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

FIRST SECTION

DECISION

Application no. 71667/17
Zdravka KUŠIĆ and Others
against Croatia

The European Court of Human Rights (First Section), sitting on 10 December 2019 as a Chamber composed of:

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski,
Raffaele Sabato, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 29 September 2017,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix. They were represented before the Court by Ms S. Čanković, a lawyer practising in Zagreb.

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

3. The Government of Serbia did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

A. The circumstances of the case

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

5. At around 7 a.m. on 6 February 1992 X. found two dead bodies with gunshot wounds lying by the road near Petrovo Polje. He reported the matter to the Sisak police.

6. The Sisak police called an investigating judge and a deputy prosecutor to the scene, and at around 9 a.m. an inspection was carried out. It could be established from documents found in the clothes of the deceased that they were N.K. and P.K., the applicants' relatives. A 7.62 mm calibre cartridge case marked 321-91 was found nearby. The investigating judge noted tyre marks on the road. Photographs and a video-recording were taken of the crime scene. The bodies were transported to Sisak Hospital for examination.

7. On 7 February 1992 a medical expert carried out an external post-mortem examination of N.K. and P.K., establishing that they had died as a result of gunshot wounds to the head and torso.

8. On 10 February 1992 the Sisak police filed a criminal complaint against persons unknown with the Sisak County State Attorney's Office (*Okružno javno tužiteljstvo Sisak*), alleging that N.K. and P.K. had been murdered.

9. On 25 February 1992 the Sisak police drew up a "work plan", which included the measures taken to date and measures to be taken in the future. It also contained two possible theories for the death of N.K. and P.K.; the first was that they had been murdered by someone who had known their life circumstances and had wanted to obtain financial gain or revenge, and the second was that they had been murdered by someone from their family.

10. On 25 May 1992 the Sisak police provided the Sisak County State Attorney's Office with transcripts of interviews conducted with A., C., B., X., Y. and Y.Y. earlier that month.

A., a neighbour of the deceased, stated that on 4 February 1992 five men in camouflage uniforms had come to the K. family home, searched it and then left. The following day two men in camouflage uniforms had come back to the house. B. (who had been living there as a refugee) and D., had been inside at the time. One of the two men had stayed with B. and D. downstairs and had threatened them with a weapon, while the other had gone upstairs and taken N.K. out of the house. P.K. had allegedly been found at his mistress's house nearby before also being taken away. He added that there had been civil protection guards near the K. family home, but that he did not know who had been on duty that evening.

C. (the late N.K.'s brother) stated that B. had called him on the morning of 6 February 1992 and told him that N.K. and P.K. had been taken away by two armed men in camouflage uniforms. C. also stated that in January 1992 his brother N.K. had been taken from his house to Jodno, where he had been ill-treated by men in camouflage uniforms.

B. stated that at around 10 p.m. on 4 February 1992 five men in camouflage uniforms had come to the house, spent some time upstairs and then left. When they had left N.K. had told him that it had been the police.

They had asked about his son P.K., who had not been at home at the time, and had confiscated their telephone and telephone book. At around 8 p.m. the following evening two armed men in camouflage uniforms had come back to the house. One had gone upstairs and the other had stayed with B. and D. downstairs. B. and D. had noticed that the armed man with them had had a police mark. He had asked them how they could live in a house with Chetniks (*četnici*) who had killed his 6-year-old child. The other man had taken N.K. from upstairs and out of the house. P.K. had not been at home that evening. Meanwhile D. had called the police, but by the time they had arrived the men in camouflage uniforms had already left.

X. stated that at 7.15 a.m. on 6 February 1992, on his way from Martinska Ves to Sisak, he had spotted two dead bodies near the road. He had gone to a nearby hunting lodge, where soldiers had been stationed. He had told one of them that there were two dead bodies lying nearby, and the soldier had replied that they were aware of this. X. had then gone to Sisak and reported the matter to the Sisak police, and the officer on duty had told him that he already knew about the murder.

Y. and Y.Y. had no direct information of the events.

11. On 7 January 2003 the Sisak police provided the Sisak County State Attorney's Office with transcripts of interviews conducted with B., C. and D. on 6 and 7 February 1992, stating that they had been found in the Sisak police archives.

The transcripts indicate that on 6 February 1992 C. (the late N.K.'s brother) and D. attended the Sisak police station and reported that at around 8 p.m. on 5 February 1992 two men had come to N.K.'s house and taken him and his son P.K. away. D., who witnessed the event, described one of the individuals as a short chubby man wearing a camouflage uniform and a black hat marked with a Croatian coat of arms, with a missing upper right tooth. D. stated that the two men were probably police officers from the "B.R." police unit, which B., who had been there with him, had also noticed.

The transcripts further indicate that on 7 February 1992 the Sisak police interviewed C. and B.

C. stated that he had been informed that on 5 February 1992 two unknown men had taken N.K. and his son P.K. from their house to an unknown destination.

B. stated that at around 8 p.m. on 5 February 1992 he and his cousin D. had been inside the K. family home when somebody had knocked on the front door. B. had opened it and two masked men had entered and taken away N.K. and P.K.

12. On 11 September 2004 the applicants wrote to the Sisak County State Attorney's Office and the Sisak police, asking whether any action had been taken regarding the death of their relatives. On 21 October 2004 the Sisak County State Attorney's Office replied that criminal proceedings had

not been instituted since the perpetrators were still unknown. The only established facts were that N.K. and P.K. had been taken away from their home on 5 February 1992 and had been found dead the following day.

13. In February 2005 the applicants wrote to the State Attorney's Office of the Republic of Croatia, asking to reach a settlement regarding the payment of damages for the killing of N.K. and P.K. They submitted that the killing had amounted to a terrorist act for which the State was liable. In March 2005 the State Attorney's Office of the Republic of Croatia replied that there was no possibility of a settlement.

14. On 5 October 2006 the Sisak County State Attorney's Office reclassified the criminal offence against N.K. and P.K. as a war crime against the civilian population.

15. On 20 November 2006 the first applicant sent a letter to the Sisak County State Attorney's Office enquiring about the progress of the investigation. She referred to the recent reclassification of the crime committed against N.K. and P.K. as a war crime and asked to reach a settlement regarding the payment of damages. On 20 November 2006 the Sisak County State Attorney's Office replied that the decision declining to reach a settlement still stood.

16. On 19 December 2008 the Sisak County State Attorney's Office prepared a case progress report. It concluded that a war crime had been committed against N.K. and P.K. and that no further measures would be taken until interviews with all the relevant people had taken place.

17. On 2 January 2009 the Sisak police informed the Sisak County State Attorney's Office that interviews had been conducted with individuals potentially having knowledge of the criminal offences committed in the Sisak area during 1991 and 1992. With regard to the killing of the applicants' relatives, the Sisak police confirmed that they had interviewed C. (the late N.K.'s brother) and E., the woman from whose house P.K. had allegedly been taken away on the night of 5 February 1992, but that neither of them had submitted any new relevant information.

18. On 9 February 2009 the Sisak police informed the Sisak County State Attorney's Office that a further interview had been conducted with B. on 27 January 2009.

In that interview B. stated that since December 1991 he and his wife had been staying in the K. family home as refugees. The K. family were Serbs, but had treated him and his wife very well. In late 1991 N.K. had gone to Serbia for a while, which had raised suspicions about what he was doing. When N.K. had returned to Croatia in January 1992 he had been taken to the police station to appear before the commander, F., and had been released the same day. On the evening of 5 February 1992 several armed men in camouflage uniforms had come to the K. family house and taken away N.K. The men had asked them how they could live with Chetniks who had raped a child. D., who had since died, had also witnessed the event. Two days

later he had gone to the police station to give a statement and commander F. had told him that N.K. and P.K. were dead. He further submitted that P.K. had been in an intimate relationship with a woman named E., who might have had more information about his abduction. He had heard that E. had been telling people that the men who had taken away N.K. and P.K. had been stationed in Derma.

19. On 16 February 2010 the Sisak County State Attorney's Office submitted a case progress report to the State Attorney's Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*).

20. Sometime after, the case concerning the killing of N.K. and P.K. was transferred to the Osijek County State Attorney's Office (*Županijsko državno odvjetništvo u Osijeku*), which indicted V.M., Đ.B. and D.B. before the Osijek County Court (*Županijski sud u Osijeku*) for war crimes against the civilian population committed in the Sisak area during 1991 and 1992.

21. On 29 January 2014, after the criminal proceedings against V.M., Đ.B. and D.B. ended, the Osijek County State Attorney's Office returned cases to the Sisak County State Attorney's Office that had been transferred to it but excluded from the criminal proceedings. The case concerning the killing of N.K. and P.K. was among those returned.

22. On 25 July 2016 the Sisak County State Attorney's Office requested the War Crimes Service of the Ministry of Internal Affairs (*Ministarstvo unutarnjih poslova, Uprava kriminalističke policije, Služba ratnih zločina*) to take further action regarding the killing of N.K. and P.K., and specifically to interview A. again.

23. On 9 August 2016 the Sisak police interviewed G., a neighbour of the late N.K. and P.K. She reported that she had heard that in late 1991 N.K. had gone to Banovina to kill Croats.

24. On 22 September 2016 the Sisak police interviewed H., another neighbour, who was at the relevant time also a member of the local civil protection. He reported that when the war had started N.K. had frequently left Sisak, and that on one occasion he had seen him in a video-recording showing him to have been fighting for the Serbian side. Several days before being taken away N.K. had told him that he had been receiving threats by telephone. H. denied witnessing N.K. and P.K. being taken away. That night B. had come to his house to tell him that unknown men wearing camouflage police uniforms had taken away P.K. He had then gone to the K. family home with B. to check the situation, but P.K. had not been there. He had heard from someone that P.K. had been taken away in an orange or brick-coloured van.

25. In September and November 2016 the Sisak police interviewed I. and J.

26. On 11 November 2016 the Sisak County State Attorney's Office took statements from X. and E.

X., who discovered the bodies of N.K. and P.K. in February 1992, had no new relevant information.

E., the woman from whose house P.K. had allegedly been taken away in February 1992, stated that P.K. had never been in her house and that she had no information about his abduction. She was then presented with a transcript of her statement given to the police in 2008. She had stated that two individuals in camouflage uniforms had come to her house and taken away P.K., but that since her small child had started crying she could not hear what they were saying to P.K. and did not know why they had taken him away. E. denied giving such a statement to the police in 2008, repeating that P.K. had never been in her house.

27. On 7 February 2017 the Sisak County State Attorney's Office asked that a police officer, P., be interviewed.

28. On 2 March 2017 P. stated that a military unit had been stationed in the hunting lodge near to where the bodies had been found, but that he did not know which one.

29. On 13 July 2017 the Sisak County State Attorney's Office asked the police to establish which military unit had been stationed in the hunting lodge.

30. On 9 August 2017 the police informed the Sisak County State Attorney's Office that interviews had been conducted with K., L., Lj, M., N., none of whom knew which military unit had been stationed in the hunting lodge.

31. On 21 July 2017 the Sisak police asked the Ministry of Defence (*Ministarstvo obrane Republike Hrvatske*) to confirm which military unit had been stationed in the hunting lodge near to where the bodies of N.K. and P.K. had been found. On 5 September 2017 it replied that no Croatian army unit had been stationed in that hunting lodge.

32. On 20 February 2018 the Sisak County State Attorney Office asked the police to interview G., H., O., R., S., Š. and T. in order to gather further information about the killing of N.K. and P.K.

33. On 11 May 2018 the Sisak police reported that interviews had taken place with G., O., S., Š. and T., who had had no relevant information about the killing. H. and R. could not be interviewed because they had since died.

34. On 18 March 2019 it was decided that six war crimes investigations, including the investigation into the killing of N.K. and P.K., would be transferred to Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) and the Zagreb police in order to ensure the impartiality of those conducting the investigation.

35. In August 2019 the Zagreb police conducted interviews with U., V. and Z., none of whom had any information about N.K.'s and P.K.'s killing.

36. The investigation is still pending.

B. Relevant domestic law and practice

1. Croatian Constitution

37. The relevant provisions of the Croatian Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, with further amendments) read:

Article 21

"Every human being has the right to life.

..."

Article 134

"International agreements concluded and ratified in accordance with the Constitution and made public shall be part of the internal legal order of the Republic of Croatia and shall take precedence over [domestic legislation] ..."

2. Constitutional Court Act

38. The relevant part of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002) reads as follows:

Section 31

"1. The Constitutional Court's decisions shall be binding on every physical and legal person.

2. All State bodies and bodies of local and regional government are obliged to implement the Constitutional Court's decisions in matters of their constitutional and legal competence.

3. The Government shall ensure, through a State administration body, implementation of the Constitutional Court's decisions.

4. The Constitutional Court may designate an authority on which it confers the implementation of its decisions.

5. The Constitutional Court may determine the manner in which its decisions shall be implemented."

Section 62

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she considers that a decision of a State body, or local or regional government, or a legal person vested with public authority, concerning his or her rights and obligations, or as regards a suspicion or accusation of a criminal offence, has violated his or her human rights or fundamental freedoms, or his or her right to local or regional government, as guaranteed by the Constitution (hereinafter "constitutional rights").

2. If another legal remedy exists in respect of the violation of the constitutional rights [complained of], a constitutional complaint may be lodged only after that remedy has been used.

...”

Section 63

“1. The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted if the relevant court has failed to decide within a reasonable time on the rights or obligations of a party [to the proceedings], or as regards a suspicion or accusation of a criminal offence, or if the contested decision grossly violates constitutional rights and it is completely clear that the complainant will face serious and irreparable consequences if Constitutional Court proceedings are not instituted.

2. If it finds the constitutional complaint for failure to decide within a reasonable time referred to in paragraph 1 [above] well-founded, the Constitutional Court shall set a time-limit within which the relevant court must decide the case on the merits ...

3. In a decision issued under paragraph 2 [above], the Constitutional Court shall award appropriate compensation to the complainant for the violation of his or her constitutional right ... to a hearing within a reasonable time. The compensation shall be paid from the State budget within three months of the date on which the request for payment is lodged.”

Section 71

“1. [The Constitutional Court] shall examine only the violations of constitutional rights set forth in the constitutional complaint.

...”

3. The Courts Act

39. The relevant part of the Courts Act (*Zakon o sudovima*, Official Gazette no. 28/2013, with further amendments), reads as follows:

Section 5

“The courts adjudicate cases on the basis of the Constitution, *acquis* of the European Union, international agreements, legislation and other sources of law in force.”

4. Constitutional Court Rules

40. On 23 December 2014 the Constitutional Court issued a decision (Official Gazette no. 2/2015) changing the Rules of the Constitutional Court (*Poslovnik Ustavnog suda Republike Hrvatske*, “the Constitutional Court Rules”). The amended section 54(1) introduced a special reference, “U-IIIBi”, to designate proceedings instituted before the Constitutional Court by constitutional complaints alleging the lack of an effective investigation into crimes under Articles 2 and 3 of the Convention. The relevant part of the Constitutional Court Rules now reads:

Designating Constitutional Court cases
Section 54(1)

“The references [used to designate] Constitutional Court cases are the following:

...

U-III- proceedings instituted by a constitutional complaint for the protection of human rights and fundamental freedoms guaranteed by the Constitution;

...

U-IIIBi- proceedings following a constitutional complaint [lodged] prior to the exhaustion of legal remedies regarding failure to conduct an investigation (ineffective investigation) into criminal offences related to Article 2 (right to life) and Article 3 (prohibition of torture) of the Convention;

..."

5. Constitutional Court's case-law

41. In decisions U-I-892/1994 of 14 November 1994 (Official Gazette no. 83/1994) and U-I-130/1995 of 20 February 1995 (Official Gazette no. 112/1995) the Constitutional Court held that all rights guaranteed in the Convention and its Protocols were also to be considered constitutional rights, having legal force equal to the provisions of the Constitution.

42. On 14 May 2001 in case no. U-III-791/1997 the Constitutional Court accepted a constitutional complaint concerning a violation of the complainant's right to life. The relevant part of the decision reads:

"Under the [Code of Criminal Procedure], in a situation where the State Attorney is the prosecutor, the injured party has only very limited rights in the proceedings. However, as soon as the State Attorney is no longer a party (if he or she drops the charges), the injured party can act as a subsidiary prosecutor in the proceedings. In other words, when the State Attorney does not appear [as a prosecutor] in the proceedings, the [injured] party is (or can be) the subsidiary prosecutor. This should be, *mutatis mutandis*, applied in respect of a constitutional complaint. Since the State Attorney cannot lodge a constitutional complaint ... the injured party can represent him or herself. In this case, [the injured party] can lodge a constitutional complaint."

43. In decision U-IIIA-232/2003 of 13 February 2004 the Constitutional Court declared a subsidiary prosecutor's constitutional complaint concerning the length of criminal proceedings inadmissible on the grounds that the proceedings at issue had not concerned his civil rights or obligations or any criminal charge against him. The Constitutional Court followed the same approach in decision U-III-2729/2004 of 23 December 2004.

44. In decision U-IIIVs-3511/2006 of 22 October 2008 the Constitutional Court revised its practice and accepted a constitutional complaint concerning the length of criminal proceedings lodged by a subsidiary prosecutor who had not lodged a civil claim in the criminal proceedings. The relevant part of the decision reads:

"The approach taken by the lower courts, by which the complainant did not have the right to lodge a length-of-proceedings complaint because she, as a subsidiary prosecutor in the criminal proceedings ... had failed to lodge a civil claim ... reflects the approach previously taken by this court.

> ... [T]he Constitutional Court considers that that approach should be revisited on the grounds of public interest and the protection of victims' rights.
>
> ...
>
> Therefore, the Constitutional Court considers that the question of whether a subsidiary prosecutor in criminal proceedings has a right to have the competent court decide within a reasonable time [whether] the defendant be found guilty and punished in accordance with the law, cannot be considered only from the perspective of the civil claim which the injured party may have against the defendant. Such a restrictive approach would deprive the subsidiary prosecutor [of the ability] to exercise his or her right to bring a subsidiary prosecution, and would run contrary to the principle that rights should be effective ..."

45. On 13 November 2014, in decision U-III-6559/2010 (Official Gazette no. 142/14), the Constitutional Court, referring to the standards for an effective investigation outlined in the Court's judgments in *Dolenec v. Croatia* (no. 25282/06, §§ 120-130 and 143-145, 26 November 2009), *Gladović v. Croatia* (no. 28847/08, §§ 39-40 and 46-49, 10 May 2011), *Mađer v. Croatia* (no. 56185/07, §§ 105-107 and 111-112, 21 June 2011), *Đurđević v. Croatia* (no. 52442/09, §§ 72-74, 77 and 83-85, ECHR 2011) (extracts) and *V.D. v. Croatia* (no. 15526/10, §§ 60-65, 8 November 2011), for the first time accepted a constitutional complaint concerning the lack of an effective investigation into the complainant's alleged ill-treatment. In addition to finding a violation of the procedural aspect of Article 3 of the Convention, the court awarded damages to the complainant and ordered the State Attorney's Office of the Republic of Croatia to conduct an effective investigation into the alleged ill-treatment. On the Constitutional Court's website it is indicated that, by the decision in question, its case-law had been aligned with the Court's case-law under Article 3 of the Convention.

46. In decisions U-IIIBi-7367/2014 of 15 December 2015, U-IIIBi-2698/2016 of 14 December 2016, U-IIIBi-4690/2015 of 11 January 2017, U-IIIBi-3699/2015 of 30 March 2017, U-IIIBi-2615/2017 of 13 September 2017, U-IIIBi-2349/2013 of 10 January 2018, U-IIIBi-886/2018 of 10 July 2018, U-IIIBi-1385/2018 of 18 December 2018, U-IIIBi-1066/2015 of 3 April 2019, U-IIIBi-863/2019 of 9 July 2019 and U-IIIBi-4222/2018 of 5 November 2019 – all published on the Constitutional Court's website – the Constitutional Court examined constitutional complaints concerning the alleged lack of an effective investigation under Articles 2 and 3 of the Convention.

47. In particular, in decision U-IIIBi-7367/2014 of 15 December 2015 the Constitutional Court examined the effectiveness of an investigation into the fate of the complainant's brother, who disappeared in 1992 after being taken from his workplace by Croatian police officers and transported to Bosnia and Herzegovina. After obtaining observations from the competent State Attorney's Office on the measures taken in the investigation, and reiterating the principles outlined in the case of *Jelić v. Croatia* (no. 57856/11, §§ 72-77, 12 June 2014), the Constitutional Court concluded

that in that particular case the investigation following the complainant's criminal complaint filed in 2013 that a war crime had been committed against her brother could not be considered ineffective. The relevant part of its decision reads:

> "The complainant filed a criminal complaint on 2 December 2013 against unknown perpetrators, alleging that a war crime against the civilian population had been committed against her brother.
>
> ...
>
> After receiving the complainant's criminal complaint on 2 December 2013 the [competent] State Attorney's Office raised numerous enquiries (described in detail in its observations – see [above]), of which the complainant was informed ... According to the [competent] State Attorney's Office, the enquiries are still ongoing.
>
> Having regard to all the circumstances of the case, the Constitutional Court deems that up to the date of this decision the investigation into the death of the complainant's brother under Article 21 of the Constitution and Article 2 of the Convention (procedural aspect) cannot be considered ineffective.
>
> Nor can it be said that the complainant did not have effective remedies at her disposal to protect against an ineffective investigation into the death of her brother under Article 13 of the Convention, as demonstrated by the constitutional complaint being examined in these Constitutional Court proceedings."

The Constitutional Court further declared inadmissible the part of the complaint concerning the investigation into the complainant's brother's disappearance, concluding that it had no competence to examine the matter. The relevant part of the decision reads:

> "In her constitutional complaint the complainant claims that during August 1992 she reported her brother's disappearance to the Red Cross. On 1 September 2006 she also reported that disappearance to the [police].
>
> However, the evidence collected undoubtedly points to the conclusion that the complainant's brother G.Đ. disappeared on the territory of Bosnia and Herzegovina and not Croatia ... Moreover, the decision of 16 November 2001 declaring him dead ... establishes Bosnia and Herzegovina as the place of his death.
>
> In view of this state of affairs, there cannot have been a so-called forceful disappearance of the complainant's brother on Croatian territory."

48. In decisions U-IIIBi-2698/2016 of 14 December 2016, U-IIIBi-4690/2015 of 11 January 2017 and U-IIIBi-3699/2015 of 30 March 2017, the Constitutional Court's analysis of the effectiveness of investigations under the procedural scope of Article 2 of the Convention consisted of noting that the competent prosecutor was raising numerous enquiries after receiving the criminal complaint, of which the complainants were or were not informed, and that having regard to all the circumstances of the case the investigation up to the date of the decision could not be considered ineffective. The court also held that it could not be said that the complainants had not had effective remedies at their disposal to protect against an ineffective investigation under Article 13 of the Convention, as

demonstrated by their constitutional complaints being examined in the Constitutional Court proceedings.

49. In decision U-IIIBi-2615/2017 of 13 September 2017 the Constitutional Court found that an investigation into the complainant's mother's death in 2009 could not be considered ineffective. It noted that the complainant had contacted the competent State Attorney's Office more than a year after his mother's death, alleging that he had reason to believe that her long-term partner had hurt her, but without providing any specific information. The competent State Attorney's Office had taken adequate measures to verify those allegations, and the evidence collected indicated that she had died of a stroke and that the hospital had given all the medical documentation to the complainant. The Constitutional Court reiterated that the State had an obligation to conduct an effective investigation under Article 2 of the Convention where there were reasons to believe that a person had died in suspicious circumstances. Even though the complainant had been instructed by the competent State Attorney's Office to file a criminal complaint, he had never done so, nor had he ever explained why he believed his mother's death to be suspicious. If the complainant had any specific information in that regard, he could still lodge a criminal complaint.

50. In decision U-IIIBi-2349/2013 of 10 January 2018, concerning the lack of an effective investigation into the complainant's alleged ill-treatment by police officers, the Constitutional Court ruled in the complainant's favour. It examined the case under Articles 3 and 14 of the Convention and found that the steps taken by the police and the State Attorney's Office had fallen short of the necessary procedural requirements. On the basis of the Constitutional Court's findings, the State Attorney's Office of the Republic of Croatia resumed its investigation into the applicant's complaint. A number of witnesses, including the complainant, were summoned for questioning in February 2018 (see *D.K. v. Croatia*, (dec.), no. 28416/14, §§ 31-33, 26 June 2018).

51. In decision U-IIIBi-886/2018 of 10 July 2018 the Constitutional Court examined a constitutional complaint concerning police ill-treatment and the lack of an effective investigation into the matter. Noting that an investigation was underway following the complainant's criminal complaint of 17 November 2017 regarding the conduct of police officers towards him, the Constitutional Court concluded that the procedural aspect of Article 3 of the Convention has not been violated.

Two Constitutional Court judges gave a dissenting opinion to that decision. They did not agree that the mere fact that the competent authorities were examining the complainant's criminal complaint meant that the investigation into his alleged ill-treatment by the police had been effective. They noted that on 20 August 2017 the complainant had explicitly told the deputy prosecutor and the investigating judge that police officers had beaten him up and had showed them the injuries inflicted on his torso.

When he had been taken to the police station the day before he had been examined by a doctor, who had reported that he did not have any injuries. It was therefore credible that he had sustained those injuries on 20 August 2017 while being held at the police station. The two judges further noted that instead of launching the investigation of their own motion immediately after learning of the complainant's credible assertion that he had been ill-treated, the competent authorities had only started investigating his allegations in November 2017, when he had filed a criminal complaint about the matter. At that point it had no longer been possible to examine the nature and origin of his injuries.

52. In decision U-IIIBi-1385/2018 of 18 December 2018 the Constitutional Court found that an investigation into the death of the complainants' six-year-old daughter and sister near the border with Serbia after an alleged pushback of the family by Croatian police officers had been effective. It found that the complainants had filed a criminal complaint in December 2017, and that the competent investigative authorities had then examined all possible leads and established that there was no reasonable suspicion that Croatian police officers had committed criminal offences against the complainants and the late child. The Constitutional Court found that the complainants' criminal complaint had been rejected within the statutory time-limit, and that the complainants had then taken over the prosecution. The complainants had had an effective remedy for their complaint concerning the ineffectiveness of the investigation; they could seek information from the competent State Attorney about the measures taken in relation to their criminal complaint, and had also been able to lodge a constitutional complaint, which had been examined.

Three Constitutional Court judges gave a dissenting opinion to that decision. They held that the examination of the effectiveness of the investigation into the death of a child should not have been reduced to mere procedural formalism. It had been crucial to establish whether the child had crossed the border and entered Croatian territory, and whether Croatian police officers had prevented her from seeking asylum by returning her to Serbia. The three judges noted, *inter alia*, that the investigating authorities had failed to take into account an important public statement by the Serbian authorities which had been in the case file, had not considered whether the critical event had been recorded on any kind of recording device and had failed to verify the location of the complainants and the police officers involved by using their mobile telephone signals.

53. In decision U-IIIBi-1066/2015 of 3 April 2019 the Constitutional Court examined the effectiveness of an investigation into the killing of the complainant's son in 1991 in Vukovar. After obtaining observations from the competent State Attorney's Office on the measures taken in the investigation, and reiterating the principles outlined in the case of *Milić and Others v. Croatia* (no. 38766/15, §§ 44-49, 25 January 2018), the

Constitutional Court concluded that in that particular case the investigation could not be considered ineffective. The relevant part of the Constitutional Court's decision reads:

> "The Constitutional Court firstly notes that the Croatian authorities are not responsible for the death of the complainant's son.
>
> ...
>
> In this particular case the Constitutional Court finds it undisputed that the complainant's son died on 20 November 1991 in circumstances which led the competent authorities to conduct a thorough and effective investigation in accordance with Article 21 of the Constitution.
>
> The Constitutional Court finds that the complainant's son died during the war on the territory initially occupied, which was until 15 January 1998 under the governance of the United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium ("the UNTAES") on the basis of the United Nations Security Council Resolution of 15 January 1996. Therefore, the Croatian authorities could only have exercised their power over that territory, including by conducting investigations, after 15 January 1998.
>
> It is undisputed that after a wide-ranging criminal inspection, the Ministry of Internal Affairs (*Ministarstvo unutarnjih poslova*) filed a criminal complaint on 21 September 1995 with the competent State Attorney's Office against two hundred and thirty-one perpetrators of different criminal offences, including the killing of forty-seven civilians captured at Vukovar Hospital, one of whom was the complainants' son. It is also undisputed that following the criminal complaint the State Attorney's Office launched an investigation against one hundred and ninety-eight individuals indicated in the criminal complaint, whose identities could be established, and that the competent court took certain investigative measures, ordered detention and issued arrest warrants against those individuals.
>
> It is also undisputed that after the investigation was completed the criminal proceedings were discontinued in respect of one hundred and eighty-eight individuals on the basis of the General Amnesty Act (*Zakon o općem oprostu*), for the criminal offence of armed rebellion covered by that Act. An indictment was lodged against the remaining accused individuals for war crimes, of which the complainant's son was also a victim.
>
> The Constitutional Court finds that the criminal proceedings were discontinued ... by a decision of 29 January 2004 ... The case file contains no evidence, and the complainant [does not state] in her constitutional complaint that she appealed against that decision...
>
> On the other hand, the investigation against the remaining suspects was continued for war crimes. During the investigation over two hundred and twenty individuals were questioned and the available documents were obtained. The investigation led to an indictment for war crimes. During the proceedings the competent authorities established cooperation with the International Criminal Court for Yugoslavia and the competent Serbian authorities.
>
> During the investigation no facts were established and no evidence was found to show that a particular individual or individuals were directly responsible for the death of the complainant's son. These circumstances can surely be explained by objective reasons, caused primarily due to the war situation, destruction of evidence by the perpetrators during the occupation of Vukovar and the removal of traces of crime

before the peaceful integration of Podunavlje, and the fact that the suspects were not available to the competent authorities and that there is an international arrest warrant issued against them.

The complainant did not set forth in her constitutional complaint any specific evidence or suggestions that the authorities could undertake to conduct an effective investigation, nor did she claim that any of the possible perpetrators were on Croatian territory.

The Constitutional Court notes that the suspects in the criminal proceedings in question are unavailable to the Croatian authorities and that the accused persons who live in Serbia and who have Serbian citizenship cannot be extradited (see *Nježić and Štimac v. Croatia*, no. 29823/13, § 45, 9 April 2015), and the Croatian authorities cannot be responsible for that. As to any obligation on Croatia to ask Serbia to prosecute the criminal offences in question, the Constitutional Court points out that criminal proceedings against twenty-four people have already been conducted in Serbia and that eight ... have been sentenced to imprisonment ranging from five to twenty years. In addition, three individuals were tried before the International Criminal Court for Yugoslavia for the murder of prisoners of war in Ovčara, and two ... were sentenced to ten and twenty years' imprisonment.

As to the possible perpetrators who have so far not been prosecuted, and who could be residing on Serbian territory, [it should be noted that] close family members of victims could file a criminal complaint with the Serbian Prosecutor for War Crimes, which is competent to deal with serious violations of international humanitarian law (ibid. § 44). Additionally, the complainant could have made enquiries with the Serbian authorities and made her complaints about their work, and could have also lodged an application with the Court against Serbia, if she considered that her Convention rights had been violated by that country (ibid, § 68).

In conclusion, the Constitutional Court finds that, regardless of the seriousness and sensitivity of the investigation and prosecution of war crimes, Article 21 of the Constitution obliges the State to perform this task effectively. However, having regard to all the circumstances of this particular case, particularly the fact that the investigation is still pending and that there are a large number of criminal proceedings pending before the Croatian courts for war crimes, the Constitutional Court considers that in this particular case, for the moment, there is no negligence or unwillingness on the part of the competent authorities to conduct an effective investigation into the death of the complainant's son under Article 21 of the Constitution and Article 2 of the Convention."

54. In decision U-IIIBi-863/2019 of 9 July 2019 the Constitutional Court examined the effectiveness of an investigation into an explosion which had occurred at the complainant's workplace in 2006 during which he had sustained life-threatening injuries. In that case the police drafted a report on the accident in 2006, but the competent authorities did not institute any criminal proceedings. In 2016 the complainant filed a criminal complaint against his company employer and two other individuals, which was eventually dismissed on the grounds that the prosecution had become time-barred in 2011. The Constitutional Court examined the complaint in the light of the principles outlined in the case of *Fergec v. Croatia* (no. 68516/14, §§ 21-22 and §§ 32-33, 9 May 2017). It found that the complainant could have sought protection both in the civil and criminal

courts. As he did not lodge his constitutional complaint until February 2019, the Constitutional Court held that it could not examine any failure of the competent authorities to conduct a criminal investigation between 2006, when the accident had occurred, and 2011, when the prosecution of the criminal offence had become time-barred. The complainant had not used any civil remedies for his situation, even though his employer's liability for the damage he had suffered could have been examined under tort law. The Constitutional Court concluded that the complainant, by not instituting civil proceedings for damages and by only filing a criminal complaint ten years after the date of the accident, when the prosecution had already become time-barred, had brought about a situation in which the authorities could no longer investigate the matter. It concluded that there had been no breach of the procedural aspect of Article 2 of the Convention.

55. In decision U-IIIBi-4222/2018 of 5 November 2019 the Constitutional Court accepted a constitutional complaint concerning the lack of an effective investigation into the killing of the complainants' family member, who in December 1991 had been taken from his home by members of the Croatian military police to a military prison, where he had died. His body had been taken to an unknown destination and was still missing. In their constitutional complaint the complainants alleged a violation of Article 6 of the Convention, but the Constitutional Court examined the complaint under the procedural scope of Article 2 of the Convention.

The Constitutional Court noted that the competent authorities had not made sufficient efforts to establish who had been the commander of the military prison in question. It further held that inexplicable delays after 2009, together with the overall length of the investigation, had compromised its effectiveness and could only have had a negative impact on the prospect of establishing the truth.

In addition to finding a violation of the procedural aspect of Article 2 of the Convention, the Constitutional Court awarded damages to the complainants. In particular, it held that in order for the complainants to stop being "victims" of a breach of Article 2 of the Convention, the national authorities also had to afford redress for the breach of the Convention. Taking into account the amounts in respect of non-pecuniary damage awarded to applicants in cases against Croatia in which the Court had found that investigations into war crimes had been ineffective, the Constitutional Court concluded that the total amount of some 9,300 euros (EUR) requested by the complainants in their constitutional complaint was adequate and in accordance with the standards established by the Court.

56. The applicants submitted five Constitutional Court decisions to the Court, which are not available on the Constitutional Court's website: U-III-1649/2012 of 13 June 2012, U-III-5365/2013 of 6 February 2014, U-III-4413/2014 of 19 November 2014, U-III-3427/2015 of 18 November 2015 and U-III-2725/2015 of 14 January 2016. Those decisions concerned

constitutional complaints which were lodged against civil court judgments dismissing claims against the State for compensation in respect of damage related to the violent deaths of the claimants' family members. The decisions indicate that in their constitutional complaints some complainants alleged a violation of Article 21 of the Constitution and Article 2 of the Convention (U-III-5365/2013 of 6 February 2014 and U-III-2725/2015 of 14 January 2016), some alleged a violation of Articles 21 and 29 of the Constitution and Articles 2 and 6 of the Convention (U-III-3427/2015 of 18 November 2015), and some alleged a violation of Article 29 of the Constitution and Article 6 of the Convention (U-III-1649/2012 of 13 June 2012 and U-III-4413/2014 of 19 November 2014). The Constitutional Court dismissed all those constitutional complaints as manifestly ill-founded, finding that the domestic civil courts' decisions were not arbitrary.

COMPLAINTS

57. The applicants alleged, in particular, that the procedural obligations incumbent on the respondent Government under Articles 2 and 14 of the Convention had not been met.

THE LAW

58. The applicants complained that the authorities had not taken appropriate and adequate steps to investigate the killing of N.K. and P.K and bring their killers to justice. They also submitted that N.K. and P.K. had been killed because they were Serbs and that the national authorities had failed to investigate that factor. They relied on Articles 2 and 14 of the Convention. The Court, being master of the characterisation to be given in law to the facts of the case, will examine this complaint under Article 2 of the Convention alone, the relevant part of which reads as follows:

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

A. The parties' arguments

1. The Government

59. The Government argued that the applicants had failed to exhaust the available domestic remedies for their complaint. First of all, they had failed to lodge a criminal complaint concerning the killing of N.K. and P.K. Furthermore, after they had learned that the police had filed a complaint, they should have become actively involved in the investigation by providing necessary information and possible leads to the competent authorities. The applicants had only contacted the prosecution authorities with a request for

damages. However, under the Court's case-law civil proceedings for damages were irrelevant for the State's procedural obligation under Article 2 of the Convention.

60. The Government further pointed out that the case-law of the Constitutional Court showed that a constitutional complaint was an effective domestic remedy that could be used for complaints concerning ineffective investigations under Articles 2 and 3 of the Convention.

61. The Government submitted that in December 2014 the Constitutional Court had introduced the special reference "U-IIIBi" to designate proceedings instituted by constitutional complaints alleging the lack of an effective investigation under Articles 2 and 3 of the Convention.

62. Since then, in decisions U-IIIBi-7367/2014 of 15 December 2015, U-IIIBi-2698/2016 of 14 December 2016, U-IIIBi-3699/2015 of 30 March 2017, U-IIIBi-1066/2015 of 3 April 2019 and U-IIIBi-4222/2018 of 5 November 2019, all available on the Constitutional Court's website, the Constitutional Court had examined on the merits constitutional complaints concerning ineffective investigations into war crimes under Article 2 of the Convention. It had also examined the effectiveness of investigations into other criminal offences, as was evident from decisions U-III-6559/2010 of 13 November 2014, U-IIIBi-369/2016 of 19 December 2017 and U-IIIBi-2349/2013 of 10 January 2018, all available on the Constitutional Court's website.

63. As to the Constitutional Court case-law relied on by the applicants (see paragraph 56 above and 69 below), the Government contended that the constitutional complaints lodged in those cases concerned civil proceedings for damages against the State and not the effectiveness of investigations under Articles 2 and 3 of the Convention.

64. In the Government's view, the clear and consistent case-law of the Constitutional Court demonstrated that if in their constitutional complaints people complained of ineffective investigations under Articles 2 or 3 of the Convention, the Constitutional Court would examine those complaints on the merits by applying the standards for an effective investigation developed in the Court's case-law.

65. Consequently, a constitutional complaint was clearly an effective domestic remedy for complaints concerning the procedural aspect of Articles 2 and 3 of the Convention, and the fact that the applicants had lodged their application with the Court without previously using that remedy meant that their complaint before the Court should be declared inadmissible for non-exhaustion of domestic remedies.

66. The Government also contended that the complaint had been lodged out of time and that, in any event, the investigation conducted had been effective and had not been discriminatory.

2. The applicants

67. The applicants submitted that the investigation into the killing of N.K. and P.K. had been ineffective, since in almost thirty years the authorities had not managed to establish any relevant facts.

68. The applicants contended that they had not had an effective domestic remedy for their complaint. In particular, the State had refused to reach a settlement on the payment of damages for the killing of N.K. and P.K. Instituting civil proceedings for damages against the State would have been futile since the domestic courts' practice on the matter was inconsistent, and they would only have ended up paying the costs of proceedings to the State, which would have imposed an excessive individual burden on them. The applicants pointed to two Supreme Court's decisions: Rev 1669/11-2 of 26 April 2016 and Rev-x 1050/16-2 of 8 March 2017, rendered in civil proceedings in which claims for damages against the State related to the death of the claimants' family members were dismissed as time-barred.

69. The applicants further argued that a constitutional complaint was not an effective domestic remedy for complaints concerning ineffective investigations under Article 2 of the Convention because the Constitutional Court either dismissed such complaints as unfounded, or declared them inadmissible. They relied on several Constitutional Court decisions in support of their argument: U-III-1649/2012 of 13 June 2012, U-III-5365/2013 of 6 February 2014, U-III-4413/2014 of 19 November 2014, U-III-3427/2015 of 18 November 2015 and U-III-2725/2015 of 14 January 2016 (see paragraph 56 above).

70. Lastly, the applicants submitted that they had constantly made enquiries with the investigating authorities regarding the progress of the investigation, and had lodged their application with the Court as soon as they had realised that the investigation was ineffective.

B. The Court's assessment

1. Preliminary remarks

71. Having regard to the parties' arguments (see paragraphs 59 and 68 above), the Court considers it important to note the following.

72. The applicants' relatives died as a result of gunshot wounds to the head and torso (see paragraph 7 above). The Court has consistently held that when individuals have been killed as a result of the use of force, the State is under an obligation to initiate and carry out an investigation which fulfils the procedural requirements of Article 2 (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 230, 30 March 2016, and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 169, 14 April 2015). Civil proceedings which lie at the initiative of the victim's relatives cannot satisfy the State's obligation in this regard (see, *mutatis mutandis*, *Paul and Audrey*

Edwards v. the United Kingdom, no. 46477/99, § 74, ECHR 2002‑II). This is because an action for damages, either to provide redress for the death or for the breach of official duty during the investigation, is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators, let alone establishing their responsibility (see *Narin v. Turkey*, no. 18907/02, § 47, 15 December 2009, and *Jelić v. Croatia*, no. 57856/11, § 64, 12 June 2014).

73. The Court further reiterates that as soon as the State authorities are informed of the death of a person in suspicious circumstances, regardless of the manner in which this happens, the State is required to conduct an effective official investigation. It cannot be left to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures, since the authorities must act of their own motion (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 111, ECHR 2005‑VII, and *Jelić*, cited above, § 61). In that connection, the Court has already held in cases concerning ill-treatment, where the State authorities also have an obligation to act of their own motion, that the rights of victims guaranteed by the domestic law on criminal procedure, such as, in the case of Croatia, the right to ask for information about the steps taken by a State Attorney in connection with the criminal complaint and to lodge a complaint with the higher State Attorney if the subordinate State Attorney has failed to adopt a decision on a criminal complaint within six months (see *Tadić v. Croatia*, no. 10633/15, §§ 32 and 43, 23 November 2017), and, for instance, the possibility of lodging a criminal complaint against the State officials involved in the criminal proceedings concerning the applicant's complaint of a violent attack by another individual (see *Remetin v. Croatia*, no. 29525/10, §§ 73-74, 11 December 2012), should not be understood as imposing an obligation on victims to use them in the context of the exhaustion of domestic remedies (ibid.).

74. In the present case, the authorities learned of the killing of the applicants' relatives on 6 February 1992, when it was reported to the Sisak police that the bodies of N.K. and P.K. had been found lying by the road, and when the autopsy carried out on 7 February 1992 indicated that they had been shot dead (see paragraphs 5 to 7 above).

75. The Court notes that on 10 February 1992 the Sisak police filed a criminal complaint against unknown perpetrators with the Sisak County State Attorney's Office, alleging that N.K. and P.K. had been murdered, and that a criminal investigation ensued, which the applicants considered ineffective (see paragraphs 8 to 35 and 57 above).

76. The question which needs to be examined in the present case is whether, as submitted by the Government, a constitutional complaint is an effective domestic remedy for complaints concerning ineffective

investigations, and whether the applicants were obliged to avail themselves of that remedy before lodging their application with the Court.

2. Whether a constitutional complaint is an effective domestic remedy for complaints concerning ineffective investigations under Articles 2 and 3 of the Convention

(a) General principles

77. The Court refers to the general principles on the requirement to exhaust domestic remedies set out in the case of *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69‑77, 25 March 2014).

78. The Court has consistently held that the principle of subsidiarity is one of the fundamental principles on which the Convention system is based. It means that the machinery for the protection of fundamental rights established by the Convention is subsidiary to the national systems safeguarding human rights (see *Vučković*, cited above, § 69, and *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, § 26, 4 June 2013).

79. The Court reiterates that the purpose of the exhaustion rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Accordingly, this rule requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Yet, the rule is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that the domestic system provides an effective remedy in respect of the alleged violation (see *Vučković*, cited above, §§ 69 and 70, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000‑XI).

80. In that connection, the burden of proof is primarily on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Vučković*, cited above, §§ 71, 74 and 77; *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-69, *Reports of Judgments and Decisions* 1996-IV; and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

81. Nevertheless, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see *Vučković*, § 73, and *Akdivar and Others*, § 67, both cited above). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Vučković*, cited above, § 74, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001‑IX).

(b) Application of the principles to the present case

82. The Court notes that the Convention forms an integral part of the Croatian legal system, where it takes precedence over domestic legislation (Article 134 of the Constitution, see above paragraph 36) and is directly applicable (section 5 of the Courts Act, see paragraph 38 above).

83. The Constitutional Court has already held that rights guaranteed in the Convention and its Protocols are also to be considered constitutional rights, having legal force equal to the provisions of the Constitution (see paragraph 40 above), and has thus recognised its competence to examine alleged violations of the Convention.

84. Under section 62 of the Constitutional Court Act, anyone who considers that his or her rights, as guaranteed by the Constitution, have been infringed by a decision of a State or public authority concerning any of his or her rights or obligations may lodge a constitutional complaint against that decision (see paragraph 38 above), it being understood that the right to life is guaranteed by the Croatian Constitution (see paragraph 37 above; see also, *mutatis mutandis*, *Ljaskaj v. Croatia*, no. 58630/11, § 48, 20 December 2016). Under section 63 of the Constitutional Court Act, one may lodge a constitutional complaint even before all legal remedies have been exhausted if the relevant court has failed to decide within a reasonable time on his or her rights or obligations or if the contested decision grossly violates constitutional rights and it is completely clear that the complainant will face serious and irreparable consequences if Constitutional Court proceedings are not instituted (see paragraph 38 above).

85. In cases concerning Croatia, the Court has consistently held that in order to satisfy the requirement of exhaustion of domestic remedies, and in conformity with the principle of subsidiarity, applicants are required, before bringing their complaints to the Court, to afford the Croatian Constitutional Court the opportunity of remedying their situation and addressing the issues they wish to bring before the Court (see, for example, *Bučkal v. Croatia*

(dec.), no. 29597/10, § 20, 3 April 2012; *Longin v. Croatia*, no. 49268/10, § 36, 6 November 2012; and *Muršić*, cited above, § 81).

86. In cases against Croatia concerning the procedural aspect of Articles 2, 3 and 8 of the Convention, the Court, noting the inconclusive practice of the Constitutional Court as regards the admissibility of complaints concerning ineffective investigations, did not hold it against the applicants if they had afforded the Constitutional Court the opportunity to remedy the alleged failures (see *Bajić v. Croatia*, no. 41108/10, § 69, 13 November 2012 and *Remetin v. Croatia*, no. 29525/10, § 84, 11 December 2012), or if they had not turned to the Constitutional Court before lodging their application with the Court (see *Škorjanec v. Croatia*, no. 25536/14, § 48, 28 March 2017).

87. It has held – without intending to question the power of the Constitutional Court to interpret the criteria for assessing the admissibility of constitutional complaints and the resultant practice that certain decisions are not amenable to constitutional review – that applicants who had lodged their constitutional complaints had acted neither unreasonably nor contrary to the wording of section 62 of the Constitutional Court Act (see *Bajić*, §§ 68 and 69, and *Remetin*, §§ 83 and 84, both cited above). To hold that a constitutional complaint did not need to be pursued simply because, at the time, the Constitutional Court's practice suggested that the effectiveness of investigations was not amenable to constitutional review would not only disregard the fact that such practice might evolve (see *Pavlović and Others v. Croatia*, no. 13274/11, § 36, 2 April 2015). More importantly, it would remove any incentive for such evolution, as applicants would systematically address their complaints to the Court without giving the Constitutional Court a chance to change its practice. This would be contrary to the principle of subsidiarity (see, *mutatis mutandis*, *Vrtar v. Croatia*, no. 39380/13, § 76, 7 January 2016).

88. In the present case, the Government argued that the Constitutional Court's case-law developed after November 2014 demonstrated that the constitutional complaint had become an effective domestic remedy for complaints concerning ineffective investigations under Articles 2 and 3 of the Convention.

89. In that connection, the Court notes that in decision U-III-6559/2010 of 13 November 2014 the Constitutional Court, referring to the standards of effective investigation developed in the Court's case-law, accepted a constitutional complaint concerning the lack of an effective investigation into the complainant's alleged ill-treatment. In addition to finding a violation of the procedural aspect of Article 3 of the Convention, the court awarded damages to the complainant and ordered the State Attorney's Office of the Republic of Croatia to conduct an effective investigation into the alleged ill-treatment. On the Constitutional Court's website it is indicated that by the decision in question its case-law had been aligned with

the Court's case-law under Article 3 of the Convention (see paragraph 45 above).

90. The Court further notes the change to the Constitutional Court Rules on 23 December 2014, namely the introduction of the special reference "U-IIIBi" to designate proceedings instituted by constitutional complaints alleging the lack of an effective investigation under Articles 2 and 3 of the Convention (see paragraph 40 above).

91. The Court notes that since 15 December 2015 the Constitutional Court has examined on the merits eleven constitutional complaints alleging the lack of an effective investigation under Articles 2 and 3 of the Convention (see paragraphs 46 to 55 above). The investigations examined by the Constitutional Court in those decisions are not the subject of the Court's scrutiny in the present case. However, the Court must have regard to the Constitutional Court's analysis of the effectiveness of those investigations in order to examine whether a constitutional complaint is an effective remedy.

92. In that connection, the Court is of the view that before April 2019 it could not have been said with sufficient certainty that the Constitutional Court effectively examined investigations. It can be seen from the decisions cited above (see paragraphs 47 to 48 and 51 to 52) that the Constitutional Court's analysis in the majority of its decisions prior to April 2019 consisted of establishing that the competent prosecutor was taking various investigative measures following a criminal complaint, of which the complainants were or were not informed, and of a conclusion that the investigation in the case in question could not be considered ineffective. As stated above, the investigations in question are not the subject of the Court's scrutiny in the present case. However, the Court notes that the Constitutional Court's analysis of the effectiveness of those investigations did not refer to any particular circumstances of case, and appeared to sometimes disregard serious deficiencies in investigations, as highlighted by several Constitutional Court judges in their dissenting opinions given to those decisions (see paragraphs 51 and 52 above).

93. On the other hand, the Court notes that the most recent Constitutional Court decisions on the matter, those of 3 April, 9 July and 5 November 2019, demonstrate that the Constitutional Court consistently and effectively examined the investigations (see paragraphs 53-55 above). Indeed, the criteria extensively implemented by the Constitutional Court in assessing whether or not the investigations in those cases had been effective seems compatible with those identified by the Court. The Court welcomes this development in the Constitutional Court's case-law (see paragraph 87 above).

94. The Court now turns to the Constitutional Court decisions relied on by the applicants in support of their argument that a constitutional complaint was not an effective remedy for complaints concerning ineffective

investigations (see paragraphs 56 and 69 above). Those five decisions, which are not available on the Constitutional Court's website, concern constitutional complaints lodged against civil court judgments dismissing claims against the State for compensation for the violent death of the claimants' family members. Two of them alleged a violation of Article 21 of the Constitution and Article 2 of the Convention (U-III-5365/2013 of 6 February 2014 and U-III-2725/2015 of 14 January 2016), one alleged a violation of Articles 21 and 29 of the Constitution and Articles 2 and 6 of the Convention (U-III-3427/2015 of 18 November 2015) and two alleged a violation of Article 29 of the Constitution and Article 6 of the Convention (U-III-1649/2012 of 13 June 2012 and U-III-4413/2014 of 19 November 2014). The Constitutional Court dismissed all those constitutional complaints as manifestly ill-founded, finding that the domestic civil courts' decisions were not arbitrary.

95. Since the parties did not submit copies of the constitutional complaints lodged in those cases, the Court cannot verify whether the complainants, apart from some of them formally relying on Article 21 of the Constitution and Article 2 of the Convention, actually complained that the State had failed to comply with its procedural obligation as regards the violent death of their family members. The fact that a person had set forth a complaint concerning a breach of the procedural aspect of Article 2 of the Convention in a constitutional complaint concerning the domestic courts' decisions rendered in civil proceedings for damages related to the violent death of his or her family member should not prevent the Constitutional Court from examining it in the light of the principles developed under the procedural scope of Article 2 of the Convention.

96. In any event, even assuming that the complainants in the Constitutional Court cases at issue complained of a breach of the procedural obligation of the State as regards the death of their family members, the Court notes that the decisions were issued before January 2016. The Court accepts that this may have been a transitional period during which the Constitutional Court, which only started to examine such complaints on the merits in November 2014 (see paragraph 45 above), was consolidating its case-law on the admissibility of complaints concerning ineffective investigations under Articles 2 and 3 of the Convention. The fact remains that since January 2016 at the latest the Constitutional Court has consistently reviewed investigations (see paragraph 48-55 above).

97. The Court further notes that the Constitutional Court's decisions have a binding effect and that the domestic authorities are obliged to implement them in matters of their competence (see paragraph 38 above). In this connection, the Court observes that in the decision of 13 November 2014 the Constitutional Court, in addition to finding a violation of the procedural aspect of Article 3 of the Convention, awarded damages to the complainant and ordered the competent prosecutor to

conduct an effective investigation into the alleged ill-treatment (see paragraph 45 above). It further notes that following a favourable Constitutional Court decision of 10 January 2018, duly addressing the central issues of the complainant's arguments and finding a breach of the procedural obligation under Article 3 taken in conjunction with Article 14 of the Convention, the competent prosecutor resumed an investigation into the complainant's allegations (see paragraph 50 above). It lastly notes that in its decision of 5 November 2019 the Constitutional Court, in addition to finding a violation of the procedural aspect of Article 2 of the Convention in a war crime case, awarded damages to the complainants (see paragraph 55 above). The Court has no reason to doubt that following that decision the competent prosecutor's office will resume an investigation into the victim's killing, having regard to the Constitutional Court's observations on the deficiencies in that particular investigation. The Court is therefore satisfied that a constitutional complaint is capable of providing redress in respect of complaints concerning ineffective investigations.

98. With regard to the applicants' argument about the ineffectiveness of constitutional complaints in view of the fact that the Constitutional Court usually dismisses them as unfounded (see paragraph 69 above), the Court is of the view that, having regard to the Constitutional Court's latest decisions extensively implementing the criteria established by the Court in assessing whether or not an investigation was effective, there is no reason to doubt its diligence. The Court reiterates that the existence of mere doubts as to the prospects of success of a constitutional complaint which is not obviously futile is not a valid reason for failing to use that remedy (see paragraph 81 above). Indeed, the Court reiterates, as it has done in many other contexts, that before bringing complaints against Croatia to it, in order to comply with the principle of subsidiarity the applicants are in principle required to afford the Constitutional Court, as the highest court in Croatia, the opportunity to remedy their situation (see *Pavlović and Others*, cited above, § 32).

99. In the light of the above observations the Court considers that, after a period of adaptation which followed after the Constitutional Court's first decision on the matter (see paragraph 45 above), a constitutional complaint, as examined by the Constitutional Court's decisions of April, July and November 2019, now provides the parties with the possibility to have the effectiveness of investigations under Articles 2 and 3 of the Convention examined in the light of the principles developed by the Court. The Government have, accordingly, met the burden incumbent on them to prove the effectiveness of the remedy in theory and practice.

3. Whether the applicants should have lodged a constitutional complaint before bringing their case before the Court

100. The Court notes that the applicants in the present case did not lodge a constitutional complaint. It is true that they introduced their application

with the Court on 29 September 2017, whereas, according to the Court's assessment, a constitutional complaint became an effective remedy only in 2019 (see paragraph 99 above). The question therefore arises whether under Article 35 § 1 of the Convention applicants should be required to have availed themselves of this remedy before the Court examines their complaint.

101. Indeed, the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V, and *Brusco*, cited above). In particular, the Court has previously departed from this general rule in cases against, for example, Italy, Croatia and Slovakia concerning remedies against the excessive length of proceedings (see *Brusco*, cited above; *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002‑VIII; and *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, ECHR 2002-IX); concerning a new compensation remedy for internally displaced people who had been denied access to their possessions in their villages (see *İçyer v. Turkey* ((dec.) no. 18888/02, ECHR 2006-I); and concerning a new remedy for deprivation of property in northern Cyprus (see *Demopoulos and Others v. Turkey* ((dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010). The remedies under consideration were introduced to redress at domestic level the Convention grievances of people whose applications pending before the Court concerned similar issues.

102. Giving weight to the subsidiary character of its role, the Court considers that this exception also applies in the present case.

103. From a general point of view, the Court reiterates that in States which do not provide an effective remedy for alleged violations of the Convention, individuals will systematically be forced to refer complaints to the Court that would otherwise, and in the Court's opinion more appropriately, be addressed in the first place within the national legal system. In the long term, such a situation is likely to affect the operation at both national and international level, of the system of human rights protection set up by the Convention (see *Kudła*, cited above, § 155).

104. Over the years the Court has examined dozens of applications against Croatia alleging the lack of an effective investigation under Articles 2 and 3 of the Convention. The Constitutional Court, after many years of not examining such grievances, revised and consolidated its practice and now exercises a review of the effectiveness of investigations, taking the Court's case-law as the basis for its assessment (see paragraph 99 above).

105. Under these circumstances, the Court considers that the applicants should be required by Article 35 § 1 of the Convention to have recourse to a constitutional complaint. It finds no exceptional circumstances capable of exempting them from this obligation (see paragraphs 80 and 81 above). In particular, it does not appear that there is an administrative practice in Croatia consisting of a repetition of acts incompatible with the Convention and no official tolerance by the State authorities has been shown to exist which would be of such a nature as to make proceedings futile or ineffective. In that connection, as regards investigation into war crimes, in the case of *Nježić and Štimac v. Croatia* (no. 29823/13, § 72, 9 April 2015), the Court acknowledged that the prosecution authorities did not remain passive and that significant efforts had been made to prosecute war crimes. In particular, by 31 December 2012 the prosecution authorities had opened investigations in respect of a total of 3,436 alleged perpetrators, and there had been 557 convictions (see also *Trivkanović v. Croatia*, no. 12986/13, § 82, 6 July 2017). In the case of *Borojević and Others v. Croatia* (no. 70273/11, § 63, 4 April 2017), the Court held that, having regard to the overall investigation into the crimes committed during the war in Croatia in the broader Sisak area and the conviction of V.M., it could not be said that the domestic authorities had failed to discharge their procedural obligation under Article 2 of the Convention (see also *Trivkanović*, cited above, § 83).

106. The Court further notes that the investigation into the death of the applicants' relatives is still pending (see paragraph 36 above) and that the possibility to lodge a constitutional complaint still appears to be open to the applicants. It is therefore open to them, if they so wish, to lodge a constitutional complaint with the Constitutional Court, it being understood that the period during which the proceedings were pending before the Court should not be held against them.

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

108. Lastly, the Court notes that the principles regarding the procedural obligation to investigate under Article 2, outlined above, apply similarly to the procedural obligation to investigate under other Articles of the Convention (see, for instance, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 107, 5 July 2016; *Tadić v. Croatia*, no. 10633/15, § 66, 23 November 2017; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 288, ECHR 2010 (extracts); *M.C. v. Bulgaria*, no. 39272/98, § 153, ECHR 2003-XII; and *Remetin*, cited above, § 96). It is therefore open to the Croatian Constitutional Court to examine with the same scrutiny complaints concerning the failure of the Croatian authorities to comply with their

procedural obligation under other relevant Articles of the Convention, and not just Articles 2 and 3.

109. Against the above background, the Court upholds the Government's objection. The applicants' complaint under Article 2 of the Convention must be therefore rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 16 January 2020.

Abel Campos Registrar	Krzysztof Wojtyczek President

Appendix

No.	Applicant's Name	Birth date	Nationality	Place of residence
1	Zdravka KUŠIĆ	14/06/1958	Serbian	Kragujevac
2	Bojan KUŠIĆ	25/03/1987	Serbian	Kragujevac
3	Martina KUŠIĆ	25/11/1990	Serbian	Kragujevac