in the light of the importance of the protection afforded by Article 2, the Court must subject the complaint about loss of life to the most careful scrutiny, taking into consideration all the relevant circumstances of the case (see, among many others, *Banel v. Lithuania*, no. 14326/11, § 67, 18 June 2013).

73. The Court notes that the Croatian regulatory framework, as relevant for the present case, considered breaches of road safety as offences against public welfare which represent a high level of general danger to society. It provided both for the criminal and minor offences sanctions for such conduct, as well as preventive measures of seizure and confiscation of a driving licence if there was a risk of the suspect or perpetrator reoffending. The relevant legislation also provided for a possibility of imposing a duty of substance treatment for those who committed the offences under the decisive influence of drugs or alcohol. Moreover, the Road Traffic Safety

Act provided for a possibility to annul a driving licence for repeated violations of road traffic safety regulations (see paragraphs 40, 43 and 45 above).

74. According to the Government Programme for road safety the risks to life and physical integrity of participants in road traffic should be prevented. The Programme refers to control and punishment of drink-driving and speeding as effective means of preventing the risks to life and physical integrity of participants in road traffic (see paragraphs 47-48 above). Moreover, in an expert evaluation of the road safety in Croatia and the operation of the Programme, it was stressed that, amongst other, effective punishment of minor and criminal offences related to road safety was required in order to address the increase of road accidents (see paragraph 49 above).

75. In this connection, it should also be noted that the relevant UN and WHO materials indicate the necessity of effective implementation and enforcement of road safety laws as a means of reducing injuries and deaths on the road (see paragraphs 50-51 above). In addition, the European Union Valletta Declaration, relying on UN and WHO documents, indicated drink-driving and speeding as some of the major causes of road traffic collisions, which needed to be addressed by an effective enforcement of road safety rules (see paragraphs 52-54 above).

76. The Court would add that this is a matter of common knowledge that cars and other motor vehicles can become dangerous with irresponsible or careless use and may cause widespread public harm since a significant portion of the population regularly uses them. There is therefore a compelling reason to protect society against harm in road traffic (see paragraph 68 above). The State should seek to avert traffic accidents by enforcing through adequate deterrence and preventive measures compliance with the relevant rules aiming to reduce the risks of dangerously careless or reckless conduct in road traffic.

77. In sum, having regard to the above, the Court finds that the relevant domestic legal framework provided for appropriate preventive measures geared to ensuring public safety and minimising the number of road accidents. It remains to be seen whether this regulatory framework effectively operated in practice (see paragraph 69 above).

78. The applicants' relative was killed in a road traffic collision caused by D.M., who had sped through a red light at a junction while being so under the influence of alcohol that his driving ability was significantly reduced (see paragraphs 7 and 18-19 above). Such conduct was considered by the relevant authorities as involving reckless driving in wilful or wanton disregard for the safety of others which goes beyond the merely negligent causing of a road accident In other words, D.M. was aware of the kind of risk which could attend his conduct and took it regardless (see paragraphs 22 and 38 above).

79. D.M. had a long history of breaches of the relevant road traffic regulations, including drink-driving, speeding and failing to obey road signs. In the period preceding the incident, between March 2000 and May 2012, D.M. had been registered thirty-two times in police records as a perpetrator of various traffic offences. His last conviction had been for an offence committed in November 2010. Nevertheless, his driving licence was temporarily confiscated twice for only short periods of time, first for three months in 2001-2002 and then for just three days in 2006. For the other breaches of traffic regulations, he was either punished by small fines or otherwise penalised by community service or merely a reprimand. In addition, ten minor offences proceedings against him were discontinued either due to prescription or improper processing of the case by the police (see paragraph 9 above).

80. At about the time of the incident in which the applicants' relative lost his life, D.M. was being prosecuted in minor offences proceedings for an offence of drink-driving in October 2010. An order for the confiscation of his driving licence was made in the police penalty notice for a period of nine months. However, after he had challenged that notice in the minor offences court, there is no indication that the court considered seizing his driving licence pending the outcome of the trial (see paragraph 43 above). It should also be noted that in the first-instance judgment in those proceedings, given on 1 June 2011, the court erroneously established that D.M. had not been previously convicted and thus considered that a fine was a sufficient sanction, without confiscation of his driving licence. Upon the quashing of that judgment on appeal, the proceedings only came to an end in December 2013 after a new minor offences court judgment and after D.M. had already paid his fine (see paragraphs 13-15 above).

81. Given D.M.'s long record of various road traffic regulations breaches, the authorities had good reasons to consider him a repeat offender. Despite that, he only had his driving licence confiscated twice for short periods of time in 2001-2002 and 2006 (see paragraph 79 above). Indeed, at the time of the incident D.M. had a valid driving licence allowing him to participate in road traffic (see paragraph 8 above). In that connection, an indication of the domestic authorities' lack of diligence to address D.M.'s unlawful conduct can be seen in how the relevant minor offences court established the question of D.M.'s previous conviction for minor offences, erroneously finding that he had not been convicted of such offences and that it was therefore not necessary to confiscate his driving licence (see paragraph 80 above).

82. Another strong indication of deficiency in the application of the relevant mechanisms to address D.M.'s unlawful actions is the fact that the domestic authorities allowed ten different sets of minor offences proceedings against him to be discontinued owing to prescription and improper processing of the cases (compare *Remetin v. Croatia*,

no. 29525/10, § 99, 11 December 2012). The domestic authorities also continued imposing small fines and other alternative sanctions on D.M., which obviously had no deterrent effect and did not bring his conduct into compliance with the relevant traffic regulations.

83. Although the domestic authorities did take certain measures against D.M., they failed to take a comprehensive and integrated approach of applying effective deterrent and preventive measures to put an end to his continuous serious breaches of road traffic regulations. Such an approach would have required taking measures with a primary function to reduce risk factors for road traffic safety by, for instance, annulling his driving licence or confiscating it for a longer period of time, imposing traffic re-education, substance abuse treatment and, where appropriate, applying more severe and dissuasive sanctions for his conduct. The taking of such measures would have been in line with the mechanisms put in place in the relevant domestic regulatory framework and the above-noted standards endorsed by the Government in its road safety Programme, as well as those set out in the relevant international materials, aimed at ensuring public safety and minimising the number of road accidents (see paragraphs 73-76 above).

84. D.M.'s persistent unlawful conduct and breaches of road safety regulations finally resulted in the causing of the fatal road traffic collision in which the applicants' relative died. While the Court cannot speculate whether the matters would have turned out differently if the authorities had acted otherwise and ensured that the relevant regulatory framework was effectively implemented in practice with respect to D.M.'s repeated unlawful conduct , the relevant test under Article 2 cannot require it to be shown that "but for" the failing or omission of the authorities the death would not have occurred (see, *mutatis mutandis*, *Bljakaj and Others v. Croatia*, no. 74448/12, § 124, 18 September 2014). Rather, what is important, and sufficient to engage the responsibility of the State under Article 2, is to show that the deficiencies in the operation of the relevant regulatory framework worked to an individual's detriment (see paragraph 72 above).

85. In this connection, the Court would stress that it is not its task to determine how particular measures of the domestic legal order should have been administered in practice with regard to D.M.'s repeated unlawful conduct in road traffic, which finally resulted in the death of the applicants' relative. For the Court, it is sufficient to find that the above-noted multiple failures of the domestic authorities at different levels to take the appropriate measures against D.M.'s continuous unlawful conduct, and thus to ensure the effective functioning in practice of the preventive measures geared to ensuring public safety and minimising the number of road accidents, went beyond the mere negligent coordination or omission; they thus engaged the State's accountability from the standpoint of its positive obligation under Article 2 (see paragraphs 69-70 above).

86. The Court therefore finds that there has been a violation of the substantive limb (positive obligations) of Article 2 of the Convention.

(b) Procedural aspect of Article 2

(i) General principles

87. The positive obligations under Article 2 also extend to the procedural positive obligation to have in place an effective independent judicial system to deal with breaches of road safety regulations endangering the right to life. Such system may vary according to circumstances. It should, however, be capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see *Nicolae Virgiliu Tănase*, cited above, §§ 137 and 157, with further references).

88. This procedural obligation is not dependent on whether the State is ultimately found to be responsible for the death under its substantive limb but constitutes a separate and autonomous duty (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 156 and 159, 9 April 2009). It entails, in particular, an obligation to carry out an effective official investigation when individuals have been killed as the result of the use of force, but may extend to accidents, notably road traffic accidents (see *Nicolae Virgiliu Tănase*, cited above, § 138, and cases cited therein). In this connection, in *Nicolae Virgiliu Tănase* (§§ 158-171), the Court set out the following principles:

(i) The form of investigation required by this obligation varies according to the nature of the interference with the right to life. Article 2 may, and under certain circumstances must, include recourse to the criminal law. For instance, where death has been caused intentionally, a criminal investigation is generally necessary;

(ii) In cases concerning unintentional infliction of death, the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained;

(iii) However, even in cases of non-intentional interferences with the right to life or physical integrity there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2. Such circumstances can be present, for example, in case of an alleged voluntary and reckless disregard by a private individual of his or her legal duties under the relevant legislation;

(iv) In a situation where a criminal investigation is required, the kind of investigation that will achieve the purposes of securing the effective implementation of the domestic laws which protect the right to life and

holding the responsible persons accountable may vary according to the circumstances. In all instances, the procedural obligation will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice. It is not an obligation of result but of means only. Thus, the mere fact that the proceedings have ended unfavourably for the victim (or the next-of-kin) does not in itself mean that the respondent State has failed in its positive obligations under Article 2;

(v) Compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters, such as adequacy, thoroughness, promptness and reasonable expedition, independence, effective victim participation and sufficient public scrutiny. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed.

89. As regards the victim (or the next-of-kin) participation in the proceedings, in particular, the Court reiterates that the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. Moreover, Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 303-304, ECHR 2011 (extracts)).

90. The procedural requirements of Article 2 go beyond the stage of the official investigation. Where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law (see, amongst many others, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 95, ECHR 2004-XII, and *Bajić*, cited above, § 89). In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined (see, for instance, *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 239, ECHR 2016, with further references).

91. Moreover, the Court has interpreted Article 2 of the Convention as imposing a duty on States to execute their final judgments without undue delay. It is so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under Article 2 (see *Kitanovska Stanojkovic and*

Others v. the former Yugoslav Republic of Macedonia, no. 2319/14, § 32, 13 October 2016; *Minneker and Engrand v. Belgium* (dec.), no. 45870/12, § 26, 7 February 2017; and *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 50, 26 May 2020).

(ii) Application of these principles to the present case

92. As already noted, the domestic authorities characterised D.M.'s conduct causing the road traffic collision that resulted in the death of the applicants' relative as involving reckless driving in wilful or wanton disregard for the safety of others and road traffic regulations going beyond the merely negligent causing of a road accident (see paragraph 78 above). According to the domestic legal framework, such conduct is considered an intentional offence of causing traffic accident leading to death which warrants recourse to criminal law and the imposition of a sentence of imprisonment (see paragraphs 38-39 above). The Government did not contend that the matter could have been effectively pursued outside the framework of criminal proceedings.

93. The present case therefore differs from cases concerning deaths caused by road accidents involving simple negligence where the framework of civil remedies might be considered to be adequate and sufficient (see paragraph 88(ii) above). This case rather involves a situation where, as explained in the Court's case-law, a recourse to the mechanisms within the framework of criminal law was required (see paragraph 88(iii) above).

94. The Court notes that immediately after the incident the police carried out an on-site inspection (see paragraph 8 above). The State Attorney's Office immediately began an investigation during which a number of witnesses were questioned, and forensic expert reports were commissioned (see paragraphs 16-19 above). On the basis of the evidence obtained during the investigation, the State Attorney's Office indicted D.M. in the Municipal Court on 31 July 2012 on charges of causing a road accident with fatal outcome. The first-instance judgment was adopted in December 2012 and it was confirmed by the County Court in May 2013 (see paragraphs 22, 26 and 29 above). Moreover, the applicants were given a sufficient opportunity to participate in the proceedings and to put forward their arguments concerning the case (see paragraphs 21 and 28 above).

95. In these circumstances, the Court cannot conclude that the authorities failed to make a serious attempt to find out what happened. Moreover, the Court does not see any deficiencies in the manner in which the relevant procedural steps were taken following the event, or in the way the applicants took part in the proceedings, that could call into question the domestic authorities' compliance with the procedural obligation under Article 2. It should also be noted that the applicants' complaints of lack of objectivity of some of the judges are unsubstantiated and unfounded.

96. However, the case at issue, as submitted by the applicants, also concerns the inadequacy of the sentence imposed on D.M. for causing the death of the applicants' relative and the delayed enforcement of that sentence.

97. In this connection, it is not the task of the Court to ascertain whether the domestic courts correctly applied domestic criminal law; what is at issue in the present proceedings is not individual criminal-law liability, but the State's responsibility under the Convention. There is also no absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. The Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed (see *A. v. Croatia*, no. 55164/08, § 66, 14 October 2010, with further references; see also, *Armani Da Silva*, cited above, § 238).

98. The Court notes that the Criminal Code gave the domestic courts the possibility of handing down a prison sentence of between three and ten years (see paragraph 38 above). However, the Municipal Court chose to rely on the possibility provided under the relevant domestic law of imposing a penalty that was below the minimum allowed by law (see paragraph 41 above), sentencing him to two years' imprisonment. Eventually, D.M. was released on parole after serving some fourteen months of his sentence (see paragraphs 32-33 above).

99. Without intending to interfere with the domestic courts' choice of punitive measures taken against D.M. and without intending to judge the proportionality of those measures to the offence, the Court cannot but note that when making its assessment the Municipal Court, while taking into account the fact that D.M. did not have any previous criminal convictions (see paragraph 27 above), did not make reference to the fact that according to the available records D.M. had been several times fined in minor offences proceedings (see paragraph 10 above). Moreover, the Court cannot but to note that the Municipal Court's reliance on the fact that before the offence in question, D.M.'s conduct had been in compliance with the law, stands in stark contrast to his previous conduct as a driver (see paragraph 9-15 above). In these circumstances, the mitigation of D.M.'s sentence below the statutory minimum does not appear to have taken place upon a careful scrutiny of all the relevant considerations related to the case.

100. It is further noted that the relevant domestic law provided that the imprisonment procedure be treated urgently, and that enforcement of the sentence could only be postponed in exceptional circumstances (see paragraph 46 above). On the facts of the case, it is not completely clear why the enforcement of D.M.'s sentence was postponed for one year after it became final (compare, by contrast, *Zoltai v. Hungary and Ireland* (dec.), no. 61946/12, §§ 31-32, 29 September 2015). In that connection, the Court

notes in particular that the applicants needed to complain several times of a failure to enforce D.M.'s sentence of imprisonment (see paragraph 31 above).

101. In these circumstances, it cannot be held that the domestic authorities displayed the requisite diligence in enforcing the custodial sentence in respect of D.M. The one-year delay indicated above cannot be regarded as reasonable. Accordingly, such an unjustified delay in enforcing the judgment against D.M. was not in conformity with the State's obligation under Article 2 to execute the final criminal court's judgments without undue delay (see paragraph 91 above).

102. Having in mind the above considerations, while the Court considers that each of the identified deficiencies in the domestic authorities' response to D.M.'s unlawful conduct might not necessarily, separately and in itself, call into question the domestic authorities' compliance with their obligations under Article 2, it finds that, taken jointly, these deficiencies suggest that the domestic regulatory framework of road safety, as implemented in the instant case, proved to be far from rigorous and had little dissuasive effect that was capable of ensuring the effective prevention of unlawful acts, such as those complained of by the applicants. Moreover, it cannot be said that conduct of that kind by the domestic authorities was able to secure public confidence in their adherence to the rule of law and their ability to prevent any appearance of tolerating unlawful acts.

103. The Court therefore finds that there has been a violation of the procedural limb of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. 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

105. The applicants claimed 15,000 euros (EUR) each in respect of non-pecuniary damage.

106. The Government considered the applicants' claims excessive and unsubstantiated.

107. Having regard to all the circumstances of the present case, the Court accepts that the applicants suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicants

EUR 26,000 jointly in compensation for non-pecuniary damage, plus any tax that may be chargeable to them.

B. Costs and expenses

108. The applicants also claimed 34,375 Croatian kunas for the costs and expenses incurred before the Court.

109. The Government considered the applicants' claim excessive and unsubstantiated.

110. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. 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 4,540, plus any tax that may be chargeable, covering costs for the proceedings before it.

C. Default interest

111. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds*, by 6 votes to 1, that there has been a violation of the substantive limb (positive obligations) of Article 2 of the Convention;

3. *Holds*, by 6 votes to 1, that there has been a violation of the procedural limb of Article 2 of the Convention;

4. *Holds*, by 6 votes to 1,
   (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 26,000 (twenty-six thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,540 (four thousand five hundred and forty euros) jointly, 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*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Krzysztof Wojtyczek
President

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

K.W.O
R.D

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the majority's view that the respondent State violated the Convention rights of the applicant.

The instant case introduces an important novelty to the case-law: the majority find a violation of the applicant's Convention rights consisting in the fact that the respondent State did not impose preventive restrictions on different Convention rights of an individually identified person (D.M.) who was not "in the charge of the authorities". The judgment overlooks the interpretive rules set forth in the Court's case-law. It raises serious procedural questions. In addition, it overrules the Grand Chamber judgment in the case of *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, 25 June 2019).

1. Interpretation of the Convention

2. The rule of law is not possible without a sufficiently coherent and complete system of clear and precise metarules. Under the principles of the international rule of law, the assessment of any international case raising interpretive issues should start with the identification of the relevant rules of treaty interpretation, and the judicial decision should justify the interpretive choices under the applicable interpretive directives.

The instant case raises serious questions affecting the interpretation of the Convention. They concern both the proceedings before the Court and the content of the rights in issue. The Court has set out directives on the interpretation of the Convention in, *inter alia*, *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 118-125, 8 November 2016), and summarised them recently in *Slovenia v. Croatia* ((dec.) [GC], no. 54155/16, § 60, 18 November 2020). It is worth noting that, in general, the Court, when addressing novel interpretive issues, very rarely refers to its own judgments and decisions setting forth the principles of interpretation of the Convention. It refers instead to its own judgments and decisions addressing substantive-law issues. Pronouncements on legal metarules are not taken equally seriously. This selective approach ("cherry-picking") in respect of the existing case-law is difficult to explain in legal terms. In any event, the interpretive directives set forth in earlier case-law are not usually considered by the Court as guidance for future cases. Not only the Grand Chamber but also the Chambers seem to consider that they are absolutely free to tacitly set aside these directives. As a result, the set of metarules within the Convention mechanism is not a system but remains a *bric-à-brac* (compare the title of the following article: J. Combacau, "Le droit international : bric-à-brac ou système ?", *Archives de philosophie du droit*, vol. 31 (1986), pp. 85-105) or a toolkit for do-it-yourselfers.

3. Furthermore, I would like to reiterate here the views expressed by Judge Pejchal and myself in our dissenting opinion appended to the judgment in the case of *Ćwik v. Poland* (no. 31454/10, 5 November 2020):

> "The Convention for the Protection of Human Rights and Fundamental Freedoms cannot be applied in a legal vacuum but has to be construed and applied in the context of other sources of law, which include, *inter alia*, relevant international treaties between the High Contracting Parties, customary international law and universally recognised general principles of law (see the sources of international law listed in Article 39, paragraph 1 (a) to (c), of the Statute of the International Court of Justice (ICJ)). The interpretation should also duly take into account – in particular – judicial decisions of international and national courts and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (see Article 39, paragraph 1 (d), of the ICJ Statute). Relevant sources may further include legally binding resolutions of international organisations as well as instruments of soft law, starting with the Universal Declaration of Human Rights, which is explicitly mentioned in the Preamble to the Convention."

The Court should duly take into account, *inter alia*, *universally recognised general principles of law.* Given the fact that the regulation of proceedings in the Convention and the Rules of Court is incomplete and leaves many important procedural questions unanswered, general principles of law have special relevance for the conduct of the proceedings before the Court. These principles include, *inter alia*, the right to be heard, equality of arms between the parties and the principle of *res judicata* (on these questions see, for instance, C. Brown, *A Common Law of International Adjudication*, Oxford, Oxford University Press, 2007, pp. 53-55). The general principles of fair proceedings (due process) should guide the Court in its interpretation of detailed procedural provisions and help to fill, if necessary, any lacunae in the law.

4. In the instant case, the Court decides upon the meaning of the Convention provisions, overlooking the fact that there are rules of treaty interpretation and that these are binding on the Court. Concerning procedural questions, it overlooks a relevant source of law, namely the universally recognised principles of fair judicial proceedings. Concerning substantive matters, it relies (see paragraphs 50-54, 75 and 83 of the judgment) on policy papers and other documents emanating from the United Nations (document dated 2010), the European Union (documents dated 2010 and 2017) and the World Health Organization (document dated 2015 and published in October 2015), as if there were no hard legal arguments under the applicable interpretative rules, codified in the Vienna Convention of the Law of the Treaties and contextualised by the Court in *Magyar Helsinki Bizottság* (cited above). United Nations, European Union and World Health Organization policy documents are not even soft-law materials, they are not part of the Parties' subsequent practice under the Convention and they do not appear relevant for the purpose of interpreting the Convention. Yet the majority not only refer to these documents among

the relevant international materials but also take them into account – in the part of the reasoning entitled "Application of the above principles to the present case" – in the determination of the precise scope of the High Contracting Parties' obligations, and transform them implicitly into a – peculiar – source of international law (see paragraphs 75 and 83 of the judgment).

5. While the relevant circumstances under the procedural limb of Article 2 cover the period from 7 July 2012 to 31 July 2015, the question to be answered under the substantive limb of Article 2 in the instant case is whether the respondent State committed internationally wrongful acts (or omissions) which violated the Convention – as understood at the material time – during the period ending on 7 July 2012. Why are documents published in October 2015 and in 2017 relevant to establishing the scope of the respondent State's substantive obligations during the period ending on 7 July 2012? Moreover, why should EU policies be relevant to the interpretation of a treaty to which States which are not members of the EU are parties? Why is the above-mentioned EU document from 2010 relevant, when Croatia joined the European Union only on 1 July 2013?

2. The question of fair proceedings

6. The majority, in assessing the case, decided to focus on D.M.'s dangerousness and the risk he posed to other persons. As far back as the communication stage the Court issued the following request:

> "The Government are requested to submit two copies of the relevant documents concerning the applicants' case. In particular, they are requested to provide information as to the measures taken and the outcome of the relevant proceedings concerning the thirty-five traffic offences for which D.M. was registered in the police records."

The reasoning devotes eight paragraphs (paragraphs 78-85) to analysing D.M.'s behaviour and assessing the risk he posed. It further expresses the view that the authorities failed "to take appropriate measures against D.M.'s continuous unlawful conduct" (paragraph 85). The majority advocate, in particular, the following restrictions on D.M.'s rights (paragraph 83):

> "Although the domestic authorities did take certain measures against D.M., they failed to take a comprehensive and integrated approach of applying effective deterrent and preventive measures to put an end to his continuous serious breaches of road traffic regulations. Such an approach would have required taking measures with a primary function to reduce risk factors for road traffic safety by, for instance, annulling his driving licence or confiscating it for a longer period of time, imposing traffic re-education, substance abuse treatment and, where appropriate, applying more severe and dissuasive sanctions for his conduct."

The approach adopted by the majority places in centre stage the question whether D.M.'s rights were sufficiently restricted by the respondent State. It

is unusual for a judgment of the Court to single out in such a manner a specific person as posing a threat to public safety. The applicant's case has been transformed into D.M.'s case.

7. The judgment also raises questions concerning its execution. Under Article 30 of the Articles on Responsibility of States for Internationally Wrongful Acts (referred to, *inter alia,* in *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, 29 May 2019, § 84 and also § 162), a State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if the circumstances so require. Rule 6 § 2 (b) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements requires the Committee of Ministers to examine – *inter alia* – whether individual measures have been taken to ensure that the violation has ceased and whether general measures have been adopted preventing new violations similar to that or those found or putting an end to continuing violations. These provisions may be understood as an obligation to put an end to the situation in which D.M. continues to pose a risk to public safety (compare, in particular, paragraphs 83 and 85 of the reasoning, stressing the continuing nature of the situation). Whatever the approach ultimately adopted by the Committee of Ministers at the execution stage, the judgment finding against the respondent State for having failed to restrict D.M.'s rights is an invitation to the authorities to carefully scrutinise D.M.'s conduct in the future, and it will be difficult for him to escape the heightened attention of the various domestic authorities. The Court's judgment establishes facts and formulates recommendations in respect of D.M. which may be relevant in future proceedings at domestic level. There can be no doubt that the Court's judgment has a significant impact on D.M.'s rights and interests.

8. One of the most important principles of fair proceedings requires that if a decision impacting a person's rights or legally protected interests is to be taken, the person or party concerned should be heard beforehand. *Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit* (Seneca, *Medea*; compare my separate opinion appended to the judgment in the case of *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, ECHR 2015, point 7). As stated above, the right to be heard is a universally recognised general principle of law. It is also an element of the international rule of law.

Yet D.M.'s right to be heard has not been observed by the Court. Of course, there are many possible counterarguments. That the scope of the case before the Court is technically limited to the dispute between the applicant and the respondent State and encompasses neither the dispute between the applicant and D.M. nor the dispute between D.M. and the respondent State. That D.M.'s case has been pleaded by the respondent

Government and nothing reasonable can be added to their submissions. That D.M.'s case is impossible to defend. That, in any event, all the relevant circumstances of the case are obvious and have been established beyond any doubt. That the Court's judgments have no direct effect and that there is a very wide discretion at the execution stage, so that D.M. will still have an opportunity to plead his case, if necessary, at that subsequent stage. That under Article 36 of the Convention, the Court has no obligation to invite private third parties to submit observations, even if they have an obvious interest in the outcome of the proceedings before the Court.

In my view, the right to be heard is so fundamental that all these arguments cannot justify its complete suppression. In particular, the argument that the person concerned will probably not be able to say anything reasonable can never carry. The right to be heard is not restricted either to "good guys" who have a plausible defence, or to cases with unclear factual circumstances. One can never be quite sure in prima facie "easy cases" that no new relevant circumstances will be uncovered by the pleadings of the persons concerned. Moreover, even if D.M. is able, if necessary, to plead his case at the stage of execution of the judgment, his task may be made more difficult. The Court's judgment therefore poses a problem from the viewpoint of the international rule of law and human rights protection. If the majority wanted to focus attention on D.M.'s rights, he should have been invited to present observations in the instant case.

According to the approach adopted by the majority, not only does the Convention encompass an obligation to impose restrictions on a specific person's rights, and not only do individuals have a subjective right to have such restrictions imposed on third persons, but the Court asserts a power to assess whether sufficient restrictions have been imposed on individually identified persons who are not even parties to the procedure before it and who may be unaware of the ongoing proceedings impacting upon their rights.

3. Scope of the State's positive obligation to protect

9. The Court very comprehensively addressed the issue of the positive obligations of the State under Articles 2 and 3 in the context of a risk to the life and health of persons in the case of *Nicolae Virgiliu Tănase* (cited above, emphasis added):

> "135. This substantive positive obligation entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life ... It applies in the context of any activity, whether public or not, in which the right to life may be at stake ... The Court would stress that in the context of road traffic, these duties of the domestic authorities entail the obligation to have in place an appropriate set of preventive measures geared to ensuring public safety and minimising the number of road accidents.

> 136. Secondly, there is a further substantive positive obligation to take preventive operational measures to protect an identified individual from another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII) or, in particular circumstances, from himself (see *Renolde v. France*, no. 5608/05, § 81, ECHR 2008 (extracts); *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011, and *Fernandes de Oliveira*, cited above, §§ 103 and 108-15). The Court has held that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every alleged risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. In order to engage this positive obligation, it must be established that **the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk** (*Osman*, cited above, §§ 115-16; *Öneryıldız*, cited above, §§ 74 and 101; *Bone v. France* (dec.), no. 69869/01, 1 March 2005; *Cavit Tınarlıoğlu*, cited above, §§ 91-92, and *Fernandes de Oliveira*, cited above, § 109). The Court considers that this obligation may in certain circumstances include the provision of emergency medical treatment in the event of a life-threatening accident.
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> 137. Thirdly, the Court reiterates that the State's duty to safeguard the right to life must be considered to involve not only these substantive positive obligations, but also, in the event of death, the procedural positive obligation to have in place an effective independent judicial system. Such system may vary according to circumstances (see paragraph 158 below) ..."

It is important to stress here that these general principles were stated precisely in the context of a case concerning a road-traffic accident. Moreover, the preventive measures referred to in § 135 *in fine* are clearly general measures only. Individual measures are addressed only in § 136. The substantive positive obligation to take preventive operational measures to protect an identified individual from another individual arises only if there is a **real and immediate risk** to the life of an **identified individual or individuals** from the criminal acts of a third party. According to the Grand Chamber, the States' obligation to protect persons from risk can never extend beyond that, at least not in the context of road traffic and "other activities in which the right to life may be at stake". I do not see any reason to depart from this approach, which is the result of a very thorough and mature reflection.

In the recent case of *Kotilainen and Others v. Finland* (no. 62439/12, 17 September 2020, emphasis added) the Court further expressed the following views:

> "In certain circumstances, however, the Court has held that a similar obligation to afford protection against a real and imminent risk of criminal acts emanating from a given individual may arise toward members of the public who are not identifiable in advance, namely in the **context of the granting of prison leave or conditional release to dangerous prisoners** (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 69, ECHR 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 107, 15 December 2009; and *Choreftakis and Choreftaki v. Greece*, no. 46846/08, §§ 48-49, 17 January 2012).

> 71. ... In the latter context, the Court has stressed the duty of diligence incumbent on the State authorities, in dealing with the danger emanating from the potential acts of certain individuals **in their charge,** to afford general protection of the right to life (see *Mastromatteo*, cited above, § 74, and *Maiorano and Others*, cited above, § 121). Similarly, in a case concerning a police officer who deliberately shot two persons with his police gun while off-duty, the Court found a violation of Article 2 on the grounds that the officer had been issued with the gun in breach of the existing domestic legislation governing police weapons and there had been a failure to properly assess his personality in the light of his known history of previous disciplinary offences (see *Gorovenko and Bugara v. Ukraine*, nos. 36146/05 and 42418/05, § 39, 12 January 2012).
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> 72. The Court has also found that the obligation to afford general protection against potential lethal acts was engaged in respect of the danger emanating from a person with a history of violence, unlawful possession of firearms and alcohol abuse, who was apparently mentally disturbed and had been **under the control of the police on the day of the killing** committed by him (see *Bljakaj and Others v. Croatia*, no. 74448/12, § 121, 18 September 2014). In the circumstances of that case, which arose in the context of domestic violence and concerned the killing of the lawyer of the perpetrator's wife in the wake of an attack on the latter, the risk to life emanating from the perpetrator was found to be real and imminent, whereas the lawyer was not in advance identifiable as victim. Furthermore, the supervisory duties of diligence **in the context of a school** were engaged in *Kayak v. Turkey* (no. 60444/08, §§ 59 and 66, 10 July 2012)."

In all those cases, either the perpetrator or the victims (see *Kayak v. Turkey*) were **in the charge of the authorities**. The instant case does not belong to the category of exceptions listed above. Neither D.M. nor the applicant was in the charge of the authorities.

It is also worth recalling that the Court expressed the following view in the case of *Marius Alexandru and Marinela Ştefan v. Romania* (no. 78643/11, 24 March 2020):

> "105. While the applicants criticise the adequacy of the measures taken by the competent public authorities to ensure safety on the public highway, the Court nevertheless reiterates that it is not its task to call into question the measures taken by the domestic authorities, the choice of which in principle falls within States' margin of appreciation (see *Öneryıldız*, cited above, § 107, and *Fatih Çakır and Merve Nisa Çakır v. Turkey,* no. 54558/11, §§ 45 and 47, 5 June 2018). The Court considers that in the instant case it was for the national authorities to determine the appropriate measures to take, and what inspections of roadside trees were necessary, in order to ensure the safety of persons on the public highway"[translation by the Registry].

10. The instant judgment adopts an approach which clearly contradicts and tacitly overrules the Grand Chamber judgment in *Nicolae Virgiliu Tănase* (cited above). The approach adopted by the majority is particularly problematic not only because the scope of positive obligations is extended, but also because these newly established obligations entail the imposition of preventive restrictions on the Convention rights of individually identified persons considered to pose a risk to the general public.

The underlying assumption in the instant case is that the authorities have to take individual preventive measures if they knew or ought to have

known, at the time, of the existence of a certain level of risk to the life or health of unidentified individuals (not in the charge of the authorities) posed by persons who are likewise not in the charge of the authorities. Moreover, under this new approach, individuals may raise claims to protection in the form of preventive measures against another individually identified person (not in the charge of the authorities) posing such a risk to the life or health of unidentified individuals (likewise not in the charge of the authorities). This is a major shift of paradigm which – if confirmed by subsequent case-law going down the same route – will transform the functioning of European societies. In my view, there are no grounds to infer from the Convention an obligation to impose preventive restrictions on D.M.'s rights in the context of the instant case.

11. Road safety is a much more complicated problem than the instant judgment suggests. It depends not only on the existence and enforcement of a legislative and administrative framework designed to provide effective deterrence against threats to the right to life, but also on the combined effect of many other factors such as the training provided to future drivers, the size, age and state of the vehicle fleet, the density of traffic, the quality and maintenance of roads and the way they were planned and built, the organisation of the traffic, the rules of civil liability, the rules governing car insurance, interactions between road traffic and alternative means of transport, as well as the national culture with its attitudes towards the law in general and traffic regulation in particular.

The main problem is not the specific risk posed by one specific person (D.M.) but the possible overall risk stemming from the general attitude of the authorities *vis-à-vis* traffic offences. Preventing just one person from driving will not significantly improve safety on the roads. These general matters, however, have been neither discussed nor investigated, and in the absence of any materials in the case file there are no grounds to take any stance on these questions.

12. Concerning the so-called procedural limb of Article 2, I would like to note briefly the following points.

The Grand Chamber judgment in *Nicolae Virgiliu Tănase* (cited above, §159-163) established the following standard:

> "In cases concerning unintentional infliction of death and/or lives being put at risk unintentionally, the Court reiterates that the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained. ...
>
> The Court considers that, once it has been established by the initial investigation that death or a life-threatening injury has not been inflicted intentionally, the logical consequence of the two forms of procedural approaches described in paragraphs 159 and 160-161 above is to regard the civil remedy as sufficient, and this regardless of

> whether the person presumed responsible for the incident is a private party or a State agent."

That is the situation in the instant case: criminal sanctions are not required by the Court's case-law.

I agree with the following view expressed in paragraph 95 of the judgment:

> "Moreover, the Court does not see any deficiencies in the manner in which the relevant procedural steps were taken following the event, or in the way the applicants took part in the proceedings, that could call into question the domestic authorities' compliance with the procedural obligation under Article 2. It should also be noted that the applicants' complaints of lack of objectivity of some of the judges are unsubstantiated and unfounded."

The majority find a violation of Article 2 under its procedural limb, focusing their attention on the severity of the punishment and its enforcement. I note in this context that the punishment imposed on D.M. does not appear manifestly disproportionate. The delay of one year in the enforcement of a sentence in itself does not run counter to the State's procedural obligation under Article 2 of the Convention; the reasons for it have not been established (see, by contrast, *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, §§ 30-34, 13 October 2016, concerning an unjustified delay of over eighteen months entirely attributable to the authorities).

The majority introduce the following disclaimer in paragraph 99: "Without intending to interfere with the domestic courts' choice of punitive measures taken against D.M. and without intending to judge the proportionality of those measures to the offence ...". However, this is precisely what the judgment does: it interferes with the domestic courts' choice of punitive measures taken against D.M. and judges the proportionality of those measures to the offence. These effects are intended. As result, essential questions relating to a specific person's criminal liability are decided in the judgment on the basis of very fragmentary and second-hand evidence, without D.M. first being heard and without any attempt to establish all the factual circumstances which are relevant for a rational assessment of the severity of the punishment and the time frame of its execution (compare my concurring opinion appended to the judgment in the case of *Sabalić v. Croatia* (no. 50231/13, 14 January 2021)).

Conclusion

13. To sum up, the international rule of law begins with observance of the rules of treaty interpretation and of the fundamental principles of procedural justice. Have D.M.'s fundamental rights been observed by the Court? To use the majority's own words (see paragraph 102 *in fine*): is the

instant judgment able to secure public confidence in the Court's adherence to the rule of law?