



Burden of proof lies on the authorities in damages claim for killing of wartime detainee

In today's **Chamber** judgment¹ in the case of [Baljak and Others v. Croatia](#) (application no. 41295/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned the domestic courts' dismissal of the applicants' claim for damages against the State on the grounds that they had failed to prove that the State was responsible for the death of their relative, despite the fact that he had been detained by Croatian soldiers and taken to an unknown location, with his body being found years later in a mass grave with a gunshot wound to the head.

The Court found in particular that the conclusion reached by the domestic courts when dismissing the claim was manifestly unreasonable. The domestic courts had imposed an unattainable standard of proof on the applicants, which was particularly unacceptable in view of the seriousness of the acts concerned.

The Court further considered that the applicants' complaint concerning the domestic courts' order for them to pay the costs of the State's representation in the civil proceedings was premature, and rejected it as inadmissible.

Principal facts

The applicants, Milan Baljak, Draginja Baljak, Stana Baljak and Dušanka Tripunović, are Croatian nationals who were born in 1943, 1924, 1940 and 1974 respectively. The first three live in Petrovaradin (Serbia) and the fourth lives in Banja Luka (Bosnia and Herzegovina).

At the beginning of August 1995, the Croatian authorities announced a military campaign, "Operation Storm", to regain control of a large part of Croatian territory occupied by the Serbian paramilitary forces since 1991. On 5 August the Croatian army regained control of the town of K. That same day, the applicants' relative, S.B. (son, brother and grandson), was captured by Croatian soldiers in a nearby village. He was placed in a basement together with about 20 other people. The following day he and several other men were taken by Croatian soldiers to an unknown location. The applicants never heard from him again. In 2002 his body was found in a grave with a gunshot wound to the head, together with the bodies of the other men taken with him. It appears that no investigation was ever opened into the circumstances of S.B.'s disappearance or death.

On 24 June 2005 the applicants brought a civil action against the State in the Zagreb Municipal Civil Court, alleging that S.B. had been killed by Croatian soldiers and seeking damages. The State objected that the applicants had not proven that S.B. had been killed by Croatian soldiers, and that in any event his death had constituted war damage, for which it was not liable.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In January 2015 the Zagreb Municipal Civil Court dismissed the applicants' civil claim. It held that they had failed to prove that S.B. had been killed by Croatian soldiers. The witnesses that had been heard had not seen how he had died. The fact that he had been captured by Croatian soldiers and that his body had later been found in a grave did not rule out the possibility that he had been killed by enemy forces especially since he had last been seen in an area where military combat operations were taking place. Under the Liability Act, a presumption of war damage applied, and the applicants had failed to prove the opposite.

The Civil Court ordered the applicants to pay 17,450 Croatian kunas (about 2,330 euros) each for the costs of the proceedings to the State.

The judgment was upheld by the appellate court and the Supreme Court. In January 2019 the Constitutional Court dismissed their constitutional complaint, ruling that the domestic courts' conclusion had not been arbitrary. However, four Constitutional Court judges gave a dissenting opinion on that decision. They submitted that, since S.B. had been under the control of Croatian soldiers, the State had been responsible for him, as well as for proving what had happened to him, and that the burden of proof should not have been shifted to the applicants. They further held that the killing of detained persons was prohibited by international law and could not be considered war damage. Lastly, in the circumstances, the fact that there had been no criminal convictions for S.B.'s killing was of no relevance, and it was the responsibility of the State to identify and prosecute the perpetrators.

Following a request from the applicants, the Ministry of Finance wrote off the debt of the costs of the proceedings for three of the applicants on account of their poor financial status but did not do so for the fourth applicant. No appeal was made against that decision.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicants complained that the domestic courts' decisions dismissing their claim were arbitrary. They contended that, since S.B. had been under the control of Croatian soldiers, there had been a clear link between his detention and killing, and the burden of proof as to what had happened to him should have rested on the authorities. They further contended that the killing of detainees was unlawful and amounted to a war crime, not war damage.

Moreover, they complained, under Article 6 § 1 and Article 1 of Protocol No. 1 (protection of property), that the domestic courts' order for them to pay the costs of the State's representation in the civil proceedings had been excessive, given their poor financial situation and the circumstances in relation to which they had sought damages.

The application was lodged with the European Court of Human Rights on 29 July 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Péter **Paczolay** (Hungary), *President*,
Ksenija **Turković** (Croatia),
Krzysztof **Wojtyczek** (Poland),
Alena **Poláčková** (Slovakia),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Ioannis **Ktistakis** (Greece),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court observed that, under Croatian law, the State was liable for any damage caused by members of its armed forces, unless the damage in question constituted war damage. Damage caused by members of its armed forces in military service or in connection with military combat actions during the war in the period between 17 August 1990 and 30 June 1996 was presumed to be war damage, unless proved otherwise.

The Court reiterated that it had already found in a number of cases that persons who had gone missing following their detention by soldiers were to be presumed dead and that the State was therefore responsible for their death. It had already held that in such situations the burden of proof lay with the authorities to provide a satisfactory and convincing explanation that the victim had survived or died in different circumstances – see, for example, [Trivkanović v. Croatia \(no. 2\)](#) (no. 54916/16) of 21 January 2021.

There had been no criminal investigation into the disappearance and killing of the applicants' relative, nor any criminal convictions. The blame for that could not lie with the applicants. It was undisputed that S.B. had gone missing while under the control of Croatian soldiers, and that there had been no news of him until his body was found in a mass grave with a gunshot wound to his head, together with the bodies of the other men taken at the same time as him. In accordance with the Court's case-law, in those circumstances there was a strong presumption of causality between S.B.'s disappearance and killing. The burden of proof that Croatian soldiers did not unlawfully kill him rested on the authorities.

The Court found that the conclusion reached by the domestic courts when dismissing the claim – that the applicants had failed to prove that Croatian soldiers had killed S.B. and that his killing did not amount to war damage – was manifestly unreasonable, taking into account the circumstances of the case and the Court's case-law. The domestic courts had imposed an unattainable standard of proof on the applicants, which was particularly unacceptable in view of the seriousness of the acts concerned. There had accordingly been a violation of Article 6 § 1 of the Convention.

Article 6 § 1 and Article 1 of Protocol No. 1

In the light of the violation of Article 6 § 1 of the Convention, the Court noted that the applicants now had an opportunity to seek the reopening of the domestic proceedings. That would allow for a fresh examination of their civil claim, as well as a fresh decision on the costs of the proceedings. In those circumstances, the Court considered that the complaint concerning the costs of the proceedings was premature and rejected it in accordance with Article 35 §§ 3 and 4 of the Convention.

Just satisfaction (Article 41)

The Court held that Croatia was to pay the applicants 3,000 euros (EUR) jointly in respect of non-pecuniary damage and EUR 3,350 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.