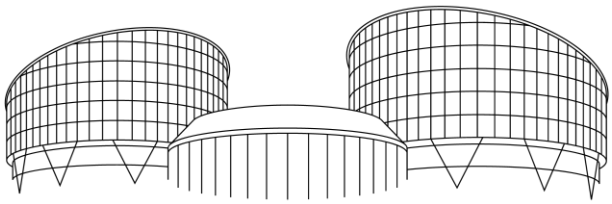

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SKENDŽIĆ AND KRZNARIĆ v. CROATIA

(Application no. 16212/08)

JUDGMENT

STRASBOURG

20 January 2011

FINAL

20/04/2011

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

In the case of Skendžić and Krznarić v. Croatia**,**

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

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 9 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 16212/08) 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, Ms Josipa Skendžić, Ms Tamara Krznarić and Mr Aleksandar Skendžić ("the applicants"), on 22 February 2008.

2. The applicants were represented by Ms G. Peraković-Turković, a lawyer practising in Ogulin. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 16 December 2009 the President of the First Section decided to communicate the complaint concerning the procedural aspect of Article 2 of the Convention as well as the complaints under Articles 5, 3, 13 and 14 of the Convention, to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

4. The applicants were born in 1957, 1985 and 1982 respectively and live in Otočac.

Background to the case

5. On 3 November 1991, during the Homeland War in Croatia, an arrest warrant, signed by the then head of Otočac police station (*Policijska postaja Otočac*) J.O., was issued in respect of M.S., the first applicant's husband and

the second and third applicants' father, born on 23 June 1948 and of Serbian ethnic origin, who was suspected of having committed the criminal offence of terrorism. On the same day two police officers from the station, D.R. and J.R., went to the applicants' flat in Otočac and arrested M.S., who was taken to J.O.

6. On the same day, at an unspecified time, two other police officers from the same police station, D.V. and M.Č., took M.S. to the Police Department of the nearby town of Gospić and handed him over to I.O., the Head of the Gospić Operational Headquarters (*Operativni štab Gospić*). They saw I.O. handcuffing M.S. and then went back to Otočac. The whereabouts of M.S. have remained unknown ever since.

7. At the request of his family, M.S. was presumed dead from 2 November 1996 onwards by virtue of a decision of the Otočac Municipal Court (*Općinski sud u Otočcu*) of 26 March 1998.

8. The applicants allege that in the same period a number of individuals of Serbian ethnic origin had disappeared or had been killed in the area around the nearby town of Gospić.

Criminal investigation

9. In the days following the arrest of her husband by the police, the first applicant telephoned the local authorities in Otočac and Gospić on numerous occasions to enquire about his fate, but to no avail.

10. On 17 December 1991, after the first applicant had made enquiries to the Ministry of the Interior (the "Ministry") regarding her husband, the Ministry sent an official letter to Otočac police station enquiring as to the whereabouts of M.S. since his arrest on 2 November 1991. On 18 December 1991 J.O. replied that M.S. had been arrested on 3 November at 11 a.m. and taken to Gospić County Prison (*Okružni zatvor Gospić*) the same day.

11. On 20 December 1991 the Ministry sent an official letter to the Gospić Police Department enquiring as to M.S.'s whereabouts.

12. On 21 December 1991 the Gospić Police Department replied that M.S. had been arrested by officers from Otočac police station and that the Gospić Police Department had not been informed of his arrest. They further stated that, to their knowledge, M.S. had been taken to Zagreb County Prison (*Okružni zatvor Zagreb*). Further to this, on 11 January 1992 the Gospić Police Department informed the Ministry that M.S. had never been detained in Gospić County Prison.

13. On 27 October 1992 the Ministry sent a letter to both Otočac police station and the Gospić Police Department enquiring as to the whereabouts of M.S. and whether he had been listed as a missing person.

14. On 29 October 1992 M.Č., one of the above-mentioned police officers from Otočac police station, drew up a report stating that after he had been arrested on 3 November 1991 M.S. had been taken to the Gospić

Operational Headquarters and handed over to its head, I.O. He also stated that there was no further information as to M.S.'s whereabouts.

15. On 14 July 1999 the first applicant sent a letter to the Minister of Justice calling for an official investigation into the disappearance of her husband. On 4 February 2000 the letter was forwarded to the State Attorney with a request that appropriate steps be taken. The first applicant was served with a copy of that request, but received no further information.

16. The first applicant sent a second letter to the Ministry of Justice on 23 May 2000 seeking information about the steps taken in order to establish the circumstances of her husband's disappearance.

17. On 7 July 2000 the Gospić County State Attorney's Office (*Županijsko državno odvjetništvo u Gospiću*) ordered investigative measures in connection with the disappearance of M.S. and asked the Otočac police to conduct an interview with former police officer D.R. and former head of the police station J.O. about the disappearance of M.S. The Otočac police interviewed D.R. on 10 July 2000. He said that in the autumn of 1991 he and another police officer, J.R., had arrested M.S. in his flat in Otočac pursuant to an arrest warrant issued by J.O. They had taken M.S. to J.O. and left.

18. On 11 July 2000 the Otočac police informed the Gospić County State Attorney's Office that they had not been able to interview J.O. because he had moved to Zagreb.

19. In a letter sent to the Ombudsman on 2 February 2001, the first applicant complained that no action was being taken in respect of the inquiry into the fate of her husband. On 13 March 2001 the Ombudsman's Office asked the applicant to explain what exactly her request was.

20. On 14 June 2002 police officer, D.R., since retired, was interviewed at Otočac police station. He said that in November 1991 he had been a police officer at that station and that during that period M.S. had been brought to the premises of Otočac police station, where he had been briefly detained and then transferred to Gospić by two police officers, M.Č. and D.V.

21. On 15 June 2002 J.R., the aforementioned police officer from Otočac police station, made a written statement that on 3 November 1991 he and another police officer, D.R., had executed an arrest warrant and arrested M.S. in his flat in Otočac. They had handed him over to J.O. and left.

22. On 18 June 2002 former police officer D.V. was interviewed at Otočac police station. He said that he could not remember a person named M.S. but did remember having on one occasion, together with his colleague M.Č., driven an official police vehicle to Gospić, but could not say for what purpose.

23. The Otočac police informed the Gospić Police Department of the result of the interviews on 19 June 2002 and the Gospić County State Attorney's Office on 26 June 2002.

24. On 9 February 2004 the first applicant officially registered M.S. with the Otočac police as a missing person. On 19 March 2004 the Otočac police informed the Gospić police that M.S. had been listed as a missing person and asked them to carry out an inquiry because M.S. had disappeared on the territory under their jurisdiction. On 30 March 2004 the Gospić police asked the Gospić Prison authorities whether they had a record of M.S. having been detained there in November 1991 and whether I.O. had had any function at Gospić Prison at that time.

25. On 1 April 2004 the Gospić Prison authorities informed the Gospić police that M.S. had never been registered as having entered that prison and that I.O. had had no function at the prison, but had been head of the Gospić Operational Headquarters.

26. On 8 April 2005 the Gospić police asked the Ličko-Senjska Police Department (*Policijska uprava ličko-senjska* – the former Gospić Police Department) to request the Zagreb Police Department to interview I.O., who was now living in Zagreb. On 16 April 2004 the Ličko-Senjska Police Department duly made that request.

27. On 22 April 2004 the Zagreb Police Department interviewed I.O. He stated that during the Homeland War in Croatia, as an officer in the Croatian Army, he had arrived in Gospić on 30 August 1991 and left sometime at the end of September 1991. He had no knowledge of the arrest and disappearance of M.S.

28. On 7 May 2004 the first applicant asked the State Attorney to take steps in order to establish the whereabouts of her husband.

29. In May 2004 the State Attorney sent a letter to the Rijeka County State Attorney's Office (*Županijsko državno odvjetništvo u Rijeci*) stating that in September 2000 his office had already forwarded to the Rijeka Office a request that an investigation be carried out into the death of M.S., in particular in connection with the criminal proceedings opened in 1999 against a certain T.O. and other persons. The first applicant's submissions from 2000, in which she stated that she had received no information in reply to her enquiry about the circumstances of her husband's death, were enclosed. The State Attorney requested all information about M.S. that had been obtained during the investigation concerning T.O. and his accomplices. A copy of this letter was served on the first applicant.

30. On 3 June 2004 the Gospić County State Attorney's Office informed the Ličko-Senjska Police Department about the interview with I.O. and also said that the records of the Military Police Administration showed that I.O. had not been on their payroll.

31. On 18 June 2004 the Zagreb Police Department interviewed J.O. He stated that from September 1991 to 15 February 1992 he had been head of Otočac police station and that sometime in October or November 1991 an order had been given for M.S. to be arrested and taken to the Gospić Police Department for questioning on suspicion of having participated in the

criminal offence of kidnapping a driver in the spring of 1991. He did not know who had given that order but was sure that it had not been him. J.O. also said that he had not seen M.S. when he was taken to the Otočac police but that he knew that M.Č., together with one or two other police officers, had taken M.S. to the Gospić police in a police car. He had no knowledge as to what had happened there but had heard rumours that on the same day M. S. had run away to the occupied territories.

32. On 13 July 2004 the Zadar Police Department (*Policijka uprava zadarska*) interviewed Ž.B., who had been Head of the Public Safety Operational Tasks Division of the Gospić Police Department (*načelnik Odjela operativnih poslova javne sigurnosti Policijske uprave Gospić*) in the period between 1 August and 30 November 1991. He had no knowledge of the arrest and disappearance of M.S. and had never heard of a person of that name.

33. On 24 August 2004 the Ličko-Senjska Police Department interviewed I.D., a retired police officer from the Gospić Police Department who said that he had not ordered the arrest of M.S. and that it had most likely been J.O. who had ordered it. He had not witnessed M.S. being brought to the Gospić Police Department.

34. In October 2004 the Deputy State Attorney sent a letter to the first applicant telling her that both the Gospić Police Department and the Gospić County State Attorney's Office had been ordered to take all necessary steps to establish the circumstances of her husband's disappearance.

35. On 11 November 2004 the Gospić County State Attorney's Office asked the Gospić County Court (*Županijski sud u Gospiću*) to hear evidence from witnesses J.S. (the first applicant), J.O., M.Č., D.V., D.R., J.R. and I.O. At hearings held on 23 and 24 November 2004 an investigating judge of the Gospić County Court heard evidence from all these witnesses, save J.O. All of them repeated what they had already said to the police. Further to this, on 10 February 2005 an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) heard evidence from J.O. He repeated the statement he had made to the police.

36. At the end of 2004 the first applicant wrote to the Vice-President of the Government, enquiring about the progress of the investigation, and the latter forwarded the letter to the State Attorney. In February 2005 the Deputy State Attorney informed the applicant that in November 2004 a request for an investigation into the disappearance of M.S. to be opened had been lodged with the Gospić County Court (*Županijski sud u Gospiću*). On 10 February 2005 the investigating judge assigned to the case heard evidence from a number of witnesses.

37. In August 2005 the first applicant's counsel sought information about the investigation from the Gospić County Court.

38. In September 2005 the Gospić County State Attorney's Office informed the applicant that those responsible for the disappearance of her

husband had yet to be identified. The Gospić County State Attorney asked the Gospić Police Department to continue with their efforts to establish the circumstances of M.S.'s disappearance.

39. In December 2005 the first applicant's counsel asked the State Attorney to transfer the case to another State Attorney's office, objecting to the lack of impartiality of the Gospić County State Attorney's Office on the grounds that the investigation had revealed involvement on the part of the local authorities in the disappearance of M.S.

40. In January 2006 the State Attorney replied to the first applicant's counsel that he had asked for a report from the Gospić County State Attorney's Office and the local police.

41. In July 2006 the first applicant's counsel told the representatives of the OSCE Mission to Croatia that the investigation was ineffective. In August 2006 the Mission enquired of the State Attorney as to progress with the investigation.

42. At the same time the first applicant's counsel requested that M.S. be listed as a disappeared person with the Department for Detained and Disappeared Persons and provided information as to where his body might be found. Soon afterwards, the Ministry of Family, Homeland War Veterans and Intergenerational Solidarity (*Ministarstvo obitelji, branitelja i međugeneracijske solidarnosti*) informed the representative that three corpses of unidentified persons had been found as a result of exhumation at a graveyard in Vraneš. In connection with this the members of the Skendžić family gave samples of their blood.

43. In October 2006 the State Attorney's Office informed the OSCE Mission to Croatia that further information had been requested from the Gospić County State Attorney's Office. The latter ordered the local police authorities to undertake further steps in order to identify the perpetrators. However, no further steps were taken.

44. On 6 September 2007 the applicants lodged a constitutional complaint about the ineffectiveness of the investigation. The proceedings are still pending.

Civil proceedings against the State

45. In March 2002 the applicants brought a civil action against the State in the Otočac Municipal Court seeking damages in connection with M.S.'s disappearance.

46. In a judgment of 6 May 2005 the Municipal Court established that M.S. had been arrested by the police and alive while in police custody and that therefore the State was responsible for his disappearance and death. It awarded the applicants each 230,000 Croatian kunas (HRK) for non-pecuniary damage in respect of their suffering for the death of a close relative, and also a monthly allowance to the first applicant until her death

and to the second and third applicants for as long as they attended school. The relevant part of the judgment reads:

> "... the arrest warrant issued by the Otočac police station on 3 November 1991 in respect of M.S., on the basis of which he was brought to that station, and at the same time the lack of any evidence that M.S. was handed over to any other State body, leads this court to establish the defendant's responsibility.
>
> ...
>
> As stated above, the fact that there is no evidence that the Otočac police station handed the detainee M.S. over to any other State body is crucial for the question of the defendant's responsibility because the issue of control over the detainee includes taking of responsibility for his safety and for the protection of his physical integrity.
>
> The evidence given by the witnesses, in particular the police officers who participated in M.S.'s arrest and his transfer to Gospić, shows that their actions violated the detainee's fundamental human rights and freedoms guaranteed under the Croatian Constitution, which cannot be restricted even at the time of ... the immediate war danger ... as well as the rights guaranteed by the Code on Criminal Procedure then in effect.
>
> It has been established that the defendant, in addition to infringing the procedure prescribed by law, did not secure to the detainee the protection of his physical integrity and life, which resulted in his disappearance and presumption of his death.
>
> In such a way, it is clear that damage was caused by unlawful and incorrect acts on the part of the State bodies, namely, the Ministry of Interior ...
>
> ...
>
> This court has no doubt that the suffering on account of the death of a husband and father cannot be translated into money: it concerns just satisfaction so that the plaintiffs may be at least partially helped in regaining their mental balance, which was certainly upset by the loss of a husband and father. In assessing the amount of just satisfaction for the plaintiffs' suffering, the court has had particular regard to the circumstances and manner in which the deceased M.S. disappeared, and accordingly considers the plaintiffs' sufferings as being particularly serious.
>
> The court has taken into account that the deceased, M.S., was arrested by the legitimate authorities and that since he was taken from his home, his family – the plaintiffs – have had no further information about [his whereabouts]. Of course the fate of the plaintiffs' husband and father has given rise to an exceptionally frustrating and stressful situation for the plaintiffs as a family, in particular seeing that the family has never learned the complete truth about his disappearance.
>
> In her statement the first plaintiff vividly described the atmosphere of utter despair and uncertainty which the plaintiffs felt at the time when M.S. was arrested and then disappeared, stressing that she had taken tranquilisers because she had received no answers as regards the fate of her husband.
>
> The statement of the second plaintiff that as a six-year old child she had been constantly crying, that she and her brother had retreated into themselves and that she

would like to know at least where her father had been buried so that she could attend his grave on All Saints Day was also moving.

The third plaintiff, who was three at the time of [the disappearance of his father], stressed the strong bond between himself and his father and the time of his arrest and uncertainty about his fate, describing it as 'horrible in which he cannot remember a single nice moment.'

It is clear that the mental suffering caused by the loss of a parent or a husband is immeasurable. In the case at issue the plaintiffs' suffering has an additional dimension owing to the fact that they still do not know the exact circumstances of M.S.'s death or the place of his grave."

47. The part of the judgment concerning the award for non-pecuniary damage was upheld by the Gospić County Court on 12 January 2006, whereas the part concerning the monthly allowance was quashed. On 10 October 2007 the Supreme Court (*Vrhovni sud Republike Hrvatske*) upheld the County Court's judgment concerning the award for non-pecuniary damage. This judgment was fully enforced on 29 April 2008.

48. The proceedings concerning the claim for a monthly allowance resumed before the Otočac Municipal Court, which delivered a fresh judgment on 11 February 2009, again awarding the applicants a monthly allowance, which was upheld by the Gospić County Court on 3 July 2009.

49. On 31 August 2009 the applicants sought enforcement of that judgment in the Otočac Municipal Court and an enforcement order was issued on 9 September 2009.

50. However, upon a request by the State on 22 September 2009, the enforcement of the judgment was adjourned on the grounds that the State had in the meantime lodged an appeal on points of law with the Supreme Court, which was still pending.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

51. The applicants complained that M.S. had been arrested by the Croatian police in November 1991 and had subsequently disappeared and that no effective investigation into the circumstances of his arrest and disappearance had taken place. They relied on Article 2 of the Convention, the relevant parts of which read:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

A. Admissibility

1. The parties' arguments

52. The Government argued that the application had been lodged outside the six-month time-limit because on 9 December 2005 the applicants had already complained to the State Attorney about the inefficiency of the investigation and therefore that date should be taken as the starting date for the six-month time-limit.

53. The Government also argued that the applicants were no longer victims of the alleged violations because in the civil proceedings against the State the national courts had established the State's responsibility for the disappearance of M.S. and awarded the applicants damages.

54. In reply, the applicants submitted that the investigation into the disappearance of their close relative was still pending and that this had been confirmed in the letters sent by the national authorities to the applicants in reply to their enquiries about the progress of the investigation. Furthermore, the applicants had lodged a constitutional complaint which was aimed at remedying the violation claimed.

2. The Court's assessment

(a) Compatibility *ratione temporis*

55. The Court notes that the issue of the Court's temporal jurisdiction arises in respect of the applicants' complaints under both the substantive and procedural aspects of Article 2 of the Convention.

(i) Substantive aspect

56. The Court reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party; this is an established principle in the Court's case-law based on the general rule of international law (see, among other authorities, *Šilih v. Slovenia* [GC], no. 71463/01, § 140, 9 April 2009).

57. In this connection the Court firstly notes that the Convention entered into force in respect of Croatia on 5 November 1997. Therefore, any

complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1991 are outside the Court's temporal jurisdiction.

58. The Court notes that the applicants' respective husband and father was arrested by the Croatian police at the beginning of November 1991 and since then his whereabouts have remained unknown. The Court further notes that M.S. was declared dead as of 2 November 1996. The alleged substantive violation of Article 2 of the Convention therefore occurred prior to 5 November 1997, when the Convention entered into force in respect of Croatia.

59. It follows that the complaint under the substantive aspect of Article 2 of the Convention is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(ii) Procedural aspect

60. In so far as any complaints are raised concerning acts or omissions of the Contracting State after 5 November 1997, the Court may take cognisance of them (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 134, 18 September 2009). It notes in this respect that part of the applicants' claims relate to the situation pertaining after 5 November 1997, namely, the continuing failure to account for the fate and whereabouts of M.S. by providing an effective investigation.

61. The Court further notes that M.S. was declared dead as of 2 November 1996. However, even where a missing person is declared dead, this does not dispose of the applicants' complaints concerning the lack of an effective investigation (see *Varnava*, cited above, §144). In this connection the Court refers to the principles established in paragraphs 145 and 148 of the *Varnava* judgment (cited above):

> "145. The Court would recall that the procedural obligation to investigate under Article 2 where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death. Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.
>
> ...
>
> 148. It cannot therefore be said that a disappearance is, simply, an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be

regarded as a continuing violation (see the fourth inter-State case, § 136). This is so, even where death may, eventually, be presumed."

62. As to the present case, the Court notes that the first steps aimed at ascertaining the fate of M.S. were taken on 17 December 1991 when the Ministry of the Interior sent an official letter to Otočac police station enquiring as to the whereabouts of M.S. (see paragraph 11 above). Before 5 November 1997 several police reports had been drawn up recording the circumstances of M.S.'s arrest, but no official investigation had been opened.

63. Following a letter by the first applicant of 14 July 1999 calling for an official investigation, the first investigative measures were ordered by the Gospić County State Attorney's Office on 7 July 2000 when that Office asked the Otočac police to interview former police officer D.R. and former head of Otočac police station J.O. about the disappearance of M.S. (see paragraph 17 above).

64. After that, various investigative steps were taken until 10 February 2005, when an investigating judge of the Zagreb County Court heard evidence from J.O.

65. Thus, all relevant investigative steps, aimed at establishing the whereabouts of M.S., took place after 5 November 1997 when the Convention entered into force in respect of Croatia. It follows that all issues pertaining to the procedural aspect of Article 2 of the Convention do fall under the Court's temporal jurisdiction.

(b) The applicants' victim status

66. The Court firstly takes note of the applicants' complaint that their close relative was arrested by the Croatian police and then disappeared and that the investigation into the circumstances of his arrest and disappearance was not effective. The Court reiterates that the procedural aspect of Article 2 of the Convention in circumstances such as those in the present case in principle require an investigation capable of leading to the identification and punishment of those responsible. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II).

67. The Court has already held that a civil procedure undertaken on the initiative of an applicant which does not involve the identification or punishment of any alleged perpetrator cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 141, ECHR 2001-III (extracts)).

68. As to the present case, the Court notes that by means of a civil action against the State the applicants did indeed obtain just satisfaction in connection with their sufferings caused by the arrest and subsequent disappearance of their close relative as well as the acknowledgement of the State's responsibility for the disappearance of M.S. Despite a positive outcome for the applicants in the form of a financial award, their civil action was not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators, and still less of establishing their responsibility (see, *mutatis mutandis*, *Kaya v. Turkey*, 19 February 1998, § 105, *Reports of Judgments and Decisions* 1998-I; *Yaşa v. Turkey*, 2 September 1998, § 74, *Reports of Judgments and Decisions* 1998-VI; and *Shanaghan v. the United Kingdom*, no. 37715/97, § 99, 4 May 2001). Furthermore, a Contracting State's obligation under the procedural aspect of Article 2 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of a person's death at the hands of State officials might be rendered illusory if an applicant were to cease being a victim in respect of complaints under those Articles only on the ground of an award of damages (see, *mutatis mutandis*, *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 149, 24 February 2005) even where it is, as in the present case, accompanied by the acknowledgment of the State's responsibility.

69. It follows that the applicants in the present case may still claim to be victims of the alleged violations of the procedural aspect of Article 2 of the Convention and that the Government's objections in that respect must be dismissed.

(c) Compliance with the six-month rule

70. As to the Government's objection concerning compliance with the six-month rule, the Court refers to the following principles established in *Varnava* (cited above):

> "158. ...where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation ...
>
> 159. Nonetheless it has been said that the six month time-limit does not apply as such to continuing situations ...
>
> 161. ... Not all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake. In cases of disappearances, just as it is imperative that the relevant domestic authorities launch an investigation and take measures as soon as a person has disappeared in life-threatening circumstances, it is indispensable that the applicants, who are the relatives of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. With the lapse of time, memories of witnesses fade,

witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay. What this involves is examined below.

162. The Court would comment, firstly, that a distinction must be drawn with cases of unlawful or violent death. In those cases, there is generally a precise point in time at which death is known to have occurred and some basic facts are in the public domain. The lack of progress or ineffectiveness of an investigation will generally be more readily apparent. Accordingly the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months, or at most, depending on the circumstances, a very few years after events. In disappearance cases, where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, the situation is less clear-cut. It is more difficult for the relatives of the missing to assess what is happening, or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance.

163. Secondly, the Court would take cognisance of the international materials on enforced disappearances. The International Convention for the Protection of All Persons from Enforced Disappearance stipulates that any time-limit on the prosecution of disappearance offences should be of long duration proportionate to the seriousness of the offence, while the Rome Statute of the International Criminal Court excludes any statute of limitations as regards the prosecution of international crimes against humanity, which includes enforced disappearances. Bearing in mind therefore the consensus that it should be possible to prosecute the perpetrators of such crimes even many years after the events, the Court considers that the serious nature of disappearances is such that the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection.

164. Thirdly, in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.

165. Nonetheless, the Court considers that applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a

> moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case.
>
> 166. In a complex disappearance situation such as the present, arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident. If there is an investigation of sorts, even if sporadic and plagued by problems, the relatives may reasonably wait some years longer until hope of progress being made has effectively evaporated. Where more than ten years has elapsed, the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. Stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities."

71. As to the case at issue, the Court notes that the competent State Attorney's Office ordered the first investigative measures concerning the disappearance of M.S. on 7 July 2000, upon a letter by the first applicant of 14 July 1999. The present application was lodged with the Court on 22 February 2008. At that time the inquiry into the disappearance of the applicants' close relative conducted by the State Attorney's Office was pending, as it still is now. In that connection the Court notes that the last step in the inquiry was taken on 10 February 2005, when an investigating judge of the Zagreb County Court heard evidence from witness J.O.

72. In February 2008, when the applicants submitted the present application with the Court, their constitutional complaint about the ineffectiveness of the inquiry was pending, as it still is now. Furthermore, in view of the long delays in the inquiry, which has now been pending for more than ten years, the fact that the applicants waited for some years before bringing their application to Strasbourg appears reasonable (see *Varnava*, cited above, § 166).

73. The inquiry is still ongoing. It cannot therefore be said that the six-month time-limit expired at any time during that period. It follows that the Government's objection must be dismissed.

Conclusion as to the admissibility

74. The Court notes that the complaint under the procedural aspect of Article 2 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

75. The applicants contended that their close relative had been arrested by the police and had subsequently disappeared. His body had never been found and the relevant State authorities had failed to establish the circumstances of his disappearance. The investigation into his disappearance had been conducted by the Otočac and Gospić authorities, which could not be regarded as independent because the officials of those authorities had been implicated in the events at issue.

76. The Government argued that the national authorities had done everything they could in order to establish the circumstances of M.S.'s disappearance.

2. The Court's assessment

(a) Alleged lack of an effective and prompt investigation

77. The Court reiterates that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigation authority. The mere fact that the authorities were informed of the killing of an individual gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101 and 103, ECHR 1999-IV). The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI, and *Ülkü Ekinci*, cited above, §144).

78. There is also a requirement of promptness and reasonable speediness implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-40, §§ 102-04, and *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV). It must be accepted that there may be obstacles or difficulties which prevent an investigation from

making progress in a particular situation. However, a prompt response by the authorities in investigating a disappearance may generally be regarded as essential in ensuring public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, in general, *McKerr v. the United Kingdom*, no. 28883/95, §§ 108-15, ECHR 2001-III; *Avşar v. Turkey*, no. 25657/94, §§ 390-95, ECHR 2001-VII; and *Myronenko v. Ukraine*, no. 15938/02, § 35, 18 February 2010).

79. The Court notes that there is no proof that M.S. was killed. However, the above-mentioned procedural obligations extend, but are not confined, to cases which concern intentional killings resulting from the use of force by agents of the State. The Court considers that these obligations also apply to cases where a person has disappeared in circumstances which may be regarded as life-threatening. In this connection it must be accepted that the more time passes without any news of the person who has disappeared, the greater the likelihood that he or she has died (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 226, ECHR 2004-III, and *Şeker v. Turkey*, no. 52390/99, § 69, 21 February 2006).

80. The Court notes that M.S. was presumed dead from 2 November 1996 onwards by virtue of a decision of the Otočac Municipal Court of 26 March 1998. In view of that decision and the fact that he was arrested in November 1991 during the Homeland War in Croatia and that his whereabouts have remained unknown ever since the Court accepts that he must be presumed dead following his arrest by State servicemen.

81. In the present case an official inquiry was indeed carried out into the disappearance of the applicants' close relative. However, there were substantial shortcomings in the conduct of the investigation. In this connection the Court will examine only the part of the inquiry that took place after 5 November 1997, when the Convention entered into force in respect of Croatia.

82. First of all, the Court notes that although the inquiry started soon after the disappearance of M.S., it came to a standstill in October 1992. After the ratification of the Convention by Croatia (i.e. 5 November 1997) the first steps were taken only upon the first applicant's letter of 14 July 1999, when on 7 July 2000 the Gospić County State Attorney's Office ordered investigative measures in connection with the disappearance of M.S. and asked the Otočac police to interview former police officer D.R. and former head of Otočac police station J.O. about the disappearance of M.S.

83. Further investigative measures were plagued by inexplicable delays. Thus, D.R. was interviewed only on 14 June 2002, almost two years after the request by the State Attorney's Office had been made. As regards J.O, although the Otočac police had informed the Gospić County State Attorney's Office as early as 11 July 2000 that they had not been able to

interview J.O. because he had moved to Zagreb, no steps were taken to establish his whereabouts and interview him until 18 June 2004.

84. The Court further observes that between June 2002 and February 2004 no serious attempts were made to obtain the relevant evidence.

85. These delays alone compromised the effectiveness of the investigation and could not but have had a negative impact on the prospects of establishing the truth.

86. Other elements of the investigation also call for comment. For example, two police officers of Otočac police station, D.V. and M.Č., testified that they had taken M.S. to the Police Department of the nearby town of Gospić and handed him over to I.O. They had seen I.O. handcuffing M.S. and had then returned to Otočac. However, the authorities did not see fit to confront these two police officers with I.O. and ask them whether he was the man they were referring to in their statements.

87. It also appears that the authorities made no serious effort to establish the identity of all the police officers or other persons present at the time of M.S.'s detention in the Gospić Police Department in order to obtain their statements about the events surrounding M.S.'s arrival at that Police Department and his further fate. Furthermore, since February 2005 there has been no specific activity aimed at identifying those responsible for the fate of M.S.

88. The Court considers that the deficiencies described above are sufficient to conclude that the national authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the disappearance of M.S.

(b) Alleged lack of independence of the investigation

89. The Court reiterates that for an investigation into an alleged unlawful arrest of a person by State agents and his or her subsequent disappearance to be effective, it may generally be regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events (see, for example, *Güleç v. Turkey*, 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, 28 July 1998, *Reports* 1998-IV, §§ 83-84; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001-III (extracts); and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001).

90. As to the present case, the Court notes that the preliminary inquiry into the circumstances of M.S.'s arrest by the police officers of Otočac police station and his subsequent disappearance was not independent. Notably, the inquiry was entrusted to the same police station of which the police officers had arrested M.S. and then transferred him to Gospić. Some of them, such as J.R., who had arrested M.S., were still working at the same

police station at the time of the inquiry. In the Court's view, those factors produced an obvious conflict of interests and lack of independence of the investigating authorities (see, *mutatis mutandis*, *Gharibashvili v. Georgia*, no. 11830/03, § 68, 29 July 2008). In this connection the Court also notes that the first applicant's request from 2005 that the case be entrusted to a different authority has remained unanswered.

(c) Conclusion

91. The Court finds that the shortcomings in the inquiry into the disappearance of M.S. regarding its effectiveness and the lack of independence of the authorities involved failed to comply with the requirements of Article 2 of the Convention. There has accordingly been a violation of the procedural obligation of Article 2 of the Convention in those respects.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

92. The applicants complained that the prolonged uncertainty as to the fate of M.S. had caused them continual anxiety and fear. They relied on Article 3 of the Convention which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Admissibility

93. The Court will firstly examine whether the applicants may still be considered victims of the alleged violation of Article 3 of the Convention in connection with disappearances of their close relative. In this connection the Court refers to the general principles stated above in paragraphs 66 and 67. It also considers that for this issue further principles, as stated in the *Varnava* case (cited above), are also relevant in the circumstances of the present case:

> "200. The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court's case-law recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3. The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention (see, amongst many authorities, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164). Other relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person (*Tanış*, cited above, § 219). The finding of such a violation is not limited to cases

where the respondent State has been held responsible for the disappearance (see *Osmanoğlu*, cited above, § 96) but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person.

201. The Court notes that in the fourth inter-State case the Grand Chamber found that in the context of the disappearances in 1974, where the military operation resulted in considerable loss of life, large-scale arrests and detentions and enforced separations of families, the relatives of the missing men had suffered the agony of not knowing whether their family member had been killed in the conflict or had been taken into detention and, due to the continuing division of Cyprus, had been faced with very serious obstacles in their search for information. The silence of the authorities of the respondent State in face of the real concerns of the relatives could only be categorised as inhuman treatment (at § 157).

202. The Court finds no basis on which it can differ from this finding in the present case. The length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity. There has, accordingly, been a breach of Article 3 in respect of the applicants."

94. As regards the present case, the Court notes that in the judgment of the Otočac Municipal Court of 6 May 2005 the applicants were awarded HRK 230,000 each in compensation for their suffering in connection with the disappearance and death of M.S. In its judgment the Municipal Court expressly acknowledged the applicants' suffering in connection with the arrest and subsequent disappearance of M.S. and the prolonged period during which they had been left without any information as to his fate (see paragraph 46 above).

95. In the Court's view, the language of the Municipal Court's judgment amounts to acknowledging a violation of Article 3 of the Convention because the Municipal Court found the State authorities responsible for the disappearance of the applicants' close relative and awarded them just satisfaction for their suffering as regards the uncertainty of his fate. As to the amount of the just satisfaction awarded, the Court notes that it actually exceeds the amount the Court usually awards in the same type of case.

96. Against that background, the Court finds that the national courts expressly acknowledged the breach of the applicants' right not to be subjected to inhuman treatment and afforded them appropriate redress for their suffering. Therefore, the applicants can no longer claim to be the victims of the violation alleged.

97. It follows that this complaint must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

98. The applicants further complained that the arrest of their close relative was illegal and that there was no effective investigation into the circumstances of his arrest. They relied on Article 5 of the Convention which reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

99. In so far as the applicants' complaint relates to the actual arrest and detention of M.S., the Court notes it occurred in 1991 while the Convention entered into force in respect of Croatia on 5 November 1997.

100. It follows that this complaint is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

101. In so far as the applicants' claim concerns a duty of the State which arose after M.S. had been arrested by the Croatian police and subsequently disappeared, meaning that the Government, which were responsible for his fate, had an obligation to account for him and carry out a prompt, effective, independent and thorough investigation into the circumstances of his arrest, the Court concludes that this complaint concerns a continuous situation and falls within its competence *ratione temporis* (see *Varnava and Others v. Turkey* [GC], cited above, § 208). Furthermore, the Court considers that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

102. The applicants maintained that the national authorities had not submitted any documents regarding M.S.'s arrest despite the fact that it had been their duty to keep records of the arrest, detention, removal and transfer.

103. The Government argued that the relevant authorities had taken all measures in order to establish the circumstances of M.S.'s arrest.

2. The Court's assessment

104. The Court notes that M.S. was arrested and taken away by the Croatian police in November 1991 and that his whereabouts have remained unknown ever since. The Court refers to the relevant paragraph of the *Cyprus v. Turkey* judgment ([GC], no. 25781/94, ECHR 2001-IV):

> "147. The Court stresses at the outset that the unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of the person contained in Article 5 of the Convention and a most grave violation of that Article. Having assumed control over a given individual, it is incumbent on the authorities to account for his or her whereabouts. It is for this reason that Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 124)."

and, further, to the relevant paragraph in *Varnava* (cited above):

> "208. The Court recalls that it has found above that there was a *prima facie* or arguable case that two of the men were last seen in circumstances falling within the control of the Turkish or Turkish Cypriot forces, namely, Eleftherios Thoma and Savvas Hadjipanteli who were included on ICRC lists as detainees (see paragraphs 77 and 80 above). They have not been seen since. However, the Turkish authorities have not acknowledged their detention; they have not provided any documentary evidence giving official trace of their movements. The Court notes the patent disregard of the procedural safeguards applicable to the detention of persons. While there is no evidence that any of the missing persons were still in detention in the period under the Court's consideration, it remains incumbent on the Turkish Government to show that they have since carried out an effective investigation into the arguable claim that the two missing men had been taken into custody and not seen subsequently (see, amongst many authorities, *Kurt*, cited above, § 124). The Court's findings above in relation to Article 2 leave no doubt that the authorities have also failed to conduct the requisite investigation in that regard. This discloses a continuing violation of Article 5."

105. As to the present case, the Court notes that, contrary to the situations in the two above-cited cases, the Croatian authorities did acknowledge their responsibility for the arrest and disappearance of M.S. In a final civil judgment (see paragraphs 46 and 47 above) the national courts established that M.S. had been arrested by the police and that the State was responsible for his disappearance and death. On the basis of those findings, they awarded the applicants compensation.

106. While this element cannot in itself satisfy the procedural obligation to investigate the circumstances surrounding the arrest of a person who subsequently disappeared, the Court notes that in the present case the national authorities took steps to establish the circumstances of M.S.'s arrest. They interviewed the police officers involved and established that M.S. had been arrested by two police officers of the Otočac police on 3 November 1991 and taken to Otočac police station on suspicion of having been involved in terrorist activities. On the same day two other police officers took him to the Police Department of the nearby town of Gospić and handed him over to I.O. They saw I.O. handcuffing M.S. and then left. The whereabouts of M.S. have remained unknown. As regards shortcomings in establishing M.S.'s further fate, the Court has already found a violation of the procedural aspect of Article 2 of the Convention.

107. Against this background, and in view of the violation found under the procedural aspect of Article 2 of the Convention, the Court finds that it is not necessary to examine further any complaint under Article 5 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicants complained further that they had no effective domestic remedy at their disposal by which to submit their Convention complaints. They relied on Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

109. The Court considers that this complaint is closely linked to the one concerning the procedural aspect of Article 2 of the Convention and must also therefore be declared admissible.

B. Merits

110. The Court notes that the applicants were able to institute civil proceedings against the State in the national courts seeking compensation in connection with the arrest and disappearance of M.S. and that they were duly awarded compensation.

111. They were also able to enquire as to the whereabouts of M.S. and call for an official investigation and to lodge a constitutional complaint about the ineffectiveness of the investigation. The issue of effectiveness of these remedies has already been addressed in the context of Article 2 of the Convention. In view of its findings under Article 2 of the Convention, the Court considers that there is no need to examine further the complaint under Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH THE PROCEDRUAL ASPECT OF ARTICLE 2 OF THE CONVENTION

112. The applicants complained that M.S. had been arrested purely because of his Serbian ethnic origin and that the national authorities had failed to investigate that factor, contrary to Article 14 of the Convention, which reads:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

113. The Court considers that this complaint is closely linked to the one concerning the procedural aspect of Article 2 of the Convention and must also therefore be declared admissible.

B. Merits

1. The parties' submissions

114. The applicants argued that the reason for arresting M.S. had been his Serbian ethnic origin and that there had been no evidence of his supposed terrorist activities.

115. The Government argued that M.S. had been arrested on suspicion of having been involved in terrorist activities and that there had been no indication whatsoever that his arrest had been based on his ethnic origin or any ground other than a suspicion of criminal activity. In these circumstances the national authorities had had no reason to investigate possible racial motivation for his arrest.

2. The Court's assessment

116. The Court reiterates that Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and its Protocols, since it protects individuals placed in similar situations from any discrimination in the enjoyment of the rights set forth in those other provisions. Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, the Court may not always consider it necessary to examine the case under Article 14 as well, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 89, ECHR 1999-III; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII).

117. As to the present case, the Court notes that the applicants claimed that M.S. had been arrested solely on the basis of his Serbian origin, while the Government claimed that he had been arrested by the Croatian police during the Homeland War in Croatia on suspicion of having committed the criminal offence of terrorism and in execution of an arrest warrant, signed by the then head of Otočac police station.

118. The Court considers that the main issue in the present case is the one concerning effectiveness of the investigation into the disappearance of

M.S. In this regard the Court has already found a violation of the procedural aspect of Article 2 of the Convention after establishing various shortcomings in the investigation. In view of the Court's analysis under that Article and the violation found, the Court considers that in the circumstances of the present case it is not necessary to examine any further complaint under Article 14 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. 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

120. The applicants claimed 30,000 euros (EUR) in respect of non-pecuniary damage as regards the complaint under Article 2 of the Convention; EUR 10,000 as regards the complaint under Article 5 of the Convention; EUR 10,000 each as regards the complaint under Article 3 of the Convention; and EUR 12,000 as regards the complaint under Article 13 of the Convention.

121. The Government argued that the applicants had received adequate compensation in the civil proceedings where the State had been found responsible for the disappearance of M.S. and where the applicants were awarded the sum of approximately EUR 150,000.

122. The Court firstly notes that the violation found relates to the procedural aspect of Article 2 only. The Court notes that by a final judgment of the Otočac Municipal Court the applicants were awarded HRK 230,000 each. That judgment has been enforced and the amount awarded fully paid. The compensation was awarded on account of their suffering as a result of the disappearance of their respective husband and father, for which the State was found responsible.

123. Thus, although the Court has found that the complaint under the procedural aspect of Article 2 could not be remedied by paying monetary compensation alone, it nevertheless considers it relevant when assessing the applicants' claim in respect of non-pecuniary damage. In view of the compensation awarded and the fact that the violation found by the Court concerns the procedural aspect of Article 2 of the Convention, namely, the lack of an effective, adequate and thorough investigation into the disappearance of M.S, the Court finds that the just satisfaction awarded by

the national courts is sufficient and that the applicants' claim in respect of non-pecuniary damage has to be rejected.

B. Costs and expenses

124. The applicants also claimed EUR 7,615 for the costs and expenses incurred before the Court.

125. The Government deemed the claim excessive and unsubstantiated.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for costs and expenses in the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the procedural aspect of Article 2 and the complaints under Articles 5, 13 and 14 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 2 of the Convention on account of failings in the investigative procedures concerning the disappearance of M.S.;

3. *Holds* that there is no need to examine the complaint under Article 5 of the Convention;

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds* that there is no need to examine the complaint under Article 14 of the Convention;

6. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into Croatian kuna at the rate applicable on the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Section Registrar	President

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

C.L.R.
S.N.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN, JEBENS AND MALINVERNI

1. We are unable to agree with the reasoning concerning the alleged violation of Article 14 of the Convention in conjunction with the procedural aspect of Article 2 of the Convention.

2. To begin with, we would like to emphasise that the applicants complained that M.S. had been arrested purely because of his Serbian ethnic origin and that the national authorities had failed to investigate that factor, contrary to Article 14 of the Convention (see paragraphs 113 and 115 of the judgment). This complaint has thus been phrased mainly in connection with the *arrest* and the failure to investigate the discriminatory factor as to that *arrest*. To frame the complaint, as identified in the judgment, in terms of an alleged violation of Article 14 in conjunction with Article 2 (see paragraph 118) is thus, in our respectful submission, at best artificial and, at worst, entirely misconceived.

3. Moreover, we are unable to agree with the general principle set out in paragraph 116 and going back to *Dudgeon v. the United Kingdom* (22 October 1981, Series A no. 45):

> "Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, the Court may not always consider it necessary to examine the case under Article 14 as well, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 89, ECHR 1999-III; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII)."

As Judge Matscher eloquently put it in his dissenting opinion annexed to the *Dudgeon* judgment:

> "I regret that I do not feel able to agree with this line of reasoning. In my view, when the Court is called on to rule on a breach of the Convention which has been alleged by the applicant and contested by the respondent Government, it is the Court's duty, provided that the application is admissible, to decide the point by giving an answer on the merits of the issue that has been raised. The Court cannot escape this responsibility by employing formulas that are liable to limit excessively the scope of Article 14 (art. 14) to the point of depriving it of all practical value.
>
> Admittedly, there are extreme situations where an existing difference of treatment is so minimal that it entails no real prejudice, physical or moral, for the persons concerned. In that event, no discrimination within the meaning of Article 14 (art. 14) could be discerned, even if on occasions it might be difficult to produce an objective and rational explanation for the difference of treatment. It is only in such conditions that, in my opinion, the maxim "*de minimis non curat praetor*" would be admissible (see, mutatis mutandis, my separate opinion appended to the Marckx judgment, p. 58).

I do not, however, find these conditions satisfied in the present case, with the result that a definite position must be taken regarding the alleged violation of Article 14 (art. 14) in relation to the complaints made by the applicant."

4. We would like to add that it was unnecessary to make such a broad and problematical *obiter dictum* in the above-mentioned judgments (*Dudgeon*, *Chassagnou* and *Timishev*) and to repeat it in the present case. Indeed, in the case of *Dudgeon*, and in connection with one aspect of his complaint under Article 14 taken in conjunction with Article 8 (namely, different laws concerning male homosexual acts in various parts of the United Kingdom), the applicant himself had conceded that, if the Court were to find a breach of Article 8, then this particular question would cease to have the same importance (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 68, Series A no. 45). In *Chassagnou* the Court found a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 95, ECHR 1999-III) and in *Timishev* the Court found a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 4 to the Convention (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 59, ECHR 2005-XII).

5. The importance of Article 14 is, furthermore, apparent in the Court's Grand Chamber judgment in the case of *D.H.* (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-...), in which it found Article 14 to be applicable in conjunction with Article 2 of Protocol No. 1 and found a violation of the two provisions taken together. In our view, the repetition in paragraph 116 of the judgment of the aforementioned *obiter dictum* therefore runs counter to the robust case-law that the Court has recently developed under Article 14 of the Convention. It should be abandoned or at least qualified.