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La CEDU su onere della prova nel risarcimento danni per l'uccisione di un detenuto in tempo di guerra

(CEDU, sez. I, sent. 25 novembre 2021, ric. n. 41295/19)

La Corte Edu si pronuncia sul ricorso presentato dai parenti di un uomo (S.B.) scomparso dopo essere stato detenuto dai soldati croati durante la campagna militare "Operazione Tempesta" nel 1995, il cui corpo fu ritrovato nel 2002 in una fossa comune, insieme ai corpi di altri uomini portati via contestualmente a S.B. I ricorrenti avevano avanzato innanzi ai tribunali interni richiesta di risarcimento danni nei confronti dello Stato croato, domanda rigettata perché essi non avrebbero provato la responsabilità dello Stato stesso per la morte del loro parente.

I Giudici di Strasburgo hanno rilevato, innanzitutto, che non c'era stata alcuna indagine penale sulla scomparsa e sull'uccisione di S.B., né condanne penali. Era indiscusso che l'uomo fosse scomparso mentre era sotto il controllo dei soldati croati e che la famiglia non aveva avuto sue notizie fino al ritrovamento del corpo in una fossa comune con una ferita da arma da fuoco alla testa, insieme ai corpi degli altri uomini catturati contemporaneamente al medesimo. In conformità a costante giurisprudenza della Corte, si è statuito che in simili circostanze esisteva una forte presunzione di causalità tra la scomparsa e l'uccisione dell'uomo e che l'onere della prova della non avvenuta uccisione per mano dei soldati croati spettava alle autorità.

Di qui la conclusione per l'avvenuta violazione del diritto a un processo equo, avendo i tribunali croati imposto ai ricorrenti uno standard di prova irraggiungibile, circostanza assolutamente inaccettabile in considerazione della gravità degli atti in questione.

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

FIRST SECTION

CASE OF XXXXX AND OTHERS v. CROATIA

(*Application no. 41295/19*)

JUDGMENT

STRASBOURG

25 November 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXXXX and Others v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Péter Paczolay, *President*,
Ksenija Turković,
Krzysztof Wojtyczek,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Ioannis Ktistakis, *judges*,
and Renata Degener, *Section Registrar*,
Having regard to:
the application (no. 41295/19) 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 four Croatian nationals, Mr Milan Baljak, Ms Draginja Baljak, Ms Stana XXXXX and Ms Dušanka Tripunović ("the applicants"), on 29 July 2019;
the decision to give notice to the Croatian Government ("the Government") of the complaints concerning the domestic courts' decisions dismissing the applicants' civil claim and ordering them to pay the costs of the proceedings to the State and to declare inadmissible the remainder of the application;
the parties' observations;
Having deliberated in private on 2 November 2021,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns 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 their relative had been detained by Croatian soldiers and taken to an unknown location, with his body having been found years later in a mass grave with a gunshot wound to the head.

THE FACTS

2. The applicants' details are set out in the appendix. They were initially represented before the Court by Mr L. Šušak, and then by Ms S. Čanković, both lawyers practising in Zagreb.
3. The Government were represented by their Agent, Ms Š. Stažnik.
4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. Background to the case

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

II. Killing of the applicants' relative

6. On 5 August 1995 the Croatian army regained control of the town of K. On 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 some twenty 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.
7. It appears from the documents and observations submitted by the parties that no investigation was ever opened into the circumstances of S.B.'s disappearance or death.

III. Civil proceedings

8. On 24 June 2005 the applicants brought a civil action against the State in the Zagreb Municipal Civil Court (Općinski građanski sud u Zagrebu), alleging that S.B. had been killed by Croatian soldiers and seeking damages. They relied on the Act on the liability of the Republic of Croatia for damage caused by members of the Croatian armed forces and police during the Homeland War (hereinafter "the Liability Act" – see paragraph 18 below).
9. 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.
10. The Zagreb Municipal Civil Court heard several witnesses.
Ms M.V. submitted that she had known S.B. personally. On 5 August 1995 she, S.B., her children and several others had tried to flee the area by car. The Croatian army had opened fire at them and wounded her son, S.V. Some soldiers had then taken them to a basement, where there had been several other people. The following day the soldiers had told them that they would take the wounded to a hospital and the soldiers to a prison. They had taken her son, S.B. and several other younger men out of the basement, and she had heard gunshots outside. S.B. had been wearing army pants. She and the rest of those captured had been told to go to the town of K. On their way there they had seen the Croatian army in tanks and trucks.
Ms S.V. submitted that on 5 August 1995 she had been in a car with S.B. and several others when the Croatian army had opened fire at them and wounded her daughter and S.V. Some soldiers had then taken them to a basement. The following day they had ordered S.B. and M.G. to carry out S.V., who had been wounded. Soon after she had heard gunshots outside, but she had not known what had happened. She had not seen S.B.'s body, but she knew that his and S.V.'s bodies had later been found in a grave in the town of K.
11. The fourth applicant submitted that the bodies of S.B., S.V., M.G. and M.T., who had all been taken from the basement by Croatian soldiers, had been found in the same grave in the town of K.

12. On 23 January 2015 the Zagreb Municipal Civil Court dismissed the applicants' civil claim. It held that they had not proven that S.B. had been killed by Croatian soldiers. The witnesses 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. The court further noted that S.B. had last been seen in the area where military combat operations had been taking place. Under the Liability Act, a presumption of war damage applied, and the applicants had failed to prove the opposite. The applicants were ordered to pay the costs of the proceedings to the State in the amount of 17,450 Croatian kunas (about 2,330 euros) each.

13. The applicants appealed. On 24 May 2016 the Zagreb County Court (Županijski sud u Zagrebu) dismissed their appeal and upheld the first-instance judgment.

14. On 14 February 2017 the Supreme Court dismissed an appeal on points of law by the applicants, finding that the lower courts had correctly applied the relevant law to the facts of the case.

15. On 29 January 2019 the Constitutional Court dismissed a constitutional complaint by the applicants, ruling that the domestic courts' conclusion had not been arbitrary.

Four Constitutional Court judges gave a dissenting opinion on that decision. They submitted that, since S.B. had been under the control of State agents, 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, they held that, in the circumstances, the fact that there had been no criminal convictions for S.B.'s killing was of no relevance, and that it was the responsibility of the State to identify and prosecute the perpetrators.

The decision was served on the applicants' representative on 19 February 2019.

IV. Proceedings concerning the writing-off of the applicants' debt

16. On 23 September 2019 the applicants submitted a request to the competent authority, asking that their costs debt (see paragraph 12 above) be written off on account of their poor financial status.

17. On 23 November 2020 the Ministry of Finance (Ministarstvo financija Republike Hrvatske) granted the request of the first, second and third applicants but dismissed the request of the fourth applicant. The fourth applicant did not appeal against that decision and it became final.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW AND PRACTICE

18. The Act on the liability of the Republic of Croatia for damage caused by members of the Croatian armed forces and police during the Homeland War (Zakon o odgovornosti Republike Hrvatske za štetu uzrokovanu od pripadnika hrvatskih oružanih i redarstvenih snaga tijekom Domovinskog rata, Official Gazette no. 117/03 – "the Liability Act"), which entered into force on 31 July 2003, provides that the State is liable, under the general rules of tort liability, for damage caused during the war from 17 August 1990 to 30 June 1996 by members of the Croatian army and police forces in military or police service or in connection with that service, unless the damage in question constituted war damage. The relevant provisions further read as follows:

Section 3

"(1) War damage within the meaning of this Act includes, in particular:
– damage caused at the time and in the area where military actions were carried out by any means of [warfare] (bombing, shelling, machine-gun fire, explosions, blasting, moving of troops and so forth);
– damage resulting in direct and specific military advantage if, given the time and place where it occurred, it directly served military operations, in particular:
(a) damage caused as a direct consequence of any protective or preparatory measures carried out by the competent military authorities with the aim of eliminating or preventing an enemy attack;
(b) damage caused as a direct consequence of protective or preparatory measures carried out by the competent military authorities in anticipation of enemy action (work on land, confiscation of movable property, occupation of real estate and so forth);
(c) damage caused as a direct consequence of measures taken to prevent the spread or alleviate the consequences of the damage described in subsection 1 of this section;
– damage which, given its effects and the specific time and place where it occurred, was directly caused by the state of war and was directly related to war operations (direct consequences of war events related to unrest, disturbances, panic, evacuations and similar events [occurring] immediately after war operations were carried out).
(2) It is presumed that damage caused by members of the Croatian army and police forces in military or police service or in connection with that service during the Homeland War in the period between 17 August 1990 and 30 June 1996 constituted war damage, if it occurred at the time and in the area where military combat actions took place, but the injured party may prove the opposite."

19. Section 428a of the Civil Procedure Act (Zakon o parničnom postupku), which concerns the reopening of proceedings following a final judgment of the European Court of Human Rights, is cited in Romić and Others v. Croatia (nos. 22238/13 and 6 others, § 70, 14 May 2020).
20. The applicants relied on the following Supreme Court judgments:
(a) Judgment no. Rev 270/06-2 of 10 October 2007, rendered in a case in which the plaintiffs had sought damages from the State in relation to the disappearance of their husband and father, who had gone missing after being arrested by police officers on 3 November 1991. The relevant part of that judgment reads as follows:

"In the proceedings before the lower courts it was established:
- that the decision of the O. police station of 3 November 1991 had ordered M.S.'s detention, and that the police officers had taken him to the police station;
- that the police officers had been ordered to take M.S. to the G. crisis unit, where they had handed him over to the civilians present, without any written confirmation of him having been handed over;
- that neither the O. police station, the G. Prison nor the L.S. police department had any documents concerning M.S. being transferred and handed over in G.;
- that there was no evidence that the O. police station had handed M.S. over to any other facility;
- that M.S. had been declared legally dead by a final decision ...

Considering the above findings, the lower courts held that the State was liable for the damage in question ... under the [Liability Act] and dismissed the objection of war damage. The Supreme Court accepts that conclusion as correct ... This is because the arrest warrant in respect of M.S. was issued by the O. police station, whose officers had first taken him to the police station, then to the G. crisis unit, after which time there was never any news of him[. I]t follows that his disappearance was caused by unlawful action on the part of the police officers ... under whose control he was while being taken away."

(b) Judgment no. Rev 1518/10-2 of 7 December 2011, rendered in a case in which the plaintiff had sought damages from the State in relation to the disappearance of her husband, who had been taken away from their home on 4 July 1992 by unidentified persons dressed in military police uniform. He had been declared legally dead in 2000, and his body had eventually been identified by his family in 2003. The relevant part of the judgment reads as follows:

"The second-instance court held that [the civil action was unfounded], having particular regard to the place where the plaintiff's husband's body had been buried, namely Bosnia and Herzegovina, thus concluding that the late M.B. had not been killed on the territory of the Republic of Croatia ... that is, that the plaintiff had failed to prove that fact.
...
... the facts taken into account by the second-instance court ... at present do not constitute a reliable basis for its conclusion. That is to say, a judgment cannot be based on a certain level of probability of the legally relevant facts, even if those facts were "highly probable", but on their certainty ...
Thus, the second-instance court's conclusion that it was highly probable that the late M.B. had been alive when he had left Croatia ... and had been killed in Bosnia and Herzegovina where he had been buried and that it was ... 'hard to believe that the late M.B. was killed by someone in Croatia and then taken to be buried in such a remote and dangerous place in ... Bosnia and Herzegovina' ... is not acceptable.
It must be taken into account that it is undisputed that the plaintiff's late husband was kidnapped from his home in Croatia, after which time there was never any trace of him, and that during the proceedings no interruption of the causal link between his kidnapping and unlawful killing was established ..."

21. The Government referred to the following Supreme Court judgments:
(a) Judgment no. Rev 23/2004-2 of 15 January 2004, rendered in a case in which the plaintiffs had sought damages from the State in relation to the killing of their family member, a Croatian soldier, by another Croatian soldier. The Supreme Court held as follows:

"It was established that on 5 August 1995, on the first line of combat, near the University of Agronomics in O., a Croatian soldier had fired his automatic gun in fear, while on guard, shooting T.Š., a Croatian soldier and the plaintiffs' son, husband and father. It was also established ... that the Croatian soldier had been convicted of [manslaughter] for that incident.
Taking into account the above-mentioned facts, this court accepts the conclusion of the appellate court that the damage in question constituted war damage under section 3(1) of the Liability Act,

since it was caused at the time and in the area where military actions were carried out and by means of [warfare], damage for which, under section 2 of the Liability Act, the State is not liable ..."

(b) Judgment no. Rev 272/2007-2 of 9 May 2007, rendered in a case in which the plaintiffs had sought damages from the State for the death of their husband and father, who had been the victim of a war crime against a civilian population committed by a member of the Croatian army in 1991. The Supreme Court held that damage resulting from a war crime could not be considered war damage for which the State was not liable. The relevant part of the judgment reads:

"[In the appeal on points of law the State argues that] the substantive law was misapplied in that [the lower court] dismissed as unfounded its argument that [the case concerned] war damage because [the damage sustained] resulted from an act of war or was directly related to the war.
...
Given that by the aforementioned final judgment [of the criminal court the serviceman in question], who had been a member of the Croatian army, was found guilty of a war crime for, inter alia, having killed the plaintiffs' father and husband, the finding of the lower courts that the defendant was liable to compensate the plaintiffs for non-pecuniary damage is correct.
...
The defendant's argument that the present case concerns war damage, for which the State is not liable, is unfounded.
The final judgment by the criminal court established that [the serviceman in question] as a member of the Croatian army, had committed a war crime against a civilian population.
In [the Supreme Court's view] a war crime cannot be [seen as] war damage within the meaning of section 3 of the [Liability Act]. The war crime in question, as is apparent from [the judgment of the criminal court], was committed against the civilian population of Serbian ethnicity in retaliation, which refutes the argument made in the appeal on points of law that [the resultant damage] was war damage."

(c) Judgment no. 114/2010-2 of 31 August 2011, rendered in a case in which the plaintiff had sought damages from the State for the destruction of his property immediately after Operation Storm. The Supreme Court held as follows:

"In the proceedings it was established that the plaintiff's [real estate] located in V. had been burned down after [Operation Storm] on 8 or 9 August 1995, that the plaintiff's movables had been destroyed or stolen ... that none of the witnesses could state amidst [which army's] combat operations the latter damage had occurred.
On the basis of those facts, the courts held that the plaintiff had not proven that the damage had been caused by Croatian soldiers ... and, therefore, referring to section 2 of the Liability Act, dismissed his civil claim.
Since the damage sustained by the applicant was caused in August 1995, in the course of [Operation Storm], the responsibility of the State should be examined under the Liability Act ... The State is liable only for damage which does not constitute war damage.
...

Precisely because the plaintiff did not prove that the damage had been caused by Croatian soldiers, he has incorrectly invoked the Geneva Convention relative to the Protection of Civilian Persons in Time of War."

(d) Judgment no. 2398/2011-3 of 15 April 2015, rendered in a case in which the plaintiff had sought damages from the State for the death of his parents, who had been killed in the course of Operation Storm. The relevant part of the judgment reads as follows:

"... the Republic of Croatia is liable only for the damage referred to in section 1 of the Liability Act which does not constitute war damage within the meaning of section 2 of the Liability Act. Hence, in examining whether certain damage by its nature constitutes war damage or not, the particular circumstances of the case must be taken into account.
...the lower courts found that the damage in question had occurred on 5 August 1995, in the course of [Operation Storm] ... that at the time the plaintiffs' parents had been killed, their village had not been fully under the control of the Croatian army, and that there had been combat operations, that is, [warfare]. Since the latter constituted war damage, for which the Republic of Croatia was not liable ... the lower courts correctly applied the substantive law ... when they dismissed the civil claim. Precisely because the plaintiff failed to prove, in the course of the proceedings, that the damage sustained did not constitute war damage, and that it was caused by members of the Croatian army, he has incorrectly invoked the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the European Convention on Human Rights and Fundamental Freedoms, which protect civilians from war crimes. That is to say, during the proceedings it was not proven that the damage in question had been the result of the criminal offence of a war crime, which should be proven by a final court judgment, which in the present case does not exist."

22. Further relevant Supreme Court case-law is cited in Trivkanović v. Croatia (no. 2), no. 54916/16, §§ 31-32, 21 January 2021).

II. UNITED NATIONS

23. The relevant part of the report by the United Nations Secretary General "The rule of law and transitional justice in conflict and post-conflict societies" (S/2004/616), published on 23 August 2004, reads as follows:

"54. Indeed, in the face of widespread human rights violations, States have the obligation to act not only against perpetrators, but also on behalf of victims - including through the provision of reparations. Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions, by providing concrete remedies, promoting reconciliation and restoring victims' confidence in the State. ...
55. No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the

demands of justice and the dictates of peace require that something be done to compensate victims. ..."

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

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

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

PRINCIPLE 32. REPARATION PROCEDURES

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

PRINCIPLE 34. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.
In the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted."

25. On 16 December 2005 the General Assembly of the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, in which it stated:

"3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
...
(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
(d) Provide effective remedies to victims, including reparation, as described below.

...

II. Victims' right to remedies

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

(a) Equal and effective access to justice;

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

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

...

IX. Reparation for harm suffered

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

...

...

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

THE LAW

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

26. The applicants complained that the domestic courts' conclusion in the civil proceedings was arbitrary or manifestly unreasonable. They relied on Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

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

B. Merits

1. Parties' submissions

(a) The applicants

28. Relying on the Supreme Court's judgments cited in paragraph 20 above, the applicants contended that, since S.B. had been under the control of State agents, there had been a clear causal 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.

(b) The Government

29. The Government contended that, in accordance with the Supreme Court's long-standing case-law (see paragraph 21 above), since S.B. had last been seen in the area of military combat actions, a presumption of war damage had applied, and the burden of proving that his killing had not constituted war damage had rested on the applicants. They had been afforded sufficient opportunity to do so, as the first-instance court had admitted all the evidence which they had proposed. The domestic courts had established the facts based on that evidence and had correctly applied domestic law to the facts. Their conclusion could not be considered unreasonable or arbitrary.
30. The Government argued that the witnesses had not seen what had happened to S.B. The fact that Croatian army soldiers had taken him from the basement could not lead to the conclusion that they had killed him. At the time there had still been intensive fighting in the area, and it had been entirely possible that S.B. had been killed by enemy forces during their retreat.
31. The Government added that the applicants had never lodged a criminal complaint regarding S.B.'s killing, and that no Croatian army soldier had been convicted of his death.
32. They invited the Court to find no violation of Article 6 § 1 of the Convention.

2. The Court's assessment

33. The Court observes that, under Croatian law, the State is liable, under the rules of strict liability, 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 is presumed to be war damage, but plaintiffs may prove the opposite (see paragraph 18 above).
34. In the present case, the domestic courts held that the applicants had failed to prove that their relative had been killed by Croatian soldiers. Furthermore, and irrespective of that, they held that, given that S.B. had last been seen in the area of military combat actions, a presumption of war damage applied and the applicants had failed to prove the opposite (see paragraphs 12-15 above).
35. The Court reiterates that it is not its task to take the place of the domestic courts, which are in the best position to assess the evidence before them, establish facts and interpret domestic law (see, for example, Khamidov v. Russia, no. 72118/01, § 170, 15 November 2007). It should not act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for example, Bochan v. Ukraine (no. 2) [GC], no. 22251/08, § 61, ECHR).

36. The Court further reiterates that in a number of cases examined under Article 2 of the Convention it found that persons who had gone missing following their detention by State agents were to be presumed dead and that the State was therefore responsible for their death. Such findings were made in response to arguments made by the respondent Government that such persons were still alive or had not been shown to have died at the hands of State agents (see, among many other authorities, Timurtaş v. Turkey, no. 23531/94, § 86, ECHR 2000-VI, and Aslakhanova and Others v. Russia, nos. 2944/06 and 4 others, § 100, 18 December 2012).

37. That case-law is not without significance in the present case in the context of the applicants' complaint under Article 6 of the Convention (compare Trivkanović v. Croatia (no. 2), no. 54916/16, § 79, 21 January 2021). That is so because State liability in such cases is not only based on the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention. It is also based on the strong presumption of causality between the detention and death, a presumption which arises whenever, as in those cases, the events surrounding a death of an individual lie, wholly or in large part, within the exclusive knowledge of the authorities. The Court has held that in such situations the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see, for example, Varnava and Others v. Turkey [GC], nos. 16064/90 and 8 others, §§ 173-84, ECHR 2009, and Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000-VII).

38. The Court notes that in its case-law developed in the context of the historic war-related events, the Supreme Court took the view that where a war crime committed by members of the armed forces involved forced disappearance(s), and the missing victim had later been declared dead, the State was liable for the victim's death and the resultant damage because of an evident causal link between the disappearance and (presumed) death of the victim (see Trivkanović, cited above, §§ 32 and 80). That case-law also suggests that in such cases the burden of proof shifts as it is incumbent on the State to prove that the victim had survived or died in different circumstances (ibid.).

39. In the present case, the Court notes that there was no criminal investigation into the disappearance and killing of the applicants' relative, nor were there any criminal convictions (see paragraph 7 above and contrast Trivkanović, cited above, § 12). However, that cannot be attributed to the applicants, as it was the duty of the State authorities to conduct an effective official investigation as soon as they were informed of the circumstances of S.B.'s killing (see, for instance, Kušić and Others v. Croatia (dec.), no. 71667/17, §§ 72-74, 10 December 2019). In any event, the Court notes that in cases of forced disappearances the Supreme Court shifted the burden of proof to the authorities, dismissed the objection of war damage and held the State liable for the damage, even where there were no criminal convictions (see paragraph 20 above).

40. The Court notes that in the present case it is undisputed that S.B. went missing while under the control of Croatian soldiers, and that there was no news of him until his body was found in a mass grave with a gunshot wound to the head, together with the bodies of the other men taken from the basement with him (see paragraphs 6 and 12 above). In accordance with the Court's case-law under Article 2 of the Convention (see paragraphs 36-37 above), in these circumstances there was a strong presumption of causality between S.B.'s disappearance and killing and the burden of proof that Croatian soldiers did not unlawfully kill him rested on the authorities.

41. Accordingly, 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 particular circumstances of the case and the Court's case-law under Article 2 of the Convention (see paragraph 36 above). By reaching that conclusion, the domestic courts in fact imposed an unattainable standard of proof on the applicants, which was particularly unacceptable in view of the seriousness of the acts concerned (compare Trivkanović, cited above, § 81).
42. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. The applicants also complained, under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 thereto, that the domestic courts' order for them to pay the costs of the State's representation in the civil proceedings had amounted to an excessive burden, given their poor financial situation and the circumstances in relation to which they had sought damages.
44. The Government proposed to declare the complaints inadmissible on the grounds that the applicants had failed to exhaust domestic remedies, and that in any event the first, second and third applicants could no longer be considered victims of the alleged violations, as their costs debt had been written off (see paragraph 17 above).
45. Having regard to its finding concerning the domestic courts' conclusions under Article 6 § 1 of the Convention (see paragraph 42 above), the Court notes that the applicants now have an opportunity to seek the reopening of the proceedings in accordance with section 428a of the Civil Procedure Act (see paragraph 19 above). The latter would allow for a fresh examination of their civil claim, as well as a fresh decision on the costs of the proceedings, including those incurred in the proceedings before the lower courts and the Supreme Court thus far. The Court cannot speculate what the outcome of the proceedings would be and how it would affect the final decision on costs.
46. In these circumstances, the Court considers that the complaint concerning the costs of the proceedings are premature and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicants each claimed 30,000 euros (EUR) in respect of non-pecuniary damage.
49. The Government contested that claim.

50. The Court notes that, under domestic law, the applicants have the possibility to seek the reopening of the proceedings complained of (see paragraphs 19 and 42 above).
51. The Court also considers that the applicants must have sustained non-pecuniary damage which cannot be sufficiently compensated by the reopening of the proceedings. In these circumstances, ruling on an equitable basis and taking into account the possibility of reopening, it awards them EUR 3,000 jointly in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

52. The applicants also claimed EUR 10,000 for the costs and expenses incurred before the domestic courts and EUR 10,000 for those incurred before the Court.
53. The Government argued that the claim was unsubstantiated and excessive.
54. 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, as well as the fact that the applicants can seek the reopening of the domestic proceedings and thereby obtain a fresh decision on costs before the lower courts and the Supreme Court (see paragraph 45 above), the Court considers it reasonable to award the sum of EUR 850 for the costs and expenses incurred before the Constitutional Court and EUR 2,500 for those incurred in the proceedings before the Court, plus any tax that may be chargeable to the applicants.

C. Default interest

55. 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, UNANIMOUSLY,

1. Declares the complaint under Article 6 § 1 of the Convention concerning the domestic courts' decisions dismissing the applicants' civil claim admissible and the remainder of the application inadmissible;
2. Holds that there has been a violation of Article 6 § 1 of the Convention;
3. Holds

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 3,350 (three thousand three hundred and fifty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

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

4. Dismisses the remainder of the applicants' claim for just satisfaction.

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

{signature_p_2}

Renata Degener
Registrar

Péter Paczolay
President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Milan XXXXX	1943	Croatian	Petrovaradin
2.	Draginja XXXXX	1924	Croatian	Petrovaradin
3.	Stana XXXXX	1940	Croatian	Petrovaradin
4.	Dušanka XXXXXX	1974	Croatian	Banja Luka