



Humanitarian Law Center

# Circumventing Justice:

The Statute of Limitations as a Mechanism for  
Denying War Victims the Right to Compensation







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## Acronyms and Abbreviations used in the text

<b>HLC</b>	Humanitarian Law Center
<b>LCT</b>	Law on Contracts and Torts
<b>CPA</b>	Civil Procedure Act
<b>SLA</b>	Statute of Limitation Act
<b>RS</b>	Republic of Serbia
<b>MUP</b>	Ministry of the Interior
<b>VS</b>	Army of the Republic of Serbia
<b>ECtHR</b>	European Court of Human Rights



## Summary

The Republic of Serbia participated in all the armed conflicts that took place in the territory of the former Yugoslavia during the last decade of the twentieth century. A large number of people died, or disappeared, or became refugees, and very many suffered enormous material and non-pecuniary damage as a result of these conflicts.

The obligation of the Republic of Serbia to provide just compensation to victims<sup>1</sup> of human rights violations arises not only from the substantial provisions of the Serbian Constitution and domestic regulations but also from the international conventions that Serbia has ratified.

The right to claim reparations through court proceedings against the Republic of Serbia is set out in Article 35 §2 of the Constitution of the Republic of Serbia<sup>2</sup> and Articles 172 §1<sup>3</sup> and 180 §1<sup>4</sup> of the Law on Contracts and Torts.

The obligation of states to provide compensation to victims of human rights violations is also enshrined in the international conventions that the Republic of Serbia has ratified, such as the International Covenant on Civil and Political Rights,<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination,<sup>6</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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- 1 "The term 'victim' denotes a person who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights, through acts or omissions that constitute grave violations of international human rights law or serious violations of international humanitarian law. The term 'victim' also includes, where applicable, the immediate family or dependents of the direct victim. and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization", *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*, United Nations General Assembly resolution 60/147 of 16 December 2005.
- 2 "Everyone shall have the right to compensation of material or non-material damage inflicted on him/her/they by the unlawful or irregular activity of a state body, entities exercising public powers, bodies of an autonomous province or a local self-government unit."
- 3 "A legal person shall be liable for damage caused by its members or branches to a third person in performing or in connection to performing its functions."
- 4 "A State whose agencies, in conformity to existing regulations, were bound to prevent injury or loss, shall be liable for loss due to death, bodily injury or damaging or destroying property of an individual due to acts of violence or terror, as well as in the course of street demonstrations and public events."
- 5 Articles 2 and 9 of the International Covenant on Civil and Political Rights (Official Gazette of the SFRY – International Treaties, no. 7/71)
- 6 Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette of the SFRY – International Treaties, no. 31/67)



Punishment,<sup>7</sup> UN Convention on the Rights of the Child,<sup>8</sup> and European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>9</sup>

Also, international bodies have developed an extensive case-law pertaining to the guaranteed right to redress.<sup>10</sup>

In spite of the existence of clear provisions of both domestic and international law and the well-established case-law of international bodies, victims in Serbia find it virtually impossible to enforce their right to reparations before the domestic courts. The difficulties victims face in the process are varied. The standard of proof is set too high, court proceedings drag on for several years, courts do not believe the victims and their evidence, to name just a few.

Provisions governing statutory-limitation periods for filing compensation claims - or rather, the way Serbian judges interpret them, is one of the major obstacles faced by victims.

Section IV of the United Nations General Assembly Resolution on the basic principles and guidelines on the right to a remedy and reparation for victims of gross human rights violations,<sup>11</sup> which is concerned with statutes of limitation, stipulates as follows: "Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law". When it comes to domestic courts, it seems that these provisions have no legal value for them, as they continue to apply time limits for claiming compensation restrictively and contrary to the very meaning and content of these provisions.

The inconsistent practice of domestic courts is another major difficulty faced by victims asserting their right to compensation. For several decades, the Serbian judiciary has been incapable of adequately resolving a number of questions which have arisen in practice, the most important ones being the following:

7 Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette of the SFRY – International Treaties, no. 9/91).

8 Article 39 of the UN Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, nos. 15/90 and 2/97; Official Gazette of the FRJ no. 7/02).

9 Articles 13 and 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the SaM – International Treaties, no. 9/03).

10 See e.g.: *Cyprus v. Turkey*, application no. 25781/94, judgment of 10 May 2001; *Hajrizi Dzemail et al. v. Yugoslavia*, Comm. No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000, 2 December 2002; *Maria del Carmen Almeida de Quinteros et al. v. Uruguay*, UN, Com. No. 107/1981, U.N. Doc. CCPR/C/OP/2, 21 July 1983.

11 Resolution 60/147, 16 December 2005.





- Is the longer statutory limitation period, which is provided for claims for compensation for damage caused by a criminal offence, applicable only in respect of the wrongdoer, or also in respect of the person responsible for the wrongdoer's acts?
- How are the provisions governing the interruption and suspension of limitation period to be applied where the damage was caused by a criminal offence?
- Is the civil court authorised, in order to apply the "privileged" limitation period, to decide the question of the existence of a criminal act as a preliminary question?

And this list of vexed questions is by no means complete.

In drafting this report, the Humanitarian Law Center (HLC) has relied on a considerable amount of documents held in its own archive, namely court rulings and decisions handed down in compensation lawsuits against the Republic of Serbia that the HLC filed on behalf of injured parties.

Also, the HLC has requested and obtained over 30 decisions of the Court of Appeal in Belgrade under the Law on Free Access to Information of Public Importance and these decisions are also analysed in the report. The Court of Appeal in Belgrade, as the court of second instance, in the majority of cases decided on appeals lodged against first-instance judgments of basic courts in Belgrade or the Higher Court in Belgrade.

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A rich body of case-law available from the on-line legal bases of the Constitutional Court, Supreme Court of Cassation and Court of Appeal in Belgrade was also used as a source of information for the present report.

In addition to revealing that Serbian courts act inconsistently in handling compensation claims, this report points out the marked tendency of the domestic judiciary to interpret statute of limitations rules in a manner that leads to the denial of the right to compensation for the victims of gross violations of human rights, by ruling their right to compensation time-barred. Such an arbitrary application of the statute of limitations for bringing compensation claims works against the interests of the victims and amounts to a grave violation of the right to a fair trial guaranteed by both domestic and international regulations.





# I. Introduction

## i. Socio-Political Context

During the armed conflicts that were waged on the territory of the former Yugoslavia from 1991 to 2001, over 130,000 people were killed, about 4.5 million people were driven from their homes or became displaced, and tens of thousands disappeared, of whom 10,000 are still unaccounted for. During and in the aftermath of the conflicts in Croatia and BiH, more than half a million people from these two countries fled to Serbia. Also, around 200,000 internally displaced persons from Kosovo were taken in by Serbia, as a result of which Serbia became the country hosting the highest number of refugees in Europe, and one of the five countries worldwide most affected by the protracted refugee crisis.<sup>12</sup>

Serbia actively participated in all the conflicts and was involved in numerous crimes that were committed on the territory of the former Yugoslavia at the time. As a consequence, a large number of its military, police and political officials have been convicted of gross violations of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia (ICTY).

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As for the domestic trials, on the other hand, which are conducted by the War Crimes Department of the Higher Court in Belgrade, they are characterised by an absence of final convictions for offenders and by the non-prosecution of high-ranking military and police officials. This shows that the state endeavours to escape responsibility for crimes committed by its bodies.

The absence of final judgments is not unique to criminal proceedings. Victims are not able to realise their right to reparations through civil proceedings either. By imposing an undue burden of proof on the victims, disbelieving victims' testimonies and evidence, awarding them too low compensations, minimising the role and responsibility of the state bodies, and interpreting provisions on the statute of limitations for compensation claims in a manner that works against the interests of victims, the state clearly demonstrates its unwillingness to accept its responsibility for past crimes.

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12 See HLC report *Victims' Right to Reparation in Serbia and the European Court of Human Rights Standards 2014/2015*, 2016, p 5.



## ii. Limitation Periods Applicable to Compensation Claims

Limitation periods for compensation claims are set forth in Articles 376 and 377 of the Law on Contracts and Torts (LCT).

The limitation period for filing a compensation claim for damages expires three years after the date on which the party sustaining the damage first knew the damage had occurred and the identity of the person who caused the damage;<sup>13</sup> in any event, however, the period expires five years from the date on which the damage occurred.<sup>14</sup> The LCT also provides for a so-called “privileged” limitation period, which enables the damaged party, where the damage was the result of a criminal act, to claim compensation within the time limits prescribed for instituting prosecution of that criminal act.<sup>15</sup>

For determining the moment when damage occurred, it is not enough to know that damage occurred but also to know the type and full extent of the damage, and when its harmful effects developed into a permanent condition or took their final shape.<sup>16</sup>

In addition to domestic regulations, the UN Resolution on 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<sup>17</sup> is of relevance to this matter. **Section IV** of this document, which governs statutory limitation periods, is worded as follows: “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”

13 Article 376, § 1 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

14 Article 376, § 2 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

15 Where the damage is caused by a criminal offence for the prosecution of which a longer limitation period is stipulated, the time limit for bringing a compensation claim against the person liable shall expire upon the expiration of the limitation period prescribed for the criminal prosecution of the offence in question. Interruption of the running of the period of time set forth in a statute of limitations for criminal prosecution necessarily results in the suspension of the running of the period of time set forth in a statute of limitations for compensation claims. The same applies to suspension.”

16 See: judgments Rev-260/05 and Rev-751/01 of the Supreme Court of Serbia and Decision Gž-187/05 of the District Court in Čačak.

17 UN Resolution 60/147 of 16 December 2005.



### **iii. Statute of Limitations: The practice of Courts and the Position of Victims**

The legal norms that regulate the statute of limitations in respect of compensation claims are rather clear. However, the manner in which the courts apply and interpret these norms and rule differently in the same legal situations has provoked a great deal of controversy. Because of all this, the courts' case-law on this issue is characterised by lack of consistency and a restrictive, arbitrary and mechanical application of the law.

As shown in this report, in virtually all situations the provisions regarding the statute of limitations for compensation claims have been applied by the courts in such a way as to deny the victims their right to obtain compensation. The courts invariably fail to take into account the fact that the damage sustained by victims was the result of armed conflicts and criminal acts, which per se require application of the so-called "privileged" time limit, if not being completely exempt from any statute of limitations, as is set forth in the UN Basic Principles. Also, the courts pay no attention to the fact that the wars in the former Yugoslavia made it impossible for victims resident in other former-Yugoslav republics to exercise their right to issue proceedings before the courts in Serbia during the last two decades of the 20th century.

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Moreover, all ambiguities regarding the statute of limitations (its application, when the limitation period begins to run, interruption and suspension of limitation periods, etc.) are interpreted differently by domestic courts and in most cases against the interests of the victims. As a consequence of such an approach, the practice of the courts in Serbia is inconsistent and unpredictable. All this might lead to the conclusion, which cannot altogether be ruled out, that the judges purposely interpret the limitation provisions restrictively to prevent victims from realising their right to reparations. And in doing so, they jeopardise their right to a fair trial guaranteed by both domestic and international regulations.

Thus far, the HLC has represented over 1,000 victims of torture in custody, forced conscription, torture in detention camps in Serbia, enforced disappearance, war crimes against civilians and the like, in civil actions against the Republic of Serbia.

In a considerable number of these cases, the domestic courts have held that the victims' claims were unfounded as a result of being time-barred, because they were submitted outside the general limitation period of three years and/or the period of five years from the date on which the damage occurred. Furthermore, although in most of the cases the damage was the result of a criminal offence, courts have found that no



grounds existed to apply the “privileged” limitation period, because the perpetrators of the offences giving rise to the damage had not been finally convicted.

However, in 1999 a domestic court departed from the rule that “privileged” time limits do not apply to cases where there has not been a final criminal conviction. In a case involving former JNA members, the Civil Law Department of the Supreme Court of Serbia found that “the damage suffered by former members of the former JNA (death, injuries) during armed clashes with the paramilitary forces of other republics of the former SFRY, before their independence was internationally recognized by the UN General Assembly on 22 May 1992, is the result of the criminal offence of an armed rebellion under Article 124 of the Criminal Code of the SFRY. The time limit for claiming compensation therefore is the same as the statutory time limit for the prosecution of the act concerned, which is 15 years (Article 377, para. 1 of the LCT)”.

It was only after an intervention by the Constitutional Court that the domestic courts abandoned the practice grounded on the standpoint that the “privileged” limitation period is applicable only to cases where compensation is sought from the direct perpetrator of a criminal offence (e.g. members of the military and police who committed the crimes), and not to cases where compensation is sought from the entity responsible for them, i.e. the state on whose behalf they acted when committing the crimes.

These are just a few examples of domestic courts’ inconsistent and arbitrary application of the law. The aim of this report is to inform the public not only of the inconsistent application of the provisions governing the statute of limitations for compensation claims by the courts, but also of their tendency to interpret and apply these norms in a manner detrimental to the victims, thus creating a great deal of legal uncertainty within the legal system of the Republic of Serbia.



## II. Time Limits for Commencing a Civil Action for Damages

The LCT provides for three types of limitation period:

- Limitation period for bringing a civil action founded on tort<sup>18</sup>
- Limitation period for bringing a civil action founded on breach of contractual obligations<sup>19</sup>
- Limitation period for bringing a civil action founded of criminally inflicted damage.<sup>20</sup>

Different limitation periods apply depending on the type of damage giving rise to the alleged liability.

The LCT draws a distinction between material and non-material damage claims. The former are defined with precision by a provision which stipulates that a claim relating to material damage accrues at the moment of the occurrence of the damage,<sup>21</sup> whereas the section governing the latter is not so specific when it comes to establishing the moment when a claim accrues. Nevertheless, there are no excusable reasons to justify non-application of this norm where non-material damage is concerned, provided that there is a consensus of opinion that damage can occur either simultaneously with the wrongful act which caused it, or subsequent to it, after the act took place.

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Consensus on this matter was achieved a long time ago in the courts' jurisprudence, and the above norm had been complied with for many years. In cases where the damage and the wrongful act do not occur simultaneously, the claim accrues at the moment of the occurrence of the damage.<sup>22</sup> It is from that moment that the limitation period, known as the objective or absolute statute of limitations, begins to run. Within this objective time limit, another time limit, known as the subjective or relative time limit, runs and is applicable to each individual case. More precisely, the objective time limit serves to limit the running of the subjective time limit, if the latter would expire after the former had expired.

18 Article 376, § 1-2 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

19 Article 376, § 3, LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

20 Article 377 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

21 Article 186 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

22 See: Serbian Supreme Court, judgments Rev-1025/01, Prev - 82/00, Rev - 1313/00 and Rev - 260/05.



The period of limitation begins to run on the first day following the day on which the creditor became entitled to request fulfilment of the obligation, unless otherwise provided by law for specific cases,<sup>23</sup> and expires after the expiration of the last day of the period specified by the statute.<sup>24</sup>

## **i. General Limitation Period Applicable to Claims for Damages**

### **a. General Principles**

A claim for damages sustained becomes time-barred three years from the moment the party who sustained the damage first knew that the damage had occurred and the identity of the person who caused it;<sup>25</sup> and in any event, such a claim becomes time-barred five years after the date on which the damage occurred.<sup>26</sup>

Given the above-mentioned consensus of opinion that the occurrence of a wrongful act does not necessarily coincide with the occurrence of the damage and that the compensation claim accrues at the date of the occurrence of the damage rather than the date of the occurrence of the wrongful act, it is the task of the courts to establish when the damage occurred.

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In order to do so, it is not enough that the injured party know that the damage has occurred. It is also necessary that s/he know the type and full extent of the damage s/he sustained - that is, the time that the harmful effect became a permanent condition.<sup>27</sup>

Different limitation periods for claiming different types of non-material damaged are defined in the case-law of the highest courts as follows:

“The time limits for filing compensation claims in respect of non-material damage begin to run as follows: for suffering physical pain, from the moment the pain has stopped; for suffering fear, from the moment the fear has stopped; for suffering emotional distress due to an impairment of daily living activities, from the date on which the claimant first knew that his daily living activities

23 Article 361, § 1 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

24 Article 362 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

25 Article 376, § 1, LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

26 Article 376, § 2, LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FR Y no. 31/93).

27 See: Serbian Supreme Court Judgments Rev-260/05 and Rev-751/01; Decision of the District Court in Čačak Gž-187/05.





and his health had been permanently impaired, or from the date he first knew of the existence of a new, more severe after-effect.”<sup>28</sup>

As the above-cited opinion was followed in a large number of decisions of ordinary courts, it allows one to infer that the judiciary had agreed on a uniform stance on how to establish the moment of the occurrence of damage, that is, the moment the statute of limitations clock starts ticking.<sup>29</sup> **More precisely, the opinion of the courts was premised on the opinion that the objective, five-year time limit begins to run at the moment the injured party’s condition is consolidated in all respects** (physical pain, fear, emotional distress as a consequence of diminished activities of daily living), **whereas the subjective, three-year time limit, which runs parallel**

28 See ruling of the Supreme Court of Serbia Rev-1427/05.

29 “...the limitation period for the claim based upon tort begins to run from the moment the injured party knows of the damage and about the identity of the person who caused it. The term “damage” in this context implies the full extent of damage too. Where damage has occurred but its extent is not yet known (percent and manifestations of diminishment of daily living activities which are getting worse over time), because this is something that could not be determined at the time it occurred, but only the degree of bodily harm has been. **(excerpt from judgment Rev II-257/06 of the Supreme Court of Serbia)**, “...the determination of the degree of the damage suffered by the plaintiff is arrived at by a medical expert at the moment of the completion of the medical treatment, not at the moment of the receipt of the decision establishing the percentage of disability in the plaintiff” **(excerpt from ruling Gž-543/04 of the District Court in Čačak)**. “...The limitation period in respect of mental illnesses, where the outcome of medical treatment is uncertain and the treatment may even be life-long, commences at the moment the illness has manifested itself in its definite form. In the instant case, it is the day on which the medical expert provided his opinion and findings, for it is on that day that the plaintiff first had knowledge of the degree of damage, that is, the percentage by which his daily living activities were impaired, and neither the subjective nor objective time limits specified in Article 376 of the Obligations Act have passed as measured from that day” **(excerpts from judgments Gž-627/10 and Gž-1960/10 of the Court of Appeal in Belgrade)**. “The limitation period in respect of a compensation claim for non-material damage begins to run from the date on which the condition was consolidated in all of these elements” **(excerpt from judgment Gž1-6393/10 of the Court of Appeal in Belgrade)**. “The fact that the plaintiffs’ illness has been discovered and identified was not enough in itself to cause the limitation period prescribed by Article 376 of the LCT to begin running. Namely, it was only when the percentage of the impairment of activities of daily living in each of the plaintiffs was determined (by an assessment of the medical experts’ opinions and findings) that the harmful effects of the wrongful act were deemed to have occurred. As the obligation to provide compensation is triggered at the moment of the occurrence of the harmful effect (rather than the moment of the occurrence of the wrongful acts that caused it), the limitation period should be deemed to have started running from the moment when it was established that in each of the plaintiffs the capacity to perform activities of daily living was impaired by 15 percent. Hence, the harmful effect of the wrongful act implies not only the mental illness that the plaintiffs developed but the concrete impairment of activities of daily living resulting from that illness. It is therefore important, in order to make a correct assessment of the statute of limitations objection raised in respect of this type of non-material damage, to establish the time when the impairment occurred and the percentage of impairment, because it is on that moment that the plaintiff’s right to claim compensation from the defendant for the non-material damage suffered accrues” **(excerpt from judgment Gž-7971/10 of the Court of Appeal in Belgrade)**.



**with the objective time limit, commences at the moment the aggrieved party first becomes aware of the full extent and type of the damage sustained and the identity of the wrongdoer.**

Here is an example to illustrate this: Injured party X was subjected to ill-treatment in custody, as a result of which he experienced physical pain, fear, and emotional distress because of impairment of his activities of daily living. He was released from custody on 1 March 1998. Three years later (on 1 March 2001) he visited a doctor, and the doctor established that X had experienced pain of varying intensity until 1 October 1998, fear of varying intensity until 1 December 1998, and that his daily living activities were diminished by 10 per cent owing to post-traumatic stress disorder (PTSD) which manifested itself in its final form on 1 February 2001. The injured party lodged a civil compensation claim on 1 November 2003. According to the opinion adopted by the courts, the injured party: (1) **would not be** entitled to compensation for the physical pain he suffered because both the subjective and objective time limits had expired at the latest on 1 October 2003; (2) **would be** entitled to compensation for the fear he experienced because the objective time limit began to run on 1 October 1998 (the date on which the damage occurred), and the subjective limitation period began to run on 1 March 2001 (the date on which he first knew of the type and full extent of the damage); (3) **would be** entitled to compensation for diminished level of daily life activities caused by PTSD, because the objective time limit began to run on 1 February 2001 and the subjective on 1 March 2001.

For a number of years, the above approach ensured consistency of the courts' practice and respect for the consensually established rule that the objective time limit for compensation claims begins to run from the date on which damage occurred, which date does not necessarily coincide with the date on which the damage was caused, i.e. the date on which the wrongful act took place.<sup>30</sup>

### **b. Application of General Principles in Practice**

In several compensation cases the HLC witnessed situations where domestic courts deviated from their long-established practice and norms concerning application of the statute of limitations for compensation claims. These deviations could not be justified with any legitimate reasons, such as changes in the LCT or the like. Below are just a couple of cases which illustrate this point.

<sup>30</sup> Supreme Court of Serbia, judgment Rev-1025/01.



## Case of Bylykbashi et al.

In this case, three plaintiffs were ill-treated by police during arrest; while held in custody from May 1999 to April 2000 and January 2001, they were ill-treated by guards at the jail in Požarevac.

On 4 May 2010, they brought a civil action against the Republic of Serbia's Ministry of the Interior, seeking compensation for the emotional distress suffered as a consequence of diminished level of daily living activities manifested as PTSD.

The First Basic Court in Belgrade, in its judgment P-71250/2010 of 12 December 2011, rejected their claim in its entirety as being time-barred. The court found the following: the plaintiffs' level of daily living activities was diminished by 10 percent; the expert witness established that the first manifestations of disorder appeared in plaintiffs two or three months after their release from custody; however, as they underwent medical treatment in 2000 and did not file a civil action until 2010, the time limits specified in Article 376 of the LCT has passed. The court ignored the expert witness' opinion that the disorder manifested itself in its definite form only in 2008 and 2009 respectively.<sup>31</sup>

Deciding this case on appeal, the Court of Appeal in Belgrade quashed the judgment of the court of first instance and directed a retrial. Giving the reasons for its decision, the appellate panel stated that it was necessary to clarify when the disorder developed from an acute into a chronic condition, because it was at that very moment that the disorder could be considered to have manifested itself in its definite form. In the view of the appellate panel, it was from that moment on that the limitation periods began to run, because at that moment the plaintiffs discovered or could have discovered that they were suffering from chronic PTSD.<sup>32</sup>

During the retrial, the court of first instance followed the instructions of the appellate panel and re-examined the medical expert, who stood by his prior finding that the plaintiffs discovered they were suffering from PTSD in 2008 and 2009 respectively, when they visited a doctor. The court then granted, in part, their compensation claim. Explaining its decision, the court said that while there was no doubt that the first manifestations of the disorder appeared two to three months following the plaintiffs' release from custody, the medical expert found that the disorder did not manifest itself in its final form before 2008 and 2009 respectively, which is when the period of

31 First Basic Court in Belgrade, judgment P-71250/2010 of 12 December 2011.

32 Court of Appeals in Belgrade, ruling GŽ-1553/2012 of 5 December 2012.



limitation began to run. As they filed a civil action in 2010, the court of first instance held that their claim was not time-barred.<sup>33</sup>

Both parties appealed against this decision (the plaintiffs complained about the amount awarded, whereas the defendant complained both against the grounds for awarding compensation and the amount awarded), but the appellate panel ruled to uphold the judgment of the lower court. The appellate panel upheld in its entirety the argument of the lower court judge regarding the application of the provisions of the substantive law regulating limitation periods, and the view that the limitation period was to be deemed to have commenced on the date on which the disorder manifested itself in its final form.<sup>34</sup>

The Republic's Public Attorney's Office then made an extraordinary revision of the Court of Appeal's ruling, which the Supreme Court of Cassation accepted, thereby quashing the first-instance and second-instance judgments in this case. By way of explanation, the Supreme Court of Cassation stated that the plaintiffs first commenced experiencing symptoms identical to those found to be present by the medical expert immediately after their release from custody, so it was unclear why the lower courts found that the damage occurred later, i.e. in 2008 and 2009.<sup>35</sup>

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At a new retrial, the Court of First Instance rejected the compensation claim as being time-barred, explaining that the limitation period in this case began to run from the moment the plaintiffs first experienced symptoms of the disorder, which was two to three months after being released from custody. Since they did not file a legal action until 2010, the court found their claim to be time-barred.<sup>36</sup> The Court of Appeal in Belgrade upheld this judgment on 17 February 2017, on finding that symptoms of PTSD appeared in the plaintiffs at the latest six months following the traumatic event, which means that at that time the disorder had manifested itself in its definite form, which would have been established had the plaintiffs visited a doctor. In the view of the appellate panel, as that was the moment when the five-year (objective) limitation period begun to run, the claim became statute-barred at the latest in 2005. So the court concluded that in 2010, the year in which the plaintiffs filed their claim, the time limit for them to assert the right to compensation had already passed.<sup>37</sup>

33 First Basic Court in Belgrade, judgment P-1538/2013 of 19 April 2013.

34 Court of Appeals in Belgrade, decision GŽ-268/2015 of 18 February 2015.

35 Supreme Court of Cassation, decision Rev-1413/2015 of 21 January 2016.

36 First Basic Court in Belgrade, judgment P-14034/2016 of 27 June 2016.

37 Court of Appeals in Belgrade, decision GŽ-7234/2016 of 17 February 2017.



The HLC lawyer has lodged a constitutional appeal against the above decision of the Court of Appeal in Belgrade. The case is still pending before the Constitutional Court.

### **Case of Kamenica and Nuhanović**

After the fall of Žepa on 30 July 1995, the plaintiffs, Ahmet Kamenica and Selim Nuhanović, together with a group of Bosniaks, crossed into Serbia over the River Drina on 2 August 1995. On the Serbian side, they were met by soldiers and border guards, who took them first to Jagoštica, where they were beaten, insulted and otherwise humiliated by members of the Serbian MUP. From Jagoštica, the Bosniaks were transported either to the Šljivovica or the Mitrovo Polje camps, where they were held in unsanitary conditions and tortured and starved by members of the Serbian MUP. They were released from the camps with the assistance of the International Committee of the Red Cross on 10 April 1996.

On 20 December 2007, the plaintiffs brought a legal action with the First Municipal Court in Belgrade seeking compensation for the non-material damage they had suffered, namely physical pain, fear, emotional distress suffered as a consequence of a breach of their personal rights, and emotional distress suffered as a consequence of impairment of daily living activities.

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On 19 April 2010, the First Basic Court in Belgrade rejected their claim in its entirety, on the grounds that it was time-barred under Article 376 of the LCT. The court held that the plaintiffs had knowledge of the damage as early as after being released from the camp in 1996, when they began to experience psychological problems as a result of detention. Therefore, the court was of the view that the limitation period did not begin running at the time they first knew of their diagnosis, but at the time of the occurrence of the disorder, with the effects and forms in which it manifested itself.<sup>38</sup>

The plaintiffs appealed against the decision. The appellate panel of the Court of Appeal in Belgrade on 19 March 2013 upheld the first-instance judgment in the part rejecting the award of compensation for emotional distress caused by a breach of the plaintiffs' personal rights, and overturned the remaining part of the judgment. The appellate panel held that the appellants' rightly noted that knowledge that the damage occurred did not coincide with the date of its occurrence but with the date on which they became aware that the effects of the traumatic event had caused a permanent impairment of their health and daily living activities. Hence, continued the appellate

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38 First Basic Court in Belgrade, judgment P-67569/2010 of 19 April 2010.



panel, the time limit for claiming compensation for physical pain suffered began to run at the time the pain stopped, for fear, at the time the fear stopped, and for emotional distress due to impairment of daily living activities, at the time the disorder manifested itself in its definite form and developed from an acute into a chronic condition. The appellate panel concluded that medical expertise should have been sought in order to settle this matter, which the court of first instance failed to do, which is why the part of the first-instance judgment relating to this specific matter was overturned and a retrial ordered.<sup>39</sup>

Following the retrial, the Court of First Instance on 8 July 2015 granted the claim in the part relating to non-material damage, i.e. impairment of daily living activities, and rejected the rest of the claim. On the basis of the opinion and finding of the medical expert, the court established the presence of PTSD – permanent changes in the claimants' personalities, which resulted in the impairment of their daily living activities. The disorder manifested itself in its definite form on 5 December 2007 and on 26 September 2009 respectively, on which dates limitation periods for bringing a claim were considered to have begun to run. Where this fact is concerned, their claim was found not to be time-barred. In respect of the rest of their allegations, the claim was found to be lodged outside of the prescribed time limits.<sup>40</sup>

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Both parties appealed against the decision. The Court of Appeal in Belgrade opened a hearing and ruled on 26 June 2017 to uphold the judgment in the part rejecting the claim in part, and to reverse the rest of the judgment by rejecting the claim in whole. The ruling of the appellate panel was founded on the view that a compensation claim for non-material damage, that is, for emotional distress due to impairment of daily living activities, becomes time-barred at the moment at which the disorder has developed from an acute to a chronic condition, as the moment at which it manifested itself in its definite form, regardless of the moment at which the claimant first knew of his diagnosis or how the disorder is defined in the World Health Organisation Classification of Diseases. According to the appellate panel, all symptoms of the disease were manifested in the acute phase, so the claimant could not have been unaware of them. Therefore a deterioration of health cannot be grounds for claiming compensation under Article 376 § 1 of the LCT.<sup>41</sup>

The plaintiffs took the case to the Constitutional Court, submitting that the judgment of the Court of Appeal had violated their rights, including the right to a fair trial, the

39 Court of Appeals in Belgrade, ruling Gž-6322/2011 of 19 March 2013.

40 First Basic Court in Belgrade, judgment P-22986/2013 of 8 July 2015.

41 Court of Appeal in Belgrade, judgment Gž-7211/2015 of 26 June 2017.



right to non-discrimination, the right to inviolability of physical and mental integrity, the right to rehabilitation and redress, the right to have equal protection under the law, and the right to an effective remedy. The Constitutional Court has yet to decide on the appeal.

## ii. Conclusion

As seen in several of its decisions, the Court of Appeal in Belgrade has adopted the stance that an objective limitation period should start running at the moment at which the claimants have first experienced certain psychological problems, rather than the moment at which the disorder manifested itself in its definite form. More precisely, in determining the starting point of the objective limitation period, it has become no longer relevant when the claimant first knew of the medical definition of his condition or when the doctors managed to diagnose his condition, but only the moment at which his illness has objectively manifested itself (as this is when the damage has been deemed to have definitively occurred).<sup>42</sup>

Such an interpretation of Article 376 of the LCT is flawed for at least two reasons:

- (1) the courts have taken it upon themselves to determine the starting point of the objective time limit for bringing compensation claims, despite not possessing the necessary expert knowledge to be able to deal with this matter, which is the exclusive domain of court-appointed expert witnesses, and
- (2) it deprives the injured parties of the chance to exercise their right to compensation, because the limitation periods for claiming compensation are being drastically shortened, and this shortening is not justified by any changes in the relevant laws or well-established court jurisprudence.

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<sup>42</sup> “Where the appellant is concerned, he began suffering from PTSD after returning from the war zone and this is when the objective limitation period for his claim commenced; as this period had expired before he filed the claim, the Court of Appeal found his claim to be time-barred and therefore unfounded” (**excerpt from the judgment Gž-3215/11 of the Court of Appeal in Belgrade**). “As to the appellant’s submission that the limitation period for his claim should have been taken to have started running from the moment he first knew of the damage, which is the moment his illness manifested itself in its definite form, the courts notes that it has no bearing on the determination of this legal matter, because while the date the claimant first had knowledge of the disorder he suffers from is the date from which the subjective time limit begins running, this period runs within the limits of the objective time limit. In the instant case, the objective time limit had expired and, consequently, his claim for compensation in respect of non-material damage had become time-barred” (**excerpt from judgment Gž - 1484/11 of the Court of Appeal in Belgrade**).





As compensation claims are invariably against the Republic of Serbia, awards paid to successful claimants would be paid using money from the Republic's budget. So, in radically shortening the objective limitation periods, the courts deprive the injured parties of their right to obtain compensation, while, at the same time, protecting the state budget.

Apart from the above, the courts, by usurping the role of court-appointed experts without being adequately competent to do their job, altering their previous stance on how the starting point of an objective limitation period is to be determined, deliberately and consciously interpreting the limitation rules against the interests of the claimants, with none of these being justified by any changes in the relevant laws or legitimate reasons for altering the long-established practice of the courts in this regard, have only added to the widespread legal uncertainty which permeates the legal system in Serbia.

In a large number of cases that have ended up before the Constitutional Court,<sup>43</sup> this court has held, inter alia, that the domestic civil litigation case law was inconsistent to the point of breaching the principle of judicial certainty as an integral part of the appellants' right to a fair trial. In all these cases, the Constitutional Court has ordered its decisions to be published in the Official Gazette.

When it comes to inconsistent case law with regard to identifying the date on which the limitation period for bringing claims for compensation in respect of non-material damage in cases involving serious mental anguish begins to run, the Constitutional Court has stated its opinion in many of its decisions.<sup>44</sup> In all of them, the court found a breach of Article 32 §1 of the RS Constitution, on the grounds that the inconsistent court case-law undermined the principle of legal certainty.

The European Court of Human Rights has also expressed its views on this matter. In the case of *Golubović v. Serbia*,<sup>45</sup> the court dismissed the application on the grounds that the appellants had not exhausted all domestic remedies. However, the court held that a constitutional appeal, in principle, was an effective remedy, especially given the fact that the Constitutional Court had already ruled, in cases involving identical situations, that the right to a fair trial had been violated. The European Court of Human Rights also found, on the basis of the decisions of the Constitutional Court,

43 See, e.g., UŽ-61/09; UŽ-553/09; UŽ-703/09; UŽ-792/09; UŽ-2133/09; UŽ-1928/09; UŽ-1888/09; UŽ-1695/09; UŽ-1578/09; UŽ-1575/09; UŽ-1524/09; UŽ-1318/09; and UŽ-1896/09.

44 See, e.g., UŽ-1749/09; UŽ-4933/11; and UŽ-4561/10; UŽ-5487/10.

45 Application no. 10044/11, decision of 17 September 2013 (published in Official Gazette of the RS no. 114/2013).





that the applicants had requested a reopening of the civil proceedings, and that these proceedings were underway, noting that it expected their outcome to be favourable to the applicants.

Of particular importance is the European Court of Human Rights' legal opinion in the case of *Howald Moor and Others v. Switzerland*,<sup>46</sup> which concerns the application of limitation periods in respect of material and non-material damage suffered as a result of the violation of the right of access to court. While the ECtHR was satisfied that the rule on limitation periods pursues a legitimate aim of providing legal certainty, it held that the way the courts apply this rule to persons suffering from diseases which could not be diagnosed until many years after the triggering events, deprived those persons of the chance to assert their rights before the courts.

The reversed opinion of the courts, according to which the moment of the occurrence of damage is the same as the moment of the occurrence of the wrongful act (which bears a direct relevance to the calculation of the objective limitation period), was the subject of a paper written by Supreme Court of Cassation Judge Predrag Trifunović, which was published in the Journal of the Supreme Court of Cassation, issue no. 3/2016.<sup>47</sup> In it, the author, commenting on the recent court's jurisprudence, according to which the time of the occurrence of the damage is the same as the time of the occurrence of the wrongful act that caused it, argues that these two are not the same but two distinct grounds for civil liability. Citing the decisions of the Constitutional Court finding that the rights of the plaintiffs had been infringed as a result of such an approach, Judge Trifunović argues for changing the current jurisprudence which equates a harmful effect (damage) with the wrongful act that caused it, and proposes the following *sententia* to be adopted:

- “1. The objective limitation period for claiming compensation under Article 376 § 2 of the LCT is taken to have begun running from the date on which the damage occurred rather than from the date on which the wrongful act took place.
2. The occurrence of damage is a factual question to be determined in each individual case.”

46 *Howald Moor and Others v. Switzerland*, application no. 52067/10, 41072/11, judgment of 11 March 2014.

47 Journal of the Supreme Court of Cassation, pp. 120-124; available (in Serbian) at <http://www.vk.sud.rs/sites/default/files/attachments/16Bilten3.pdf>.



Given the opinion held by Judge Trifunović, the judges of the Constitutional Court and judges of the European Court of Human Rights, it seems more than likely that the European Court of Human Rights will find that all domestic civil proceedings which are founded on the opinion that the date on which the disorder manifested itself in its definite form should be taken as the starting point of the limitation period have breached the claimants' rights to a fair trial and to equal protection of the law. The rationale of the regular courts is that damage and the wrongful act that caused it are one and the same, which is an opinion that leads to a violation of the victim's right of access to court as an integral part of the right to a fair trial, denies them the right to equal protection under the law and the right to an effective remedy, and undermines the rule of law. On the other hand, the Constitutional Court's finding that the lower courts' judgments have violated the victims' right to equal protection under the law, if not coupled with the awarding of an adequate compensation or the quashing of final judgments and ordering regular courts to reconsider plaintiffs' arguments, will not deprive them of their "victim" status as defined under Article 34 of the European Convention or the Protection of Human Rights and Fundamental Freedoms.

The restrictive application of the limitation rules to compensation claims by domestic courts does not take into account the circumstance that Bosniak, Croatian, Kosovar and other victims of torture, crimes and other mass violations of human rights did not have any opportunity to assert their rights before the courts in Serbia during the armed conflicts in the 1990s. It was not realistic to expect that these victims would file compensation lawsuits against the Republic of Serbia in the Republic of Serbia, at the time the armed conflicts were still raging and their respective countries were fighting against Serbia, only to prevent their claims from becoming time-barred. Disregard for these circumstances and the context within which civil proceedings for compensation take place before domestic courts in effect unduly restricts the victims' right of access to court.

### **III. Limitation Periods Applicable to Compensation Claims for Criminally Inflicted Damage**

Apart from the general provisions governing limitation periods for compensation claims, the LCT contains special provisions which lay down limitation periods applicable in cases where the damage was caused by a criminal offence. The lawmakers' intent was to enable a longer, so-called "privileged" time limit for an aggrieved party to assert his/her right to claim compensation from the person liable. The said provisions of Article 377 of the LCT are worded as follows:



“Should loss be caused by a criminal offence, and a longer statutory limitation period be prescribed for the prosecution of the offence concerned, the claim for compensation against the person liable shall expire upon the expiration of the limitation period set forth in the statute of limitations for the criminal prosecution of the criminal offence concerned.”<sup>48</sup> “An interruption of the limitation period for criminal prosecution due to the statute of limitations shall also involve the interruption of the limitation period relating to the claim for damages.”<sup>49</sup> “The same shall apply when the unenforceability period ceases.”<sup>50</sup> This rule should not affect the usual way of determining the commencement of a limitation period. Namely, **also where the damage was caused by a criminal offence, the right to seek redress cannot become time-barred before the damage itself occurred, and the commencement of the limitation period is determined according to the rule set forth in Article 376 of the LCT.**<sup>51</sup>

However, the application in practice of the provisions laid down in Article 377 of the LCT has given rise to a number of questions and controversies. These controversies date back from the time the Statute of Limitation Act, which preceded the LCT, was in force, and continued after the coming into force of the LCT. These are:

- (1) Whether or not the longer statutory limitation period, which is provided for claims for compensation for damage caused by a criminal offence, is applicable only in respect of the wrongdoer or also in respect of the person responsible for the wrongdoer’s acts?
- (2) How the provisions governing the interruption and suspension of the limitation period are to be applied in cases where the damage was caused by a criminal offence?
- (3) Whether or not the civil court is authorized, in order to apply the “privileged” limitation period, to decide the question of the existence of a criminal act as a preliminary question?
- (4) When does the limitation period for enforcing the right to compensation for criminally-inflicted damage begin to run?

48 Article 377, § 1 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

49 Article 377, § 2 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

50 Article 377, § 3 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

51 Franjo Stanković, *Zastava potraživanja* [Statute of Limitations for Compensation Claims], Informator, Zagreb 1969, 82, ref. according to J. Studin, 1141-1142,



So far, none of these four questions have been settled in a uniform way in the domestic case-law. What is more, in cases involving a criminal offence, the courts much more frequently interpret the provision of Article 377 to the victims' disadvantage than in other cases. Their interpretation of the provision is sometimes so "creative" as to render any interpretative approach to the norm (be it linguistic, historical, teleological or economic etc.) meaningless, and the resulting violation of claimants' rights may virtually be considered to constitute a grave breach of the right to a fair trial.

## **IV. Limitation Periods for Claiming Compensation for Criminally Inflicted Damage from Wrongdoer and Person Responsible for Wrongdoer's Acts**

### **i. General Principles and Development of Case-Law**

The question whether the longer limitation period is applicable solely in cases where an action is brought against the person who caused the damage or also where an action is brought against the person responsible for the acts of the person who caused the damage, dates back from the time when the 1953 Statute of limitation Act was in force.

The relevant provision of Article 20 of this law is worded as follows: If damage is caused by a criminal offence, and a longer limitation period is prescribed for the prosecution of the criminal offence concerned, the time limit for bringing an action for damages shall expire upon the expiration of the limitation period prescribed for the criminal prosecution."<sup>52</sup>

In the period before the Law on Contracts and Torts came into force,<sup>53</sup> the practice of the Yugoslav courts was rather inconsistent. Namely, the courts applied the provision of Article 20 differently depending on whether the action was brought against the direct perpetrator of an offence or the person responsible for the direct perpetrator's acts. Some courts took the view that the privileged limitation period was applicable solely in the first case, whilst others did not see any reason why different limitation periods should apply to wrongdoers and persons responsible for their acts.<sup>54</sup>

52 Article 20, § 1, SLA, Official Gazette of the Federative People's Republic of Yugoslavia, nos. 40/53 and 57/54.

53 LCT entered into force on 1 October 1978.

54 It is important to note that Article 19 of the SLA prescribed the subjective three-year and the objective ten-year limitation periods for compensation claims.



The then-existing **Supreme Court of Yugoslavia attempted to resolve this question at its general session held on 19 October 1970.** The judges adopted the tentative opinion that “the time limit referred to in Article 20 of the SLA does not apply solely in respect of the wrongdoer but also in respect of any other person liable for damage caused by the wrongdoer.” Since this opinion was not generally accepted, different decisions continued to be handed down by courts in this legal situation.

The Law on Contracts and Torts was expected to resolve this issue in its Article 377. Namely, Article 20 of the SLA was amended by inserting the words “**against the person liable**”, to become Article 377 of the LCT. This was done by the lawmakers in order to eliminate the ambiguities which existed in the previous law and introduce equal application of limitation rules in respect of both the wrongdoer and the person responsible for his/her acts, regardless of the grounds for liability. But despite the intervention of the lawmakers, the courts largely continued to adhere to the view that privileged limitation periods did not apply to other persons responsible but only to the wrongdoer.

The Supreme Court of Serbia, for example, in its judgment Rev-1432/05, stated that the provision of Article 377 of the LCT was applicable only in respect of the person who committed the crime that was the cause of action, but not in respect of the state as a legal person liable for another person’s wrongdoings.<sup>55</sup> This opinion was followed in a number of decisions of courts of second instance and the Supreme Court.<sup>56</sup>

The question whether the privileged limitation period applies also to a person liable in cases where the damage was caused by a criminal offence was addressed by the Constitutional Court of Serbia too. On 14 July 2011, this court presented the following legal opinion:

“In cases where the damage is caused by a criminal offence (Article 377 of the LCT), if the limitation period stipulated for the prosecution of the offence concerned is longer than the limitation periods under Article 376 of the Law on Contracts and Torts, compensation claims, not only against the wrongdoer but against any person liable, may be filed within the limitation period prescribed for the prosecution of the crime concerned only if the existence of the criminal offence and criminal responsibility of

<sup>55</sup> See Supreme Court of Serbia, Judgment Rev-1432/05

<sup>56</sup> See: Supreme Court of Serbia, decisions Rev-2575/05, Rev-2604/05, Rev-2897/05, Rev-127/06, Rev-2153/06, Rev-1453/06, Rev-67/07, Rev-2695/07, Rev-2409/07; Court of Appeal in Belgrade decision Gž - 3217/12.



the wrongdoer have been established in a final judgment. An interruption of the limitation period for criminal prosecution results in the interruption of the limitation period for bringing a compensation claim.

The same limitation period as that applicable to criminal prosecution applies to the cases where criminal prosecution has been terminated or could not be instituted because of the death or mental illness of the defendant, or if some other circumstances, such as amnesty or pardon, prevented criminal prosecution from being conducted.

In all other similar cases the general limitation period referred to in Article 376 of the Law on Contracts and Torts shall be applicable.<sup>57</sup>

The Constitutional Court adopted this opinion after having to deal with a large number of cases on constitutional appeal.

28 However, not even the Constitutional Court resolved this issue by fully equating the liability of the wrongdoer with the liability of the person liable for his/her acts. On the contrary, the Constitutional Court made application of the privileged limitation period to actions against the party liable conditional upon the existence of a final judgment of conviction against the wrongdoer. In fact, the Constitutional Court expanded the effect of the norm to cover situations where criminal prosecution had been terminated or could not be instituted because of the death or mental illness of the defendant, or because of other circumstances that preclude criminal prosecution, such as amnesty or pardon. In this way, the court restricted the right of regular courts to make use of the possibility to assess, as a preliminary issue, whether the act giving rise to the damage in question constitutes a criminal offence, in which case the longer limitation period would apply. This approach was followed in many decisions rendered by the Constitutional Court.<sup>58</sup>

The fact that the majority of judges held the view that limitation periods under Article 377 of the LCT do not apply to the person liable does not necessarily mean that there were no cases in which the courts decided otherwise.

Thus the Court of Appeals, and the Supreme Court of Serbia before, rendered decisions in which the effect of this norm was interpreted as applying to the person liable as well. For example, the Supreme Court of Serbia, in its decisions Rev-1335/05 and

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57 Opinion of the Constitutional Court Su I - 400/1/3 - 11 of 14 July 2011.

58 See, e.g., UŽ-3706/2013; UŽ-1956/2009; UŽ-345/2008; UŽ-1980/09.



Sgzz-58/05, stated that the term “person liable” in respect of whom a longer limitation period applies under Article 377§ 1 of the LCT, denotes the person liable for damage caused by a criminal offence, even though that person him-/herself is not the person who committed the offence. Although this legal opinion, founded on the view of the Constitutional Court adopted on 14 July 2011, could also be found in some other, subsequent decisions,<sup>59</sup> it should be considered an exception rather than a rule.

## ii. Cases

In the proceedings that the HLC brought before the courts of the Republic of Serbia, two key questions facing the judiciary were whether compensation in respect of material or non-material damage can be obtained from the Republic of Serbia, as the party liable for damage caused by acts of some of its bodies, and whether the civil court is authorised to decide the question of the existence of a criminal offence and criminal liability of the wrongdoer, as a preliminary question.

### Case of Kukurovići

On 10 July 2007, the HLC instituted a civil action against the Ministry of Defence of the Republic of Serbia on behalf of 20 residents of Kukurovići, to seek compensation in respect of the material damage they sustained in 1993, when their houses in the village of Kukurovići were destroyed as a result of an attack on the village by members of the Yugoslav Army. The action was founded, inter alia, upon the criminal complaint that the HLC lodged on 24 October 2006 against unknown perpetrators concerning the events in Kukurovići. The case that originated from the criminal complaint is still in the preliminary investigation phase.<sup>60</sup> The plaintiffs reported the damage in 1993, after which the investigative judge of the District Court in Užice and the District Public Prosecutor from Užice investigated the scene and wrote reports thereupon (Kri-9/93 and Kri-32/93).

On 5 March 2015, the Higher Court in Belgrade dismissed the claims for material damage as being out of time. The court held that the claim had become time-barred, because more than five years had elapsed from 1993 (when the event that gave rise to the cause of action took place) until 2007 (when the action was brought) - in other words, that the limitation periods laid down in Article 376 of the LCT had expired.

<sup>59</sup> See, e.g., decision Gž-262/11 of the Court of Appeal in Kragujevac; decision Gž-5074/13 and decision Gž - 1422/14 of the Court of Appeal in Belgrade; and decision Rev-1-50/2014 of the Supreme Court of Cassation.

<sup>60</sup> KTRN-2/04.



As regards the plaintiffs' observation that in their case the limitation periods under Article 377 of the LCT applicable to cases where the damage has been caused by a criminal offence should be applied, the court held that since no final judgment of conviction had been passed on the perpetrators, there were no grounds to apply this Article, neither in respect of the direct perpetrators nor in respect of the person liable for their acts.<sup>61</sup>

The plaintiffs appealed, but the Court of Appeal dismissed their appeal and upheld the first-instance judgment.<sup>62</sup> As to the appellants' submission that Article 377 of the LCT should have been applied in their case, the appellate panel noted that the issue of the existence of a criminal offence cannot be assessed without assessing criminal responsibility for the offence at the same time; therefore an application of Article 377 of the LCT is justified only in situations where the existence of a criminal offence has been established through criminal proceedings. Deciding otherwise would lead to a breach of the presumption of innocence guaranteed by Article 34 § 3 of the RS Constitution. Besides, the appellate panel assessed as unfounded the plaintiffs' allegations that in the instant case the running of the limitation period was interrupted by the actions undertaken by the investigative judge and the Office of the War Crimes Prosecutor, explaining that the limitation period had not been interrupted, as it could only be interrupted by actions taken against a specific defendant and not by actions taken against an unidentified person, which was the case here.

The plaintiffs appealed to the Constitutional Court, claiming a violation of their right to a fair trial and a violation of their right to redress guaranteed by Article 32§ 1 and Article 35 § 2 of the RS Constitution respectively. This court, on 8 June 2017, rejected their constitutional appeal. From the statement of reasons given, it transpired that the Constitutional Court agreed with the arguments of the Court of Appeal concerning the application of Article 376 of the LCT, finding that there had been no grounds for the civil court to apply Article 377 and decide the question of whether the act causing the damage constituted a criminal offence, explaining that this possibility may be used only exceptionally, in cases where instituting criminal proceedings has not been possible due to some legitimate reason.<sup>63</sup>

The plaintiffs then took the case to the European Court of Human Rights and are now awaiting its decision.

61 Higher Court in Belgrade, judgment P-1142/10 of 5 March 2015.

62 Court of Appeal in Belgrade, judgment Gž-2561/2015 of 30 September 2014.

63 Constitutional Court of Serbia, decision UŽ-7969/2015 of 8 June 2017.





## Case of Dudaš and others

The case originated from a civil action brought by the HLC on 20 November 2007 with the First Municipal Court in Belgrade on behalf of 12 plaintiffs against the Republic of Serbia, claiming damages for the fear, impairment of daily living activities and injury to honour and reputation they suffered as a result of their stay in detention camps in the Republic of Serbia, namely Sremska Mitrovica Gaol, Stajićevo and Begejci. The plaintiffs were held for between 16 and 24 days in the camps, to be exchanged for members of the armed forces of the Federal Republic of Yugoslavia during December 1991, in the presence of members of the ICRC. During detention, the plaintiffs were subjected to inhumane treatment, starvation and physical and mental abuse. The conditions in the camps were appalling, and medical care was inadequate.

On 10 October 2013, the First Basic Court in Belgrade rejected, in its entirety, the plaintiffs' claim on the grounds of being out of time, since both the three-year and the five-year limitation periods prescribed in Article 376 of the LCT had expired. As to the plaintiffs' submission that Article 377 of the LCT was applicable in their case, the court noted that Article 377 is applicable only where the existence of a criminal offence and criminal responsibility of the perpetrator has been established in a final judgment of conviction handed down by a criminal court, and that that was not the case here. The court went on to say that it is not for a civil court to assess if the damage was caused by acts that constitute a criminal offence, unless there exist special reasons that so warrant.<sup>64</sup>

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The plaintiffs promptly appealed against the decision. The Court of Appeal, upon considering the appeal, on 7 July 2017 upheld the first-instance judgment in part. The part relating to compensation sought in respect of the non-material damage suffered due to impairment of daily living activities was set aside, and the matter was sent back to the civil court for a retrial. Explaining the rationale behind their decision, the appellate panel stated that they accepted the reasons given by the Court of First Instance regarding the application of Article 377 of the LCT, agreeing that the conditions had not been met for the Court of First Instance to determine the preliminary question whether the damage was caused by an act containing elements of a criminal offence, because the plaintiffs had failed to demonstrate that after their release from the camps they were prevented, by any procedural obstacles, from filing an action sooner than they did. At the same time, the appellate panel overturned the part of the judgment relating to the compensation sought for the emotional distress

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64 First Basic Court in Belgrade, judgment P-21329/2013 of 10 October 2013.



they suffered due to the impairment of daily living activities, on the grounds of the failure of the Court of First Instance to establish when the illness which caused the damage became a chronic condition.<sup>65</sup>

The plaintiffs lodged a constitutional appeal against the part of the judgment, which became final after being upheld by the Court of Appeal. The Constitutional Court has not yet ruled on the appeal.

### iii. Grounds for Republic of Serbia's Responsibility

From the above-mentioned cases, in which the HLC provided legal representation for the victims, it can be seen that the domestic courts' jurisprudence links the application of the privileged limitation period to the **grounds for responsibility** of the person liable, namely the Republic of Serbia.

At the core of the above-cited opinion of the regular courts, which is based upon the relevant decisions of the Constitutional Court, lies the assertion that the privileged limitation period applies in respect of the person liable only in cases where the wrongdoer has been finally convicted. More precisely, according to the courts, the privileged limitation period applies only to cases where the person liable is held liable on grounds of culpability.

However, this opinion is based upon the wrong premise that liability for another person's acts, as a form of liability, is established upon specific legal grounds.

Namely, the LCT recognises liability for another person's acts either as subjective liability (based upon proven or presumed fault), or objective liability, or liability based upon the principle of fairness. In none of these three legal grounds for liability for another person's acts does the LCT differentiate between or exempt the person liable from his responsibility towards the injured party. More specifically, the person liable (which in the cases in which the plaintiffs were represented by the HLC is the Republic of Serbia) will be held liable for the acts of the wrongdoer regardless of the type of liability, whether it is subjective, objective or based upon the principle of fairness.

Since nowhere in the LCT is there a provision that liability for another person's acts is established on the basis of precisely specified legal grounds, the decision reached by the courts that the privileged limitation period cannot be applied in respect of the

65 Court of Appeal in Belgrade, judgment Gž-3887/2017 of 7 July 2017.



person liable (Republic of Serbia) unless the wrongdoer has been found responsible under subjective liability and proven guilty (by a final judgment of conviction), is ill-founded.

The wording of Article 377 of the LCT supports this conclusion, since according to it, only two conditions have to have been met for the longer limitation period to be applied: that the damage has been caused by a criminal offence, and that a longer limitation period is prescribed for the prosecution of the offence concerned. Not even does the norm itself specify the legal grounds for liability for another person's act, much less the existence of a final judgment of conviction in respect of the wrongdoer, as requirements that have to have been met in order for the longer limitation period also to be applied in respect of the person liable.

It is undeniable that this opinion, adopted in the courts' jurisprudence, is not grounded in the law. It is also undeniable that it puts the victims at a disadvantage. By adding a condition non-existent in the law (the existence of a final judgment of conviction with respect to direct perpetrator of the offence concerned), domestic courts have made the position of the victims in compensation lawsuits much more difficult. On the other hand, according to the current jurisprudence of the Serbian courts, an absence of a final judgment of conviction requires the application of shorter limitation periods provided under Article 376 of the LCT. This, in consequence, puts the victims in the difficult position of not being able to seek compensation for the damage they have undeniably suffered as a result of a criminal offence within the time limits prescribed for the criminal prosecution of the offence concerned.

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## **V. Interruption and Suspension of Limitation Periods in Actions Founded on Damage Caused by a Criminal Offence**

### **i. General Principles and Development of Case-Law**

In addition to the question whether grounds exist to apply the same limitation periods in respect of both the wrongdoer and the person liable, there is another question facing the ordinary courts, and that is: may the general rules specified in the LCT concerning the interruption and suspension of limitation periods be applied also to cases where damage was caused by a criminal offence?



The LCT regulated this issue in Articles 381–386 as follows: the limitation period may be suspended in civil actions between certain categories of persons - spouses, parents and their children (during the validity of the parental rights), a ward and his/her legal guardian or guardianship organisation (throughout the duration of the guardianship relationship and until all relevant accounts have been settled), and cohabiting partners (during cohabitation);<sup>66</sup> also, during mobilization, in case of imminent threat of war, or during war itself (in claims of persons engaged in the military); in claims of persons employed in another person's household against the employer or members of his family living with him in the same household (for the duration of such employment);<sup>67</sup> as well as in cases where the creditor was not able, due to unsurmountable obstacles, to assert his/her right through court proceedings.<sup>68</sup>

The effect of suspension is manifested in two ways: (1) If a limitation period could not begin to run owing to some legal cause, it begins to run once the cause ceases to exist; and (2) If a limitation period has commenced before the occurrence of the event that give rise to suspension, it resumes once the cause of suspension has ceased to exist, and the time lapsed prior to suspension is deducted from the statutorily prescribed limitation period.<sup>69</sup>

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Unlike suspension, interruption of limitation period occurs when a debtor acknowledges the debt (either by a declaration to the creditor, or indirectly, by an instalment payment, payment of interest due, or by providing security)<sup>70</sup>, or by the institution of court proceedings, or by any other action a creditor takes against the debtor, in court or with some other competent body, with the aim of confirming, guaranteeing or realizing the claim.<sup>71</sup> A mere notice, verbal or in writing, given by a creditor to the debtor asking him to fulfil his obligation does not interrupt the running of a limitation period.<sup>72</sup>

66 Article 381 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

67 Article 382 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

68 Article 383 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

69 Article 384 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

70 Article 387 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

71 Article 388 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

72 Article 391 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).



The legal effect of interruption of a limitation period is that after each interruption the limitation period starts running anew, and the time passed prior to interruption is not deducted from the statutorily prescribed limitation period. The limitation period that begins running anew following an interruption expires upon the expiry of the statutorily prescribed limitation period which was interrupted.<sup>73</sup>

Under Article 377 § 2, any interruption of the limitation period for criminal prosecution results in an interruption of the limitation period for filing a compensation claim.<sup>74</sup> According to paragraph 3 of this article, the same rules apply to suspension of the limitation period.<sup>75</sup>

The key issue that has arisen in the courts' practise is whether the LCT rules governing interruption or suspension apply also to cases where the damage has been caused by a criminal offence (Article 377 of the LCT), and a longer limitation period is stipulated for the prosecution of the offense concerned.

This ambiguity also has been interpreted in the court's jurisprudence to the disadvantage of the victims.

The Supreme Court of Cassation, in its judgment Rev-1770/10, noted that the longer limitation period stipulated in Article 377 § 1 of the LCT for claims over "war damage" begins to run from the date on which the criminal act is committed and expires upon the expiry of the statutorily prescribed limitation period for criminal prosecution of that offence; this limitation period is **not subject to the general rules of the LCT governing the interruption and suspension of limitation periods**, and it may only be extended as a result of interruption or suspension of the criminal prosecution.<sup>76</sup> The Court of Appeal in Belgrade<sup>77</sup> and the Court of Appeal in Novi Sad<sup>78</sup> have followed this opinion when deciding their cases. The Court of Appeal in Niš adopted the same opinion as that adopted by the Court of Cassation at its Civil Law Department session held on 17 June 2011.<sup>79</sup>

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73 Article 392 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

74 Article 377 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

75 Article 377 § 3 of the LCT (Official Gazette of the SFRY, nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia 57/89 and Official Gazette of the FRY no. 31/93).

76 See also Supreme Court of Cassation decision Rev-407/10.

77 See, e.g., Gž-1965/10; Gž-11680/10, Gž-4395/11, Gž-681/12.

78 See, e.g., Gž-9772/10.

79 See Už-863/2012.



Therefore, it may be concluded that the courts have completely ruled out the possibility of applying the general rules on interruption and suspension of limitation periods from Articles 381-393 of the LCD, to situations where damage was caused by a criminal offence.

The regular courts in Serbia were confronted with the issue of interruption and suspension of limitation periods in at least two more instances: (1) where an aggrieved party approached the relevant state authorities with a request for compensation before bringing a civil action; and (2) in the period during which the “state of war” was in effect. In both these situations, the said legal norm was interpreted to the disadvantage of injured parties/victims.

As regards the first situation, the injured party, before bringing a legal action, was bound by law to submit a motion to the competent state authorities for the recovery of damages out-of-court. This obligation was laid down in a special law<sup>80</sup> and in the Civil Procedure Act.<sup>81</sup> Upon the expiry of the time limit prescribed for a competent state authority to decide on a claim submitted out-of-court, the injured party could bring an action with a civil court.

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Although the injured parties followed the above procedure and approached, unsuccessfully, the relevant state authorities about an out-of-court settlement of their claims, preliminary to bringing a civil action, the Serbian courts adopted the position that **a motion to a state authority is not an action that interrupts the running of the limitation period in compensation claims.**

The courts invoked Articles 391 and 387-88 of the LCT. Article 391 stipulates that a mere notice, verbal or in writing, given by a creditor to a debtor asking him to fulfil his obligation is not enough to interrupt the running of a limitation period, whilst Articles 387-388 stipulate that a limitation period is interrupted when a debtor acknowledges the debt, or when a creditor issues court proceedings, or takes any other action before a court or some other government authority against the debtor, with a view to having his claim confirmed, secured or settled. Therefore, a notice that an injured party has given to a government authority, i.e. the defendant, does not interrupt the running of the limitation period, because the defendant has not acknowledged the debt in a way

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80 See Article 194 of the Law on Army of Yugoslavia (Official Gazette of the FRY nos. 43/94, 44/99, 74/99, 3/2002, and Official Gazette of the SaM no. 7/2005, 44/2005).

81 See Article 193 of the Civil Procedure Act (Official Gazette of the RS no. 72/11). In Article 10 of the Law Amending the Criminal Procedure Code (*Official Gazette of the RS no. 55/14*) the phrase “is bound to” is replaced by the word “may”; and so approaching the Serbia’s Public Attorney with a request for an out-of-court settlement was no longer made obligatory.



prescribed by the law. This opinion was followed in a number of decisions issued by the Supreme Court of Cassation and various courts of appeal.<sup>82</sup>

Not even in the second situation, where the injured parties claimed that during the “state of war” grounds existed for the limitation period to be interrupted, did the courts rule in their favour.

The court’s interpretation was based on the assertion that Article 377 of the LCT stipulates that a claim for compensation for damage caused by a criminal offence becomes statute-barred upon the expiry of the limitation period prescribed for the criminal prosecution of the offence concerned. The claim accrues from the date of occurrence of the damage, which date is determined according to Article 186 of the LCT, and runs from that date until the date of expiry of the statutory limitation period for the criminal prosecution of the offence concerned; and it is within this time limit that the injured party is allowed to file his/her compensation claim. The limitation periods for the prosecution of criminal offences may be interrupted solely for reasons provided for in a separate law governing interruption and suspension of the criminal prosecution. The court did not accept the plaintiffs argument that during the “state of war” a Decree on the application of the Law on Contracts and Torts was in force (Official Gazette of the FRY nos. 22/99, 33/99 and 35/99), prescribing that during the “state of war” all ongoing civil proceedings and all other proceedings for damages against the Federal Republic of Yugoslavia – Federal Secretariat of National Defence and the Army of Yugoslavia – were to be interrupted and new proceedings were not to be instituted, and that therefore the limitation periods could not be deemed to have run during this period. The explanation was that in cases like the instant one, because the plaintiffs were given the possibility to file their claims within a longer, privileged, time limit, once this time limit had expired, they definitely lost their right to claim compensation. This longer limitation period applies to criminal prosecution and may be interrupted only by events specified in the rules governing criminal prosecution.<sup>83</sup>

The Court of Appeal in Belgrade took this argument a step further by stating the following: the Decree on the application of the Law on Contracts and Torts applied to all court proceedings for compensation against the Federal Republic of Yugoslavia – the Federal Secretariat of National Defence, the Army of Yugoslavia and the Federal Ministry of the Interior – as well as to proceedings against the authorities of the FRY

82 See: decision of the Supreme Court of Cassation Rev-6/12; decisions of the Court of Appeal in Belgrade Gž-7673/10, Gž-13406/10, Gž-15296/10, Gž-13084/10, Gž-5954/11, Gž-1734/12, and Gž-5704/12.

83 See, Court of Appeal in Belgrade, judgment Gž-15296/10.



republics in charge of internal affairs; the measures contained in the Decree were meant to protect the interests of the state, its army and the MUP, and they did not apply to injured parties; consequently, the provisions of the Decree have no effect on the limitation periods for claiming compensation.<sup>84</sup>

This restrictive interpretation, to the disadvantage of the victims, of the rules governing the interruption and suspension of limitation periods, also ended up before the Constitutional Court, after the plaintiffs lodged a constitutional appeal.

The Constitutional Court gave a resumé of all disputed issues and its own interpretation of the rules governing interruption and suspension of limitation periods laid down in the LCT.<sup>85</sup>

In addition to referencing judgments handed down by the ordinary courts, the Constitutional Court cited the **legal opinion adopted by the Supreme Court of Serbia at its Civil Law Department session held on 16 February 1998**. The opinion, which concerns “limitation periods applicable to compensation claims involving an injury or death during the armed conflicts”, reads as follows:

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“The running of the limitation period is suspended for the period of time during which a creditor was prevented from pursuing his claim through court proceedings due to armed conflicts or the imminent threat thereof in the area of his permanent or temporary residence (Article 383 of the LCT);

Voluntary (out-of-court) payment of damages to the creditor by the person liable (army post office or a state authority) suspends the running of the limitation period, so the statutory limitation period begins running afresh from the date of the payment (Article 387 § 2 of the LCT in conjunction with Article 392 § 1 of the LCT);

An aggrieved creditor’s preliminary (mandatory) motion for the recovery of damages submitted to the person liable (army post office or a state authority) interrupts the running of the limitation period (Article 388 of the LCT).”

Assessing the above-cited opinion of the Civil Law Department of the Supreme Court of Serbia and the fact that after 2010 the opinion of the courts regarding this matter changed, the Constitutional Court noted: the evolution of case-law per se is not

84 See, Court of Appeal in Belgrade, judgment Gž-1965/10.

85 See, Constitutional Court of Serbia, judgment UŽ-863/2012.





incompatible with good administration of justice; however where there exists a well-established court jurisprudence, the highest court in the country is bound to provide substantial reasons for any departure it makes from it, in order to safeguard the right of parties to receive a reasoned judgment (European Court of Human Rights, case of *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, decision of 14 January 2010, § 38).

Unlike the courts of appeal and the Supreme Court of Cassation, the Constitutional Court has found this opinion unacceptable from the constitutional point of view. Namely, the relevant legal provisions do not preclude the application of the general rules on the interruption and suspension of limitation periods contained in the LCT, although the limitation periods are assessed in accordance with Article 377§ 1 of the LCT. The privileged limitation period was introduced because of the way in which the damage was caused (by a criminal offence), so the *ratio legis* behind these provisions is to give injured parties who have suffered damage which is the result of a criminal offence a more privileged position with respect to other injured parties. If the causes of the interruption and suspension specified in the general rules set forth in the LCT were ruled out, this would lead to the privileged limitation period provided under Article 377 of the LCT losing its privileged character, and even being de facto shorter from the limitation periods set forth in Article 376 of the LCT. The Constitutional Court therefore holds that if an injured party issues court proceedings or takes some other action before a competent authority, in order to have his claim confirmed, secured or settled (Article 388), these actions do interrupt the running of the limitation period, regardless of the fact that such actions are not listed as actions interrupting the limitation period in the provisions of the Criminal Code governing the interruption of limitation. Should an opinion to the contrary be accepted, it could ultimately lead to the conclusion that not even the filing of a civil action interrupts the limitation period, and therefore render the judicial protection in such cases completely meaningless. The Constitutional Court noted that this opinion could be found in the theory of law as well.<sup>86</sup>

In this particular case, the Constitutional Court found that the appellants' rights to a fair trial and to equal protection under the law as guaranteed by Articles 32§ 1 and 36§ 1 of the Constitution of the Republic of Serbia respectively had been violated, and ordered the Court of Second Instance to repeat the appeals procedure.

<sup>86</sup> See decision UŽ-863/2012 of the Constitutional Court of Serbia.



This decision of the Constitutional Court effected a significant shift in the way Serbian courts handled compensation cases - or rather, led to Serbian courts returning to their previous position before it was reversed in 2010.<sup>87</sup> However, many injured parties remained deprived of their right to obtain compensation because of the arbitrary application of the provision of the LCT by the ordinary courts.

## **ii. Interruption and Suspension of Limitation Period in Compensation Claims for Damage Arising from War**

The issue of interruption and suspension of limitation periods is of particular importance to the victims of the armed conflicts of the 1990s in the former Yugoslavia. Until 2000 (and in some cases until even later), these victims were not able to pursue their claims in respect of the damage they sustained as a result of the armed conflicts.

Given the opinion adopted in the courts' practice that civil actions must be brought within three of the five years from the date of the occurrence of damage, and the fact that the damage these victims sustained was occasioned while the armed conflicts were still raging in the former Yugoslavia, Bosniak, Croat and Albanian victims were prevented from taking legal action before Serbian courts to claim compensation for the damage they sustained as a result of war. That being the case, all the conditions had been met for the limitation periods to be deemed to have been interrupted until such time as the circumstances had changed, to the point of allowing them to institute court proceedings. Furthermore, expecting the victims to issue court proceedings within the three-year or five-year time limit from the occurrence of the damage would have meant imposing an undue burden on them and have demonstrated that the courts had failed to take into account all the objective circumstances that exercised a decisive influence in preventing them from taking legal action during the 1990s.

But the courts failed to regard the armed conflicts as objective circumstances having a decisive influence in preventing the victims from taking legal action to seek compensation. Instead, they restrictively, formally and mechanically applied the limitation rules, focussing solely on the date of the occurrence of the damage or the event that give rise to it, and ignoring the LCT provisions on the interruption of limitation periods in the event of war.

<sup>87</sup> See, e.g., decisions Gž-8815/13, Gž-8/14, Gž-6174/14, Gž-1773/14, and Gž-2211/14 of the Court of Appeal in Belgrade.



## VI. Are Civil Courts Authorised to Decide the Question of the Existence of a Criminal Offence as a Preliminary Question?

Another question loomed large in the cases in which the HLC represented the victims: Does the extended limitation period apply also to situations where the existence of a criminal offence has not been established in a final judgment of conviction?

### i. Evolution of Case-Law

As with the question of equal application of the privileged limitation period in respect of both the perpetrator of a criminal offence and the person liable, the case-law of the courts has vacillated from one position to another.

During the time when the Statute of Limitation Act was in force, the majority opinion was that only a court conducting criminal proceedings is authorised to determine whether an act which has given rise to damage constitutes a criminal offence. The existence of a criminal offence may be determined through civil proceedings only in exceptional circumstances, namely, where criminal prosecution has been terminated, or could not be instituted at all because the defendant had died, become mentally ill, or had been granted amnesty or clemency, or where there existed other circumstances which precluded the conduct of criminal prosecution.<sup>88</sup>

However, the judges of **the then-existing Supreme Court of Yugoslavia, at a general session held in May 1972**, having debated the issue of the application of the longer limitation period to bringing and conducting civil proceedings over a breach of duty on the part of an employee, adopted the position that where a breach of duty constitutes a criminal offence the longer limitation period should be applied, even if the criminal responsibility of the person liable has not been established through criminal proceedings. Giving its reasons for deciding so, the court said that it was solely for the purpose of assessing which limitation period should apply to the given breach of duty by the employee and only for the purpose of the given proceedings that a civil court may determine and decide whether the action which constitutes a breach of duty also possesses elements of a criminal offence.<sup>89</sup>

<sup>88</sup> Supreme Court of Serbia, decision Gž-1406/64, ref. according to Dr Marija Karanikić Mirić.

<sup>89</sup> Position adopted at the general session of the Supreme Court of Yugoslavia held in May 1972, cited according to Dr Marija Karanikić Mirić.



The coming into force of the Law on Contracts and Torts on 1 October 1978 did not resolve this ambiguity. The jurisprudence of the courts returned to the previously prevailing position that only a court conducting criminal proceedings was authorised to assess whether the act that caused damage was a criminal offence.<sup>90</sup>

Departures from this interpretation were very rare. One such departure was the **Rev-1313/00** decision of the Supreme Court of Serbia. In it, the court stated as follows: under Article 12 of the Civil Procedure Act, where an issue arises in relation to the existence of a criminal offence and the perpetrator's criminal liability, the court shall be bound by the final judgment of the criminal court by which the accused was found guilty. However, if owing to certain procedural obstacles it was not at all possible to institute and complete criminal proceedings against the perpetrator, whether because the perpetrator had died or was not available to law enforcement agencies, or had not been identified, or because there were multiple perpetrators, the civil court is authorised to assess, as a preliminary question, whether the damage was caused by an act that possesses elements of a criminal offence, because a criminal offence exists even if criminal proceedings never took place. It is important to note that in doing so the civil court does not establish criminal responsibility (because this is something that can be established only through criminal proceedings), but only examines the way in which the limitation rules under Article 377 are to be applied so as to safeguard the right of the injured party to claim compensation for damage caused by a criminal offence.<sup>91</sup>

Not even the above-cited opinion was consistently observed by the Serbian judiciary. On the contrary, divergences in the interpretation of the legal norm were the order of the day, and this was particularly true of the lower courts in Serbia. For example, the District Court in Valjevo, in its judgment **Gž-88/06**, stated as follows: "In the opinion of the District Court in Valjevo, where criminal proceedings have been discontinued due to the death of the defendant, the civil court is not allowed to decide on the preliminary issue of the existence of a criminal offence, not even for the purpose of applying the longer limitation period to a compensation claim in order to better protect the injured party's right to claim compensation for damage caused by a criminal offence. The national legal order requires that the existence of a criminal offence and criminal responsibility of the accused (no crime without criminal liability) be determined by a criminal court, because, according to Article 23 § 3 of the Constitution of the Republic of Serbia, no one may be considered guilty of a criminal offence until proven guilty

90 See, e.g.: judgment Rev-3077/08 of the Supreme Court of Serbia; judgment Gž-763/11 of the Court of Appeal in Novi Sad; and judgment Gž-470/13 of the Higher Court in Čačak.

91 See judgment Rev-1313/00 of the Supreme Court of Serbia, on the same position and judgment Gž-4350/10 of the Court of Appeal in Belgrade.



in a final judgment of a court of law, and according to Article 3 § 1 of the Criminal Procedure Code, every person shall be presumed innocent until proven guilty in a final decision of the competent court.”<sup>92</sup>

The legal opinion that the privileged limitation period in compensation claims applies even in the absence of a final judgment of conviction was adopted by the **Supreme Court of Serbia at a general session of its Civil Law Department held on 27 December 1999**. Discussing the issue of when compensation claims based on damage caused by war become time-barred, this court held the following:

“The damage inflicted upon former members of the Yugoslav People’s Army (death, injuries) during armed clashes with the paramilitary forces of other republics of the former SFRY before their independence was internationally recognized by the UN General Assembly on 22 May 1992, is deemed to have occurred as a result of the criminal act of armed rebellion under Article 124 of the Criminal Code of the SFRY. Therefore, the compensation claim becomes time-barred after the expiry of the 15-year limitation period stipulated for criminal prosecution of that offence under Article 377 § 1 of the LCT.”<sup>93</sup>

Thus the Supreme Court of Serbia did establish, as an answer to a preliminary question, that the act that had caused damage in this case possessed all the elements of the criminal offence of armed rebellion under Article 124 of the Criminal Code of Yugoslavia, and despite the absence of any final judgment of conviction with respect to the offence in question, found that the requirements had been fulfilled for Article 377 to apply to the instant case.

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In a joint dissenting opinion issued with respect to decision **Už-863/2012** of the Constitutional Court of Serbia, two judges of the Constitutional Court made a reference to these points:

“Without impugning at all the fact that the circumstances under which the party with the constitutional appeal was wounded in the Vukovar area on 21 September 1991 constitutes the criminal offence of armed rebellion under Article 124 of the Criminal Code of Yugoslavia, we note that the application of the privileged limitation period in this civil action is founded on totally abstract grounds. Namely, **we do not know of anyone**

92 see judgment Gž-88/06 of the District Court in Valjevo.

93 See decision Už-863/2012 of the Constitutional Court of Serbia or Journal of the Supreme Court of Serbia issue no. 3/2005, p. 72, available (in Serbian) at: <http://www.vk.sud.rs/sites/default/files/files/Bilteni/VrhovniSud/Bilten%202005-3.pdf>



**having been finally convicted of the offence in question or of criminal proceedings not having been conducted and completed due to the death or mental illness of the defendants, let alone anyone having been granted amnesty or pardoned by our state authorities for the offence in question.** Hence, according to the view of the Constitutional Court itself, which has not been altered in the meantime, the three-year or five-year limitation period prescribed by the general rules from Article 377 of the LCT should have been applied in the civil case at hand. Therefore we find that the Constitutional Court has not only has significantly departed from its own view, but even gone a big step further by extending the already long 15-year limitation period by an additional 15 years, by applying the general limitation rules laid down in the LCT. In our opinion, this is something that should not have been done. There can be no doubt that the relevant provision of Article 377 of the LCT is nothing more than a specific exception to the general limitation rules for compensation claims laid down in Article 376 of the LCT. And ever since Roman Law, there has been a general principle that every exception must be interpreted in a most restrictive way. What is more, the very Article 377 of the LCT contains a separate provision which refers to the interruption of the limitation period in compensation claims based upon damage caused by a criminal offence, and which states that an interruption of the limitation period prescribed for criminal proceedings (prosecution) results in an interruption of the limitation period prescribed for compensation claims based upon damage caused by a criminal offence. In all other legal situations interruption of limitation periods is a matter regulated jointly, in the separate Section 4 of the LCT (Articles 387-393)."

The domestic courts have followed the view of the Supreme Court of Serbia religiously when deciding the cases involving damage caused by the criminal offence of armed rebellion under Article 124 of the Criminal Code of Yugoslavia.<sup>94</sup>

Consistency in the application of the legal view of the Civil Law Department of the Supreme Court of Serbia adopted at the session held on 27 December 1999 was for the first time put to the test following the armed conflict in Kosovo, when a number of citizens brought civil actions to claim compensation for the damage they sustained as a result of the war in Kosovo.

94 See, e.g., the following decisions: Gž-738/04 of the District Court in Valjevo; Gž-2614/04 and Gž-4701/06 of the District Court in Belgrade; Rev-180/05 and Rev-1473/06 of the Supreme Court of Serbia; Gž-1965/10, Gž-6643/10, Gž-11694/10, Gž-15473/10, Gž-1214/11, Gž-5182/11 and Gž-4244/11 of the Court of Appeal in Belgrade.



While in the case of former JNA members who claimed compensation for damage (death or wounds) which they suffered as a result of armed clashes with the paramilitary formations of the former Yugoslav republics, in which no one had been previously convicted of armed rebellion under Article 124 of the CC of Yugoslavia, and in which no other reasons had existed for extending the limitation period, in compensation lawsuits brought by citizens in respect of the damage sustained as a result of the armed conflict in Kosovo, final convictions did occur. Namely, many people were finally convicted either of terrorism under Article 125 of the CC of Yugoslavia, or of association for the purpose of conducting hostile activities under Article 136 of the CC of Yugoslavia.<sup>95</sup>

Nevertheless, Serbian courts ruled that the privileged limitation period from Article 377 of the LCT did not apply to these claims, and that it was not for a civil court to decide the preliminary question whether the act that caused damage possessed elements of a criminal offence. Of course, it was not for the civil court to do so, because final judgments of conviction did already exist.

Here is an excerpt from the section of the Court of Appeal' judgment **Gž-830/10** in which the court states the grounds on which it decided: "In view of the legal opinion of the Civil Law Department of the Supreme Court of Serbia of 27 February 1999, this court does not find any grounds for the limitation period set forth in Article 377 of the LCT to apply in the case under consideration. This Article stipulates that if damage is caused by a criminal offence, and a longer limitation period is prescribed for the prosecution of the offence concerned, the time limit for bringing an action against the person liable will expire upon the expiration of the limitation period prescribed for the criminal prosecution. In the instant case, the plaintiff suffered damage on 10 May 1999 in the territory of Kosovo, which is part of the Republic of Serbia. But since the plaintiff was not wounded in armed clashes with the paramilitary units of any former Yugoslav republic and his claim was filed on 13 May 2003, his claim is statute-barred pursuant to Article 376 of the Law on Contracts and Torts, because four years and five days had passed between the date of the occurrence of the wrongful act and the date on which the claim was filed."<sup>96</sup>

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95 For more details, see the HLC report *Judging with Impunity: The role of prosecutors and judges in show trials of Kosovo Albanians 1998-2000*, available at [http://www.hlc-rdc.org/wp-content/uploads/2017/07/Report\\_Judging\\_with\\_impunity\\_The\\_role\\_of\\_prosecutors\\_and\\_judges\\_in\\_show\\_trials\\_of\\_Kosovo\\_Albanians\\_in\\_the\\_period\\_1998-2000.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/07/Report_Judging_with_impunity_The_role_of_prosecutors_and_judges_in_show_trials_of_Kosovo_Albanians_in_the_period_1998-2000.pdf).

96 See judgment Gž-830/10 of the Court of Appeal in Kragujevac.



These same grounds were cited by the Court of Appeal in Novi Sad in its judgment **Gž-3931/11**. This court stated that a special limitation period applicable in compensation cases involving damage caused by a criminal offence applies only where the existence of a criminal offence has been established through criminal proceedings; otherwise, the limitation period specified in general limitation rules set forth in Article 376 of the LCT will apply. The appellate panel offered the following explanation:

”Since the wrongful act took place in 1999 and its harmful effects, namely mental anguish, occurred on 26 March 1999, the date on which the plaintiff learnt of his son’s death in the war zone, and the compensation claim was filed with a court on 17 July 2009, the court of second instance finds that the decision of the first-instance court invoking the statute of limitations was correct and, consequently, the claim was ill-founded. Contrary to the legal opinion of the court of first instance that in the present case the limitation period prescribed by Article 377 of the LCT should be applied, because the damage the plaintiff suffered was the result of a criminal act of terrorism under 125 of the CC of Yugoslavia for which the defendant was responsible, and a longer limitation period is prescribed for the prosecution of that offence, the court of second instance is of the opinion that there are no grounds for application of the provisions of Article 377 of the LCT. Namely, the special limitation period from the cited Article 377 may be applied only where the existence of a criminal offence has been established through criminal proceedings, otherwise, the limitation periods set forth in general limitation rules envisaged in Article 376 of the LCT are to be applied. Within these limitation periods, the state may be held liable on grounds of objective liability for the damage arising out of the performance of a military task during a state of war as a dangerous activity within the meaning of Article 174 of the LCT.”<sup>97</sup>

By taking such a view, the regular courts yet again interpreted this norm in a manner detrimental to the victims and denied them the right to file their claims against the state within the privileged limitation period. In deciding the claims, the judges displayed an arbitrariness which was founded upon the authority based on the possession of power (rather than the authority of law), and displayed an extreme degree of arbitrariness in application of the law, as they failed to state clearly and unambiguously the grounds on which their view, that the rules applicable to the so-called compensations for damage caused by war did not apply to the above-

97 See judgment Gž-3931/11 of the Court of Appeal in Novi Sad.





mentioned cases, was based. It seems likely that in these proceedings too the courts were more concerned with protecting the state budget than with protecting the individual rights of the injured parties.

The Constitutional Court of Serbia also had a chance to set out its opinion on this subject when considering the constitutional appeals lodged by injured parties. In one of its decisions upon appeal this court argued as follows:

“The Constitutional Court used the provisions of the Law on Contracts and Torts governing limitation periods for claiming damages as the starting point for deliberation, and established that Article 376 § 1 and 2 of the Law on Contracts and Torts provides for subjective and objective time limits, the former being three years from the date on which the damage and the identity of the person who caused it were discovered by the injured party, and the latter being five years from the occurrence of the damage. If the damage was inflicted by a criminal offence and a longer limitation period is prescribed for the prosecution of that offence than the period laid down in Article 376 of the LCT, a compensation claim in respect of this type of damage against a person liable becomes statute-barred upon the expiry of the limitation period prescribed for the criminal prosecution, according to Article 377, § 1 of the LCT. Hence, in order for the longer limitation period to apply, the damage has to have been caused by a criminal offence. However, according to Article 13 of the Civil Procedure Act, where the existence of a criminal offence and the criminal responsibility of the perpetrator are concerned, a civil court is bound by a final judgment of the criminal court. Therefore, the Constitutional Court holds that a limitation period longer than the general limitation period prescribed by Article 376 of the Law on Contracts and Torts is applicable only if a criminal court has established, in a final judgment, that the act that caused the damage constitutes a criminal offence. However, since on the basis of the very allegations in the constitutional appeal it can be concluded that criminal proceedings against the suspected perpetrators have never been instituted, the Constitutional Court holds that in the instant case, the general limitation rules for compensation claims laid down in Article 376 are to be applied, and therefore finds that the time limit within which the appellant was allowed to pursue compensation through court proceedings has expired.

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On the grounds of the above-said, the Constitutional Court holds that the legal view set out in the impugned judgment of the Supreme Court of Serbia is correct and founded upon a constitutionally acceptable, rather than arbitrary, interpretation of the applicable law, and therefore the judgment of the Supreme Court has not breached the appellant's right to a fair trial or his right to rehabilitation and redress, guaranteed by Articles 32 and 35 of the Constitution."<sup>98</sup>

This decision of the Constitutional Court makes it clear that the longer limitation period is applicable only to situations where the existence of a criminal offence has been established in a final judgment, and that a civil court is not authorised to decide the question about the existence of a criminal offence except in situations where some procedural obstacles have precluded the institution of criminal proceedings.

## **ii. Existence of a Criminal Offence as a Preliminary Issue in Civil Cases in which Injured Parties were represented by the HLC**

The preliminary question of the existence of a criminal offence has arisen in the vast majority of the civil actions the HLC has brought before Serbian courts on behalf of injured parties, including the above-mentioned cases of *Kukurovići and Dudaš and others*. In all these proceedings, the regular courts have taken the same view: unless there existed a final judgment of conviction in respect of the direct perpetrator of the offence (and civil courts are not authorised to decide the question about the existence of a criminal offence), the limitation periods prescribed by Article 377 of the LCT are taken to apply. In some cases, however, even where there existed a final judgment of conviction, the courts again ruled that there were no grounds for Article 377 of the LCT to apply. One such case is *Enver Duriqi et al. v. The Republic of Serbia*.

### **Case of *Duriqi and others* (Podujevo)**

Twenty-four plaintiffs issued civil proceedings against the Republic of Serbia seeking compensation in respect of the non-material damage i.e. emotional distress they suffered as a result of the death of their loved ones in an incident that took place on 28 March 1999 in Podujevo (Kosovo). That day, members of the paramilitary unit known as the "Scorpions", a reserve component of the forces of the Serbian Ministry of the Interior, committed a war crime against ethnic Albanian civilians. Saša Cvjetan and several other members of the "Scorpions" forced members of the Bogujevci and

<sup>98</sup> See decision UŽ-345/2008 of the Constitutional Court of Serbia.



Duriqi families out of a shelter where they were hiding and killed 14 of them. Saša Cvjetan was found guilty of a war crime against a civilian population under Article 142 paragraph 1 of the Criminal Code of Yugoslavia and sentenced, by judgment K-1823/04 of the District Court in Belgrade, to twenty years in prison.<sup>99</sup>

The civil proceedings were initiated on 24 January 2007, when the plaintiff filed a civil action with the First Municipal Court in Belgrade to seek compensation in respect of the non-material damage they suffered as a result of the death of their closest family members. On 20 March 2009, the First Municipal Court handed down judgment 491/2007, rejecting the claim in its entirety. The court found that the statute-of-limitation defence raised by the defendant was well-founded, since the privileged limitation period under Article 377 of the LCT is applicable only in respect of a wrongdoer who is liable on the basis of culpability, which was Saša Cvjetan in this case, who had been finally convicted in a criminal proceeding. As regards the claim against the Republic of Serbia, only general limitation periods of three and five years prescribed by Article 376 of the LCT can be applied.<sup>100</sup>

The plaintiffs promptly appealed against the first-instance decision. On 10 March 2010, the Court of Appeal in Belgrade handed down judgment Gž-4185/2010, rejecting the appeal and upholding the judgment of the First Municipal Court in Belgrade. The appellate court accepted the finding that the privileged limitation period for claiming compensation for criminally inflicted damage applies only to cases where compensation is sought from the perpetrator of the offence and not in cases against a legal entity which is held vicariously liable for the damage s/he inflicted on a third party. The limitation period laid down in Article 377 of the LCT is applicable only in respect of the perpetrator of the act that is the cause of action, not to a legal entity that

99 In addition to Saša Cvjetan, several other defendants were sentenced to long prison terms over the incident in Podujevo: defendant Željko Đukić was sentenced to 20 years in prison for a war crime against a civilian population (by judgment K-Po2-44/2010 of the War Crimes Department of the Higher Court in Belgrade of 22 September 2010, which was upheld by judgment Kž1 Po2-2/2011 of the Court of Appeal in Belgrade of 11 February 2011); defendant Slobodan Medić was sentenced to 20 years in prison for a war crime against a civilian population (by judgment K.V. 6/2005 of the District Court in Belgrade of 5 April 2007); defendant Pero Petrašević was sentenced to 13 years in prison; defendant Branislav Medić was sentenced to 20 years in prison; and defendant Aleksandar Medić was sentenced to five years in prison. The Supreme Court of Serbia (judgment Kž I r.z. 2/2007 of 13 June 2008) upheld the first-instance judgment passed on Slobodan Medić and Pero Petrašević, reduced the sentence of Branislav Medić to 15 years, and quashed the judgment in respect of defendant Aleksandar Medić, ordering a retrial of his case. The retrial conducted by the War Crimes Department of the District Court in Belgrade resulted in judgment K.V. 8/2008 of 28 January 2009, by which Aleksandar Medić was again sentenced to five years in prison.

100 See judgment P-491/2007 of the First Municipal Court in Belgrade of 20 March 2009.



is held vicariously liable for the perpetrator's acts under Article 172 of the LCT. This means that compensation claims against the state alleging state responsibility for the damage resulting from an act of its agent become time-barred upon the expiry of the limitation periods laid down in Article 376 of the LCT.<sup>101</sup>

The plaintiffs applied for review. The Supreme Court of Cassation on 13 April 2011 dismissed Enver Duriqi's application for review and upheld the reasoning of the lower courts in their entirety. With respect to other plaintiffs, the application was dismissed as having failed to meet the amount in controversy requirement prescribed by the Criminal Procedure Code. Under the code, review is not allowed in property-related litigations where the value of a claim does not exceed the sum of EUR 100,000 in equivalent dinars as calculated using the middle exchange rate of the National Bank of Serbia on the date of filing the lawsuit.<sup>102</sup>

50 The plaintiffs then took the case to the Constitutional Court. On 17 August 2011, they lodged a constitutional appeal claiming a violation of their right to a fair trial, their right to rehabilitation and redress, their right to equal protection under the law and their right to a remedy. On 11 July 2014, the Constitutional Court ruled to uphold the appeal of Enver Duriqi upon finding that judgment Rev-85/2011 of the Supreme Court of Cassation of 13 April 2011 had violated his right to a fair trial. So the Constitutional Court quashed the judgment of the Supreme Court of Cassation and ordered this court to reconsider Enver Duriqi's application for review. The appeals of the other appellants were turned down. Stating the grounds for the decision, the Constitutional Court invoked its own position adopted at a session held on 7 July 2001, according to which in cases where damage resulted from a criminal offence and the limitation period prescribed for prosecution of the offence concerned was longer than the limitation periods laid down in Article 376 of the LCT, a compensation claim, be it against the wrongdoer or against any person responsible, may be filed up until the expiry of the limitation period prescribed for criminal prosecution of the offence concerned, only if the existence of the criminal offence and the perpetrator's criminal responsibility have been established by a final judgment. Since Saša Cvjetan had been finally convicted of the offence in question, the limitation period applicable in respect of the Republic of Serbia, as the person liable, was the same limitation period laid down in Article 377 of the LCT that would apply with respect to convict Cvjetan.<sup>103</sup>

101 See judgment Gž-4185/2010 of the Court of Appeal in Belgrade of 10 March 2010.

102 See judgment Rev-85/2011 of the Supreme Court of Cassation of 13 April 2011.

103 See judgment Už-3873/2011 of the Constitutional Court of Serbia of 11 July 2014.



Following this decision of the Constitutional Court, the Supreme Court of Cassation on 3 July 2015 quashed the judgments of the First Municipal Court in Belgrade and the Court of Appeal in Belgrade in the part concerning Enver Duriqi and ordered a retrial of his case, thus accepting the view of the Constitutional Court in its entirety.<sup>104</sup>

On 16 December 2015, the First Municipal Court in Belgrade handed down judgment P-21734/2015, allowing the proceedings P-2043/2010 of the First Municipal Court, that had already resulted in a final judgment, to be reopened, and granted in part the claims of all 24 plaintiffs.

This case is currently on appeal before the Court of Appeal in Belgrade.

### iii. Conclusion

The first argument offered in favour of the view that civil courts are not authorised to decide the question of the criminal responsibility of the wrongdoer as a preliminary question, is presumption of innocence, the principle that one is deemed innocent until proven guilty by court in a final judgment.<sup>105</sup> Other arguments advanced by the proponents of this view are that only criminal courts are authorized to establish the existence of a criminal offence and the perpetrator's criminal responsibility, and that Article 13 of the Civil Procedure Act strictly prescribes that where an issue arises in relation to the existence of a criminal offence and the perpetrator's criminal responsibility, a court conducting civil proceedings is bound by a final judgment of conviction of the criminal court.

What they fail to take into account is a provision of Article 12 of the Civil Procedure Act, which stipulates that when a decision of the court depends on a preliminary determination of the question whether a certain legal relationship exists, but the question has not yet been decided by a court or other competent authority (preliminary question), the court may decide on the question itself, unless otherwise provided for in special regulations.<sup>106</sup> The court's decision on the preliminary question shall be effective only in the civil proceedings in which the question was determined.<sup>107</sup>

104 See decision Rev1-50/2014 of the Supreme Court of Cassation of 3 July 2015.

105 Article 34, § 2 of the RS Constitution, Official Gazette of the RS no. 98/2006.

106 Article 12 § 1 of the CPA, Official Gazette of the RS nos.72/11, 49/13, 74/13 and 55/14.

107 Article 12 § 2 of the CPA, Official Gazette of the RS nos.72/11, 49/13, 74/13 and 55/14.



According to the above-cited provision, in order for a civil court to apply the privileged limitation period provided under 377 § 1 of the LCT, it must, prior to that, assess whether the act that caused the damage in question is a criminal offence. In other words, the court's decision on the merits of a compensation claim and statute of limitation objection depends on the preliminary determination of the question whether the act of the wrongdoer possesses elements of a criminal offence.

Denying the civil courts the right to decide the preliminary question of the existence of a criminal offence for the purpose of determining compensation cases involving damage caused by a criminal offence can jeopardise the very legality of the judgments resulting from civil proceedings. This is because the civil courts, by not being allowed to resolve the prejudicial (preliminary) issue which logically precedes any decision on the merits, are de facto precluded from deciding on the merits of the compensation claim at hand. In consequence, the injured party is a priori doomed to the general limitation periods provided under Article 376 of the LCT, even though the damage s/he sustained was the result of a criminal offence.

Besides, the Civil Procedure Act itself strictly provides, in Article 12 § 2, that the determination of a preliminary question has an effect only on the civil proceedings in which the question was determined. This means that the decision made with respect to the preliminary question is not fit to be substantially final and enforceable, and its effect is restricted only to the civil proceedings in the course of which and for the purpose of which it was made. Consequently, the fact that a court established, as a preliminary question, the existence of elements of a criminal offence in a wrongdoer's act does not imply a conviction or the civil court imposing a sentence on him/her. On the contrary, such a decision of the civil court will not have any criminal implications for the wrongdoer, because it only establishes the wrongdoer's civil liability to compensate the injured party for the damage s/he inflicted upon him, while giving the injured party the privilege of filing his/her compensation claim within the time limits prescribed for prosecution of the offence concerned.

The following opinion, which was set out in decision **Gž-1883/11**, supports the above-stated view that criminal and civil liability are two completely different matters:

“Civil liability is broader than criminal liability; therefore, although civil courts are bound by a final criminal conviction, parties and witnesses need to be heard in civil proceedings because the wrongdoer is held liable only within the limits of his/her responsibility, so the Law on Contracts and Tort allows the civil courts to determine whether the wrongdoer by his acts



contributed to the occurrence of the damage or caused the damage to be more extensive.”<sup>108</sup>

In view of all these considerations, the only conclusion that can be drawn is that the preliminary question of the existence of a criminal offence is not a criminal matter; the civil court may not decide on it as a subject of a separate litigation, therefore its decision cannot have the effect of finality, either with respect to an incidental request of a defendant or with respect to a defendant’s counterclaim.<sup>109</sup> Consequently, determination of the preliminary issue of the wrongdoer’s criminal responsibility in civil proceedings cannot breach the constitutionally guaranteed presumption of the innocence of the wrongdoer.

## VII. Calculation of Limitation Periods for Claims Based upon Criminally Inflicted Damage

Another problem faced by the Serbian judiciary concerns the moment from which the privileged limitation period for filing claims based upon criminally inflicted injury begins to run.

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When looking at the relevant provision of Article 377, it becomes clear a limitation period longer and more favourable to the claimant applies to cases where the damage has resulted from a criminal offence.

Clearly, this provision is meant to work in favour of the victims of a crime, allowing them to claim damages within a longer time limit - namely, that prescribed for the prosecution of the criminal offence in question, while at the same time working to the wrongdoer’s disadvantage, because s/he caused the damage by committing a criminal offence.

The fact that an act of a wrongdoer is classified as a criminal offence justifies not only the criminal punishment of the perpetrator, but also according privileged treatment to the party who suffered injury as a result of that act.

Article 377 of the LCT, which lays down limitation rules for compensation claims founded upon damage caused by a criminal offence, does not specify when the

<sup>108</sup> See judgment Gž-1883/11 of the Higher Court in Novi Sad.

<sup>109</sup> Dr Marija Karanikić Mirić, *Zastarelost potraživanja naknade štete prouzrokovane krivičnim delom* [Statutory limitation periods in compensation claims in respect of criminally inflicted injury], *Anali Pravnog fakulteta u Beogradu* [Journals of the Law school in Belgrade], year LIX, 1/2011, p. 202



time starts running on the privileged limitation period. So it can be understood as implying that also in cases where the damage is the result of a criminal offence, the commencement of the limitation period is to be determined according to Article 186 of the LCT (the date of the occurrence of the damage). There are at least two arguments in favour of such a conclusion: (1) Article 377 of the LCT does not specify when the limitation period for claims based upon damage resulting from a criminal offence begins to run; and (2) the legal provisions do not preclude application of general rules for determining the date of the occurrence of damage (as emphasised by the Constitutional Court itself in several of its decisions, including decision UŽ-863/2012).

If the view adopted earlier in court practice is accepted, according to which the occurrence of damage does not necessarily coincide with the occurrence of the wrongful act which caused it, and therefore the compensation claim accrues on the date of the occurrence of the damage, rather than on the date on which the wrongful act is committed, then in these litigations too, it rests upon the courts to establish when the damage occurred.

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Hence, two facts are worth noting here: first, the legal opinion which prevailed for several decades was that the plaintiff's discovery of the damage is not enough for determining the moment when the damage occurred, if it is not coupled with the discovery of the type and full extent of the damage, and when the harmful effects developed into a permanent condition;<sup>110</sup> and second, the commencement of the limitation period for certain types of claims for non-material damage is defined in the case-law of the highest courts in the following way:

“The time limits for filing compensation claims in respect of non-material damage begin to run as follows: for suffering physical pain, from the moment the pain has stopped; for suffering fear, from the moment the fear has stopped; for suffering emotional distress due to an impairment of daily living activities, from the date on which the claimant first knew that his daily living activities and his health had been permanently impaired, or from the date he first knew of the existence of a new, more severe after-effect.”<sup>111</sup>

110 See judgments Rev-260/05 and Rev-751/01 of the Supreme Court of Serbia and decision GŽ-187/05 of the District Court in Čačak.

111 See decision Rev-1427/05 of the Supreme Court of Serbia.





In view of all this, it is difficult to avoid the conclusion that in cases where the damage is caused by a criminal offence, the limitation period for claiming compensation can begin to run from date other than the date on which the damage occurred.

However, when this question was raised before civil courts, it turned out that the courts were of a different opinion. In one of its judgments, the Court of Appeal, deciding on the objection made by the injured party that the civil court had failed to take into account the moment when he first knew of the full extent of the damage when making a finding that his claim was statute-barred, stated as follows:

“...as regards compensation claims involving damage caused by a criminal offence and the application of the privileged limitation period provided for in Article 377 of the Law on Contracts and Torts, it should be noted that with the expiry of this limitation period, the claimant loses his right to claim compensation; in other words, the date on which the claimant first knew of the full extent of the damage or the date on which he first knew of the damage and the identity of the perpetrator or the date on which he first knew of his diagnosis and the definite form of his illness have no bearing on the application of the privileged limitation period, and the filing of a compensation claim outside the litigation process does not interrupt the limitation period within the meaning of Article 377 § 2 of the LCT”.<sup>112</sup>

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This opinion was followed in a large number of court decisions.<sup>113</sup>

However, some of the final decisions handed down by the Court of Appeal were founded on a completely different opinion. In judgment **Gž-2523/2010**, for example, this court upheld the first-instance judgment which granted the compensation claim. Giving the grounds for the decision, the courts stated the following: the injured party was diagnosed, after a psychiatric examination, as suffering from anxiety-depression syndrome, which manifested itself in its definite form on 4 March 2008; the disorder, which was the result of the injured party's stint in the war zone from 26 October to 7 December 1991, impaired his daily living activities by 17%; the competent courts, finding that the defendant – the Republic of Serbia – was under obligation to compensate him, granted his claim and awarded him a just compensation for that type of damage, but dismissed as unfounded his claim in respect of the fear he

<sup>112</sup> See judgment Gž-13406/10 of the Court of Appeal in Belgrade.

<sup>113</sup> See, e.g., decision Gž-7276/10 of the Court of Appeal in Novi Sad, and decisions Gž-6518/11, Gž-4395/11, Gž-5704/12, Gž-270/14 and Gž-2193/15 of the Court of Appeal in Belgrade.



suffered. It found the defendant's objection that the plaintiff's claim was time-barred to be ill-grounded, given the fact that the damage was caused by the criminal offence of armed rebellion, and the limitation period applicable to plaintiff's claim was the same as that applicable to the prosecution of the criminal offence in question, and the illness manifested itself in its definite form on 4 March 2008, and the legal action was filed on 25 March 2008."<sup>114</sup>

Because of the inconsistent practice of the courts in regard to this question too, and because of the dissatisfaction of many injured parties who lost their compensation cases, this question ended up before the Constitutional Court.

The Constitutional Court, in its decision **Už-2039/2010**, established that there had been a breach of the right to a fair trial and of the right to equal protection under the law, as a result of the inconsistent practice of the Court of Appeal in Belgrade in cases involving identical or similar factual and legal situations. The Constitutional Court even went one step further, by stating as follows:

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"The impugned judgment relies upon an interpretation of the substantive law that is acceptable from the constitutional point of view; Article 377 § 1 of the Law on Contracts and Torts stipulates that if damage is caused by a criminal offence, and a longer limitation period is prescribed for prosecution of the offence concerned, the time limit for bringing an action shall expire when the time limit prescribed for the criminal prosecution expires. This time limit is an objective time limit for bringing a compensation claim, and it is considered to begin running from the date of the occurrence of the damage; as the damage in the instant case occurred on 16 August 1991, this leads to the conclusion that the date of discovery of the damage and its full extent, in view of such a long limitation period of 15 years, has no bearing on the finding that the plaintiff's claim has not become statute-barred."<sup>115</sup>

This position was followed and invoked in decision **Už-863/2012** of the Constitutional Court:

"The Constitutional Court notes that in the present case under constitutional appeal, the ordinary courts, in finding that Article 377 § 1 of the Law on Contracts and Torts, which stipulates that if damage is caused by a criminal offence, and a longer limitation period is prescribed for the prosecution

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114 See decision Gž-2523/2010 of the Court of Appeal in Belgrade.

115 See decision Už-2039/2010 of the Constitutional Court of Serbia.



of the offence concerned, the time limit for bringing an action shall expire upon the expiration of the limitation period prescribed for the criminal prosecution, does apply to the instant case, provided an interpretation of the substantive law which is acceptable from the constitutional point of view. Hence, the said limitation period is an objective limitation period which begins to run from the date of the occurrence of the damage; the moment of the discovery of the damage and its full extent has no effect in such a long limitation period of 15 years, and does not affect the limitation period for the compensation claim concerned (see judgment UŽ-2039/2010 of 13 June 2012)."

By adopting such a position, the Constitutional Court de facto upheld the ordinary courts' interpretation of Article 377 of the LCT, an interpretation that deviates from the earlier position that in order for the moment of the occurrence of the damage to be determined it is not enough that the injured party had knowledge of the damage but that s/he also has to have had knowledge of the type and full extent of the damage, that is, when the harmful effects had developed into a lasting condition.

The argument advanced by the Constitutional Court that "the moment of the discovery of the damage and its full extent has no effect in such a long limitation period of 15 years and does not affect the limitation period for the compensation claim concerned" runs contrary to the previous, long-established case-law of the ordinary courts<sup>116</sup>, and the decisions of the Constitutional Court itself in cases where this court was requested to rule whether the ordinary court's decisions were in breach of the plaintiffs' right to a fair trial and equal protection under the law.<sup>117</sup> Besides, it runs contrary to the conclusion arrived at by the ECtHR in the case of *Golubović v. Serbia* that the Constitutional Court reacted appropriately in finding that the divergent interpretations of the commencement of limitation periods breached the appellants' rights, after which they requested the reopening of the civil proceedings in question.

The assertion that the present case does not involve the same factual or legal situation as those brought before the ECtHR, because it involved damage caused by a criminal offence, is also ill-founded, because it is in the cases involving damage caused by a criminal offence that the lawmakers had a clear intention of increasing the burden of responsibility placed on the wrongdoer and benefitting the aggrieved party.

116 See footnote 29.

117 See, e.g., UŽ-1749/09, UŽ-4933/11, UŽ-4561/10 and UŽ-5487/10.



By denying an injured party the right to have the limitation period applying to his case start running in the same way as the general limitation periods would start running could even place the injured party at a disadvantage. According to the case-law, in general limitation periods an objective limitation period begins to run from the moment of the occurrence of the damage (when the condition has manifested itself in its definite form, in the case of PTSD), whereas in the privileged limitation period an objective limitation period begins running even before the damage has occurred (i.e. before the condition has manifested itself in its definite form, in the case of PTSD).

Such an interpretation as that found in decision **Už-863/2012** has rendered the privilege granted to the injured party who has suffered the damage which is the result of a criminal offence completely meaningless.

## VIII. The Practice of Courts in Other Post-Yugoslav Countries

### i. Croatia

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The Croatian judiciary too has had to deal with the vexed issues of whether the privileged limitation period is applicable only in respect of the perpetrator of a criminal offence or in respect of the person responsible as well, and whether civil courts are allowed, for the purpose of applying the privileged limitation period, to examine whether the damage was caused by a criminal offence.

The Supreme Court of Croatia, in its judgment **Rev-358/1991-2**, has held that if a civil action is brought after the time limit for criminal prosecution has expired, the longer limitation period under Article 377 of the Civil Obligations Acts (COA) cannot be applied. The relevant part of the judgment reads as follows:

“Namely, according to the above-cited provision of Article 377 § 1 of the COA, a claim for compensation for damage caused by a criminal offence may no longer be brought once the limitation period for criminal prosecution of the offence concerned has expired. The criminal prosecution of the third defendant had undoubtedly become time-barred before the criminal proceedings against him were completed ... in which the charges against him were dropped exactly because the criminal prosecution had already been declared time-barred by a final decision of 9 March 1987, that is, before the indictment in this case was brought (on 21 September 1989).



Therefore, on that date the claim became time-barred.”<sup>118</sup>

In another decision, **Rev-2563/1992-2**, the Supreme Court of Croatia examined the possibility for a civil court to access, in the course of civil proceedings, the application of the statutory limitation period laid down in Article 377 of the Civil Obligations Act in cases where criminal responsibility has not been established by a final judgment resulting from criminal proceedings. The relevant part of the judgment reads as follows:

“Further, the legal opinion of the lower courts that Article 377 is only applicable where the existence of a criminal offence has been established in a final judgment of the criminal court is incorrect. This is because, according to well-established case-law, if damage has been caused by a criminal offence but no criminal proceedings have been instituted or concluded against the perpetrator because of his death or mental illness, or the offence at issue has been exempt from prosecution by a pardon or amnesty, or if there exist some other circumstances preventing criminal responsibility from being established or precluding the criminal prosecution, the fact that the damage was caused by a criminal offence may, if the defendant has invoked the statute of limitations, be established (as a preliminary issue) in the civil proceedings.

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It is to be noted that the longer statutory limitation period of the Civil Obligations Act is applicable not only in respect of the perpetrator of the criminal offence but also in respect of the person liable for the damage.”<sup>119</sup>

As regards the question whether a civil court may apply the longer limitation period provided in Article 377 of the Civil Obligations Act, the Croatian courts of appeal hold that this can be done only if it has been established by a final judgment of a criminal court that the damage had been caused as the result of a criminal offence. The relevant part of judgment **Gž-626/99** of the County Court in Bjelovar reads as follows:

“...The statutory limitation period under Article 377 of the Civil Obligations Act, as a longer limitation period, may be applied only where it has been established, by a judgment of a criminal court, that the damage was caused by a criminal offence. This limitation period cannot be applied if the criminal proceedings were terminated resulting in a decision without a finding of guilt in respect of the person responsible. However, there is

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118 See judgment Rev-358/1991-2 of the Supreme Court of Croatia.

119 See judgment Rev-2563/1992-2 of the Supreme Court of Croatia.



some doubt as to whether the civil court is allowed to establish whether the damage was caused by a criminal offence.

The civil court is authorised to do so only if there existed some procedural obstacles precluding the conduct of criminal prosecution against the perpetrator. Only then, and only in order to assess whether the statutory limitation period for claiming compensation in respect of damage was caused by a criminal offence, may the civil court itself establish whether the damage was caused by acts possessing essential elements of a criminal offence.”<sup>120</sup>

This opinion was followed by the County Court in Varaždin (judgment **Gž-151/03-2**).

Croatian citizens appealed to the Constitutional Court regarding this matter and lost their appeals. The Constitutional Court upheld the interpretation of lower courts that

“Article 377 of the Civil Obligations Act is applicable only where it has been established, by a judgment of the criminal court, that the damage was caused by a criminal offence, and that the longer limitation period under Article 377 is applicable not only in respect of the perpetrator of the criminal offence, but also in respect of the person liable for the damage.”<sup>121</sup>

As this issue ended before the European Court of Human Rights, this court too provided its opinion about the interpretation of Article 377 of the Civil Obligations Act by the Croatian courts. Having considered the application filed by *Ante and Marija Baničević* (case 44252/10), the court on 2 October 2012 declared it inadmissible. Explaining the reasons for so deciding, the ECtHR stated as follows:

“The Court notes that, although section 377 of the Civil Obligations Act leaves some doubt as to the manner of application of the statutory limitation period for civil actions seeking compensation for damage caused by a criminal offence, any possible lack of clarity was remedied by the established practice of the domestic courts. This allowed the applicants to foresee under what circumstances they might expect that their civil action would be dismissed on the grounds that it had become time-barred. However, by failing to lodge their civil action within the general statutory limitation period, the applicants, although legally represented, placed

120 See judgment Gž-626/99 of the County Court in Bjelovar.

121 See judgments U-III-8149/2014 i U-III-4886/2016 of the Constitutional Court of Croatia.



themselves in a situation in which they risked having their civil action declared time-barred.

Therefore, it cannot be said that the statutory limitation periods themselves, or the manner in which they were applied in this case, impaired the very essence of the applicants' right of access to the court."<sup>122</sup>

## ii. Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina (BiH) in several of its decisions also had to deal with the issues discussed above. Like the Constitutional Court of Croatia before it, this court also adopted a position that was based on the decision of the European Court of Human Rights in *Baničević v. Croatia*, as a result of which BiH citizens were deprived of the right to use the privileged limitation period for claiming damages.

Thus the Constitutional Court of BiH, in its judgment **Ap-4128/10**, provided its opinion regarding these two vexed questions, invoking the ECtHR decision and rationale in *Baničević*. The relevant part of the Judgment of the Constitutional Court of BiH is worded as follows:

“Further, the Constitutional Court holds that the reasoning of the Supreme Court in respect of the application of Article 377 of the Law on Contracts and Torts is not at all arbitrary, because Article 377 cannot be applied in respect of both the perpetrator of a criminal offence and a third person, who is considered liable for the damage caused by another person instead of him, but only in respect of the perpetrator. Therefore, the provision to be applied in respect of the third person is not Article 377, but Article 376 of the LCT. Further, the Constitutional Court notes that the Supreme Court found that in the instant case there were no grounds for the civil court to assess whether the damage was caused by acts that possessed elements of a criminal offence, and, in the opinion of the Constitutional Court, provided clear and precise reasons for so finding, therefore not acting arbitrarily in applying the substantive law. In addition to this, the Constitutional Court notes that the appellants had failed to demonstrate in the course of the civil proceedings that there existed a final judgment of the criminal court establishing that members of the armed forces of the Republika Srpska committed a crime

122 See ECtHR decision in *Baničević v. Croatia*, Application 44252/10, decision of 2 October 2012, § 36, 37.



against humanity or a crime against international law, during the commission of which close family members of the appellants lost their lives - that is, the existence of a final judgment the civil court would have been bound by within the meaning of Article 12 of the Civil Procedure Act.

Therefore, in view of the circumstances of the case at hand, and the case-law of the European Court of Human Rights (case of *Baničević*), the Constitutional Court holds that in the instant case there was nothing to prevent the appellants from lodging their civil action for damages within the limitation period under section 376 § 1 and 2 of the LCT. By failing to lodge their civil action within the general statutory limitation period, the appellants, although legally represented, risked having their civil action declared time-barred. The Constitutional Court notes that in the case at hand, Article 377 of the LCT could not be applied because the limitation periods under Article 377 can apply only in respect of the perpetrator of a criminal offence, not in respect of third parties who might be held liable for his acts. Further, there were no grounds for the civil court to assess whether the damage in question was caused by acts that constituted a criminal offence. Therefore, the Constitutional Court holds that in the instant case, which concerns the statute of limitations, it cannot be said that the statutory limitation periods themselves, or the manner in which they were applied in this case, infringed the appellants' right to a fair trial."<sup>123</sup>

The Constitutional Court of BiH followed this opinion based on the ECtHR decision in *Baničević* in its other decisions too.<sup>124</sup>

However, in its decision **AP-289/03**, which was handed down ten years previously, and prior to the ECtHR decision in *Baničević*, the Constitutional Court was of a different opinion. Here is the relevant part of this judgment:

"29. In view of the above considerations, the rationale given for the first-instance judgment contains detailed explanations regarding all applicable limitation periods, and the indisputable fact that the appellants' forebear was, as a civilian, detained in a detention camp during the war and killed there, indicate that a crime belonging to the category of crimes against humanity and international law was committed, which is a well-known

<sup>123</sup> See decision AP-4128/10, paras. 43-44 of the Constitutional Court of Bosnia and Herzegovina.

<sup>124</sup> See decisions AP-4264/11, AP-3979/11 and AP-2829/11 of the Constitutional Court of Bosnia and Herzegovina.





fact. Therefore, in cases like this one, a claim is time-barred only after the limitation period for prosecution of this category of crimes has expired. Hence the appellants are undoubtedly entitled to obtain compensation for the damage they suffered, namely the emotional distress they suffered because of the loss of their father/husband.

[...]

38. Therefore, the circumstances and facts of the instant case indicate that the damage sustained by the appellants was caused by the commission of a crime belonging to the category of crimes against humanity and international law. As according to Article 100 of the Criminal Code the crimes in question are not subject to any limitation periods, the compensation claims concerning damage caused by this category of crimes cannot be subject to a statute of limitations either. That being the case, the Constitutional Court holds that the absence of a final criminal conviction in the criminal proceedings does not imply that the damage was not caused by a criminal offence.”<sup>125</sup>

Judging by the above-cited decision, it can be said that it was only after the ECtHR judgment in *Baničević* that the Constitutional Court of Bosnia and Herzegovina decided to alter its position set out in case **AP-289/03**, and thus not allow the courts, where an issue arises in relation to whether the privileged limitation period applies only in respect of the perpetrator of a criminal offence or also in respect of the person liable, and whether the civil court, in order to apply the longer limitation period, is allowed to assess, as a preliminary issue, whether the damage was caused by a criminal offence, to apply legal norms in favour of the injured parties.

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## IX. Conclusion

As mentioned earlier, the privileged limitation periods were introduced into the legal system of Serbia with a view to providing better protection to injured parties and enable them to assert their claims within the limitation period prescribed for the prosecution of the criminal offence in question, as a longer limitation period, while at the same time imposing a higher level of responsibility on the wrongdoer, because s/he caused damage by committing a criminal offence – an act defined by the law as unlawful and committed with a guilty mind and punishable by criminal sanctions.

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125 See decision AP-289/03 of the Constitutional Court of Bosnia and Herzegovina.



However, the courts have gone to great lengths to thwart this clear legislative intention to give preferential treatment to those injured parties who have suffered damage which was caused by a criminal offence, the practice of ordinary courts that has been analysed here shows a clear intention on the part of judges to deprive injured parties of the right to obtain adequate compensation for the damage they suffered in every way they can, and thus save state budget funds.

In virtually none of the above-described legal situations have the legal norms governing the issue of limitation been interpreted in favour of the injured parties. What is more, even where the case-law initially upheld the view that a plaintiff's claims were well-founded, this view was altered soon without any legitimate reasons, such as changes in the relevant law or the need to reconsider the legal issue in question in the light of some new facts that had emerged. These unjustified changes of opinion resulted in inconsistent court practice and legal uncertainty. The civil proceedings in which the HLC has provided legal representation for the victims are the prime example of this. In these proceedings, some victims obtained final and enforceable judgments in their favour and received compensation from the Republic of Serbia, whereas some other victims, in the cases involving identical circumstances, lost their compensation cases just because the court practice had been changed in the meantime.

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In a considerable number of these cases, the Constitutional Court intervened in an attempt to improve consistency in court decisions or at least repair the damage done by the ordinary courts. Sometimes it was successful in doing so, but in many cases the vexed issues had to be resolved by the European Court of Human Rights (the case of *Golubović*, for example).

The judges' willingness to openly side with the defendant (the Republic of Serbia, for the most part), thus making the already difficult substantive and procedural position of the injured parties even more difficult, is giving cause for concern. This is because in doing so, the judges undermine the position of the plaintiff in civil proceedings, therefore undermining the principle of "equality of arms" between the parties in proceedings and placing an undue burden on injured parties that they are not able to shoulder. Finally, such an approach leads to a violation not only of the right to a fair trial but also the right to an effective remedy, as it a priori denies injured parties their right to have their case properly determined by the ordinary courts in Serbia.

Such a practice of the courts is damaging in multiple ways. First and foremost, it is damaging to injured parties, by making it impossible for them to obtain adequate legal protection, and putting an excessive burden on them in civil proceedings. Because of



that, many of them are forced to seek protection from the European Court of Human Rights. And this court has already expressed its opinion regarding Serbia in the case of *Golubović*.

Should injured parties in the future win their ECtHR cases against Serbia, that could put an additional strain on the state budget which the Serbian judiciary does its utmost to protect by its judgments. As a result, rather than being the guardian of the state budget, which is apparently the primary goal it has set itself, the Serbian judiciary might actually contribute to its collapse.

But above all, the Serbian judicial system is damaging itself, by becoming the source of legal uncertainty and inconsistent and arbitrary application of law, thus undermining the rule of law, instead of upholding it.







## **Circumventing Justice:**

The Statute of Limitations as a Mechanism for Denying War Victims  
the Right to Compensation

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