CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

**CASE OF BRANKO TOMAŠIĆ AND OTHERS v. CROATIA**

*(Application no. 46598/06)*

JUDGMENT

STRASBOURG

15 January 2009

**FINAL**

*15/04/2009*

*This judgment may be subject to editorial revision.*

**In the case of Branko Tomašic and Others v. Croatia,**

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 11 December 2008,

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

# PROCEDURE

1. The case originated in an application (no. 46598/06) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Croatian nationals, Mr Branko Tomašić, Mrs Đurđa Tomašić, Mr Marko Tomašić, Mr Tomislav Tomašić and Miss Ana Tomašić ("the applicants"), on 30 October 2006.

2. The applicants were represented by Mrs I. Bojić, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. On 7 May 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1956, 1963, 1985, 1995 and 2001 respectively and live in Čakovec. The first and second applicants are husband and wife and the third to fifth applicants are their children.

5. During 2004 M.T., the first and second applicants' daughter and the third to fifth applicants' sister, entered into a relationship with a certain M.M. They started living together with the applicants in their home. On 1

March 2005 they had a child, V.T. Soon afterwards M.M. had a series of disputes with the members of the household and often expressed verbal threats against M.T., which resulted in him moving out of the house in July 2005. On 4 January 2006 the Čakovec Social Welfare Centre (*Centar za socijalnu skrb Čakovec* – hereinafter "the Welfare Centre") filed a report with the Međimurje Police Department (*Policijska uprava međimurska*) stating, *inter alia*, that on 2 January 2006 M.M. had come to the Centre and claimed that he had a bomb and would "throw it at his former wife [meaning M.T.] and child".

6. On 5 January 2006 M.T. lodged a criminal complaint with the Čakovec State Attorney's Office against M.M. She alleged that on a number of occasions since July 2005 M.M. had come to her parents' house where she also lived with her daughter and had threatened to kill her and their daughter with a bomb unless she agreed to come back to him. He had also often made telephone calls and sent SMS messages to her by mobile phone repeating the same threats.

7. On 3 February 2006 M.M. was detained following the instigation of the criminal proceedings against him in the Čakovec Municipal Court (*Općinski sud u Čakovcu*) on 27 January 2006. A psychiatric opinion obtained during the proceedings stated that on 2 January 2006 M.M. had claimed before the employees of the Welfare Centre that he had a bomb and that his threats had been meant seriously. He had repeated the same claim on 19 January 2006 before police officers from the Međimurje Police Department. The relevant parts of the conclusions of the report read as follows:

> "1. Defendant M.M. is a person suffering from a profound personality disorder etiologically linked to innate malfunctioning of the brain and the highly unfavourable pedagogical circumstances of his childhood. Dg: mixed personality disorder ...
>
> 2. In the context of the said personality disorder the defendant's reaction to a problematic situation was an inadequate and pathological defence mechanism with inflated ideas and related activities. These inflated ideas do not amount to a mental illness.
>
> 3. I have not found elements of either permanent or temporary innate mental illness, diminished intellectual capacity or epilepsy which might be linked to the criminal offences with which the defendant is charged.
>
> 4. He is not addicted to alcohol, drugs or other substances ...
>
> 5. In view of what has been said under 1, 2 and 3 and in view of all the other information collected so far in connection with the criminal offences, I consider that his ability to wilfully control and understand the meaning and consequences of his act *tempore criminis* was diminished, but that [he was not] completely unaccountable.
>
> 6. There is a strong likelihood that he will repeat the same or similar criminal offences. In order to prevent this, I recommend that the court, apart from the other

measures, order compulsory psychiatric treatment with a predominantly psychotherapeutic approach with the aim of developing an ability to resolve difficult situations in life in a more constructive manner."

8. On 15 March 2006 the Municipal Court found M.M. guilty of threatening M.T. on several occasions during the period between July and 30 December 2005 both in front of her family house and at the parking lot near the city graveyard when M.T. had been alone. He had shouted threats that he would kill her, himself and their child with a bomb; at the Welfare Centre on 2 January 2006 he had said that his threats had been meant seriously, that he actually had a bomb and that he would kill himself and the child with the bomb on the child's first birthday on 1 March 2006. He was sentenced to five months' imprisonment and a security measure of compulsory psychiatric treatment was ordered during his imprisonment and afterwards as necessary. In ordering the defendant's compulsory psychiatric treatment the court relied entirely on the findings of the psychiatric report. The relevant part of the judgment read as follows:

"... throughout the whole period in question the defendant had been telling the victim that he would throw a bomb at himself and their child as well as her [the victim] if she happened to be around. These events came to a head on 30 December. The defendant did not refrain from mentioning a bomb either in front of the Welfare Centre's employees or a policeman. Furthermore, he said in front of the policemen that he would blow himself and the child up with a bomb on the child's first birthday. Therefore, there is no doubt that both the victim and the witnesses understood these threats as being meant seriously ... Thus, the victim's fears for her own as well as her child's safety were justified ...

...

... all conditions for ordering a security measure [of compulsory psychiatric treatment] have been fulfilled since the defendant committed a crime while his capacity for understanding was diminished and it is likely that he will repeat the same or similar offence. It is necessary to order compulsory psychiatric treatment during his prison term and after his release. The treatment shall take a predominantly psychotherapeutic approach, as recommended by the expert, in order to develop [the defendant's] ability to address difficult situations in life in a more constructive manner."

9. On 28 April 2006 the Čakovec County Court (*Županijski sud u Čakovcu*) reduced the security measure to the duration of M.M.'s prison sentence and upheld the remaining part of the judgment. The relevant part of the judgment reads as follows:

"... there is no doubt that frequent murder threats by ... a bomb should by any objective test have been understood as meant seriously and that [such threats] would cause a real sense of disquiet, fear and anxiety in an average person, in particular in a situation where the victim has known the perpetrator as an aggressive person out of control, as is the case with the victim in the present case.

> There is also no doubt that ... the defendant's threats extended throughout a period of half a year during which the victim feared, owing to continued threats, not only for her own safety but also for the safety and wellbeing of her child which was not even a year old at the time. The victim was thus undoubtedly put in a difficult and unenviable position where she feared daily for her and her daughter's life, which was confirmed not only in her testimony but also the fact that she sought assistance from the competent authorities [such as] the police, the Social Welfare Centre and the State Attorney.
>
> ...
>
> While examining ... the impugned judgment under Article 379 paragraph 1(2) of the Code of Criminal Procedure this appellate court has established that the first-instance court violated the statutory provisions to the detriment of the defendant when it ordered that a security measure of compulsory psychiatric treatment should continue after the defendant's release [from prison], which is contrary to Article 75 of the Criminal Code according to which compulsory psychiatric treatment may last as long as the reasons for its application exist but no longer than the prison term.
>
> ...
>
> ... this court does not agree with the defendant's argument that in his case the purpose of punishment would be achieved by a suspended sentence, especially in view of the fact that the defendant ... did not show any self-criticism as regards his acts or any feelings of remorse for what he had said ..."

10. M.M. served his sentence in Varaždin Prison and was released on 3 July 2006. On 15 August 2006 he shot M.T., her daughter V.T. and himself. Before the shooting he was spotted by M.T.'s neighbour carrying an automatic gun and leaving his bicycle in the adjacent woods. The neighbour immediately called the police. The police arrived at the scene twenty minutes later, just after the tragic event.

11. On 15 August 2006 the police interviewed M.T.'s neighbour I.S. who had seen M.M. approaching M.T.'s house immediately before the critical event. At the request of the police, on 17 August 2006 an investigating judge of the Varaždin County Court issued a search warrant of a flat and a vehicle belonging to a certain M.G. who was suspected of having procured weapons for M.M. The warrant was executed the same day, but no connection was established between M.G. and the weapons used by M.M.. The investigating judge has not taken any further steps in that case.

12. On 18 August 2006 the police submitted a report to the Čakovec County State Attorney's Office detailing the circumstances of the tragic event.

13. On 28 November 2006 the State Attorney's Office dismissed a criminal complaint against M.M. for murdering M.T. and V.T. on the ground that he was dead. It is unclear who lodged that complaint, but a copy of this decision was sent to the applicants. In a letter of the same day the State Attorney's Office asked the Međimurje Police Department to collect all information concerning psychiatric treatment of M.M. in Varaždin

Prison. The relevant part of a report drawn up on 13 December 2006 by the Varaždin prison authorities reads as follows:

> "M.M. had been kept in detention on remand in Varaždin Prison from 3 February to 22 May 2006 when he was sent to serve his prison term ... which expired on 3 July 2006.
>
> A psychiatric examination of M.M. carried out during his stay in detention showed that he suffered from a mixed personality disorder which derived from innate malfunctioning of the brain and the unfavourable pedagogical circumstances of his childhood. In the same opinion the expert psychiatrist recommended that compulsory psychiatric treatment be ordered with a predominantly psychotherapeutic approach with the aim [that M.M.] develop an ability to resolve difficult situations in life in a more constructive manner.
>
> While M.M. served his prison term, intensive treatment consisting in frequent individual conversational sessions was envisaged, in accordance with the individual programme of serving a prison term. He rarely came for the sessions of his own accord and was therefore, in [order to satisfy] the need for treatment, requested to do so by the staff. ...
>
> While in prison M.M. saw the prison doctor on five occasions, sometimes of his own accord, sometimes at the doctor's call. He did not insist on his psychiatric therapy and therefore his treatment was based, as recommended by the expert, on intensive psychotherapeutic treatment by the staff, the prison governor and the others who talked to him. He was a highly introverted person, so his true personality could not be detected in detention or prison conditions."

14. On 11 December 2006 the Međimurje Police Department interviewed the Varaždin prison governor, P.L. The relevant part of a report on the interview drawn up on 2 December 2006 reads as follows:

> "The above-mentioned is the governor of Varaždin Prison and he states that the late M.M. served his prison term in Varaždin Prison from 3 February to 3 July 2006 ...
>
> While in prison M.M. underwent psychiatric treatment pursuant to the expert opinion and recommendation. The treatment was based on intensive psychotherapeutic treatment of M.M. consisting of conversational sessions between M.M. and the prison staff, himself [meaning the governor] and the prison doctor. During the treatment M.M. neither received nor asked for any pharmacotherapy. It was also established that M.M. was a very introverted person who did not wish to cooperate in the treatment.
>
> During his stay in the prison M.M. saw the prison doctor on five occasions in connection with some other problems, that is to say, illnesses.
>
> He further maintains that there are no internal regulations on the implementation of security measures and that all treatment is carried out in accordance with the Enforcement of Prison Sentences Act."

15. According to the Government, since no oversights on the part of the persons in charge of the execution of the M.M.'s prison term and security

measure had been established, the investigation was concluded, although no formal decision to that effect has been adopted.

16. M.M.'s medical record from prison, submitted by the Government, does not indicate any psychiatric or psychotherapeutic treatment.

17. On 6 November 2006 the applicants submitted a proposal to the State Attorney for a settlement of their claim for non-pecuniary damages related to the deaths of M.T. and V.T. They alleged failures by the competent authorities to take adequate steps to protect the lives of M.T. and V.T. and inadequacy of the investigation into the circumstances of their deaths. They sought 1,105,000 Croatian kunas (HRK) in compensation and HRK 13,481 for costs. They received no reply. Under section 186(a) of the Civil Procedure Act, where such a request has been refused or no decision has been taken within three months of its submission the person concerned may file an action with the competent court. The applicants have not brought a civil action.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Article 21 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000 and 28/2001) reads as follows:

> "Every human being has the right to life.
>
> ..."

19. The relevant part of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu*, Official Gazette no. 29/2002) reads as follows:

**Section 38**

> "Everyone has the right to request the institution of proceedings to review the constitutionality of statutes ..."

**Section 55**

> "(1) The Constitutional Court shall quash a statute or its provisions if it finds that they are incompatible with the Constitution ..."

20. The relevant part of Article 75 of the Criminal Code (*Kaznenei zakon Republike Hrvatske*, Official Gazette nos. 110/1997, 28/1998, 50/2000, 129/2000, 51/2001, 11/2003 and 105/2004) reads as follows:

> "The security measure of compulsory psychiatric treatment may be imposed only as regards a perpetrator who, at the time of committing a criminal offence, suffered from significantly diminished responsibility [and] where there is a risk that the factors giving rise to the state [of diminished responsibility] might incite the future commission of a further criminal offence.

The security measure of compulsory psychiatric treatment may be imposed, under the conditions set out in paragraph 1 of this Article, during the execution of a prison sentence, in lieu of a prison sentence or together with a suspended sentence.

Compulsory psychiatric treatment shall be imposed for as long as the grounds for its application exist, but [it shall not] in any case exceed the prison term ... Compulsory psychiatric treatment shall not under any circumstances exceed three years.

..."

21. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 63/2002, 62/2003 and 115/2006) read as follows:

**Article 174(2)**

"In order to ... decide whether to request an investigation ... the State Attorney shall order the police to collect the necessary information and take other measures concerning the crime [at issue] with a view to identifying the perpetrator ..."

**Article 177**

"Where there is a suspicion that a criminal offence liable to public prosecution has been committed, the police shall take the necessary measures with a view to indentifying the perpetrator ... and collect all information of possible relevance for the conduct of the criminal proceedings..."

**Article 187**

"(1) An investigation shall be opened against a particular individual where there is a suspicion that he or she has committed a criminal offence.

(2) During the investigation evidence and information necessary for deciding whether an indictment is to be brought or the proceedings are to be discontinued shall be collected ..."

22. The relevant provisions of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette no. 35/2005) read as follows:

**Section 19**

"(1) Every legal entity and every natural person has the right to respect for their personal integrity under the conditions prescribed by this Act.

(2) The right to respect for one's personal integrity within the meaning of this Act includes the right to life, physical and mental health, good reputation and honour, the right to be respected, the right to respect for one's name and privacy of personal and family life, freedom *et alia*.

..."

**Section 1100**

"(1) Where a court finds it justifiable, on account of the seriousness of an infringement of the right to respect for one's personal integrity and the circumstances of a particular case, it shall award non-pecuniary damages, irrespective of compensation for pecuniary damage or where no such damage exists.

..."

**Section 1101**

"(1) In the case of death or particularly serious invalidity of a person the right to non-pecuniary damages shall vest in his or her close family members (spouse, children and parents).

(2) Such damages may be awarded to the siblings, grandparents, grandchildren and a common-law spouse where these persons and the deceased permanently shared the same household.

"

23. Section 13 of the State Administration Act (*Zakon o ustrojstvu državne uprave*, Official Gazette nos. 75/1993, 48/1999, 15/2000 and 59/2001) reads as follows:

"The Republic of Croatia shall compensate damage caused to a citizen, legal entity or other party by unlawful or wrongful conduct of a State administration body, a body of local self-government and administration ..."

24. The relevant part of section 186(a) of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette nos. 53/91, 91/92, 58/93, 112/99, 88/01 and 117/03 reads as follows:

"A person intending to bring a civil suit against the Republic of Croatia shall beforehand submit a request for a settlement with the competent State Attorney's office.

...

Where the request has been refused or no decision has been taken within three months of its submission, the person concerned may file an action with the competent court.

..."

25. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette nos. 128/1999 and 190/2003) read as follows:

**PURPOSE OF A PRISON TERM**

**Section 2**

"The main purpose of a prison term, apart from humane treatment and respect for personal integrity of a person serving a prison term, ... is development of his or her capacity for life after release in accordance with the laws and general customs of society."

**PREPARATION FOR RELEASE AND ASSISTANCE AFTER THE RELEASE**

**Section 13**

"During the enforcement of a prison sentence a penitentiary or prison shall, together with the institutions and other legal entities in charge of assistance after release, ensure preparation of a prisoner for his or her release [from prison]."

**INDIVIDUAL PRGRAMME FOR THE ENFORCEMENT OF A PRISON TERM**

**Section 69**

(1) The individual programme for the enforcement of a prison term (hereinafter "the enforcement programme") consists of a combination of pedagogical, working, leisure, health, psychological and safety acts and measures aimed at organising the time spent during the prison term according to the character traits and needs of a prisoner and the type and possibilities of a particular penitentiary or prison. The enforcement programme shall be designed with a view to fulfilling the purposes of a prison term under section 7 of this Act.

(2) The enforcement programme shall be designed by a prison governor on the proposal of a penitentiary or a prison's expert team ...

(3) The enforcement programme shall contain information on ... special procedures (... psychological and psychiatric assistance ... special security measures ...)

..."

**HEALTH PROTECTION**

**Section 103**

"(1) Inmates shall be provided with medical treatment and regular care for their physical and mental health..."

26. Section 22 of the State Attorney Act (*Zakon o državnom odvjetništvu*, Official Gazette 75/1995) reads as follows:

"(1) The State Attorney's Office is entitled to compensation for the costs of representation before the courts and other competent bodies according to the regulations on lawyers' fees.

(2) Funds obtained as the costs of representation are paid into the State's budget."

27. As regards civil proceedings for damages the Government submitted several decisions of the Supreme Court expressing its opinion on the responsibility of the State for damage caused by the administrative authorities.

The relevant parts of decision no. Rev 2203/1991-2 of 30 December 1991 read as follows:

"The employees of Open Penitentiary V.-P. and of L. State Prison caused the damage in question by their unlawful and wrongful conduct in allowing D.P. to escape from the penitentiary instead of preventing his escape by the use of force if necessary (sections 175 and 176, paragraph 140, of the Enforcement of Penal and Misdemeanours Sanctions Act, Official Gazette nos. 21/74 and 39/74).

Enforcement of a sentence, and in particular the enforcement of a prison term, fulfils the purpose of punishment defined by law which includes, *inter alia*, preventing a perpetrator from committing [a further] criminal offence by restricting his freedom of movement. In the circumstances of the present case the employees of the above-mentioned penitentiaries, for whose conduct the defendant [the State] is liable, failed to [prevent the escape] of a convict who repeated the same act of violence (in even more serious circumstances) as the criminal offence for which he had been convicted and placed in prison ... The fact that he committed a criminal offence of robbery and caused damage to the plaintiff and numerous other persons by acts of violence during his escape shows that he is a danger to society who should have been prevented from committing criminal offences by being kept in prison. The same transpires from his previous criminal record ...

Therefore, in the case at issue there is a legally relevant causal link between the unlawful and wrongful conduct of the defendant's employees, the escape and the harmful act ... which all lead to the defendant's liability."

The relevant part of decision no. Rev 186/04-2 of 10 January 2006 reads as follows:

"Pursuant to section 13 of the State Administration Act (Official Gazette nos. 75/93, 48/99, 15/00 and 59/01) the Republic of Croatia is obliged to compensate damage resulting from unlawful or wrongful conduct of the State administration bodies, bodies of local self-government and administration ...

...

Conduct or an omission that is against a law or any other regulation amounts to an unlawful act ... if there exists an intent to cause damage to the rights or interests of third persons or acceptance of that outcome ."

28. The applicants submitted several decisions of the Supreme Court concerning the same issue.

The relevant part of decision no. Rev 713/1998 of 13 September 2000 reads as follows:

> "Conduct or an omission that is against a law or any other regulation amounts to an unlawful act only if there exists an intent to cause damage to the rights and interests of a third person or acceptance of that outcome. The same is true in respect of conduct or a failure to act, contrary to the common or prescribed manner of acting, amounting to wrongful conduct."

The relevant part of decision no. Rev 218/04-2 of 27 October 2004 reads as follows:

> "The plaintiffs' claim for damages against the Republic of Croatia is justified only where the statutory conditions have been fulfilled, namely, that the damage is a consequence of unlawful or wrongful conduct of a person or a body performing [civil] service. Unlawful conduct means acting against a law or any other regulation or an omission to apply a regulation with intent to cause harm to a third person or acceptance of that outcome. Wrongful conduct means an act or a failure to act that is contrary to the common or prescribed manner of acting and from which it can be concluded that there has been an intent to cause harm to the rights and interests of a third person or acceptance of that outcome."

The relevant part of decision no. Rev 730/04-2 of 16 November 2005 reads as follows:

> "... unlawful conduct means acting against the law or omitting to apply statutory provisions with intent to cause damage to a third person or acceptance of that outcome. Wrongful conduct means an act or a failure to act, contrary to the common or prescribed manner of acting ... The burden of proof is on the plaintiff. ... The plaintiff claiming damages is obliged to prove the existence of damage, a harmful act by the defendant (in this case unlawful or wrongful conduct of the State administration bodies within the meaning of section 13 of the State Administration Act) and a causal link between the harmful act and the actual damage."

The relevant part of decision no. Rev 257/06-2 of 18 May 2006 reads as follows:

> "The purpose of section 13 of the State Administration Act is [to make] the State liable for the damage caused by consciously acting against the law with intent to cause damage to another."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

29. The applicants made a twofold complaint under Article 2 of the Convention. They contended firstly that the State had failed to comply with their positive obligations in order to prevent the deaths of M.T. and V.T. and secondly that the State had failed to conduct a thorough investigation

into the possible responsibility of their agents for the deaths of M.T. and V.T.

Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

## A. Admissibility

*The parties' submissions*

30. The Government argued that the applicants had several remedies at their disposal which they had failed to exhaust. Firstly, they had failed to lodge a criminal complaint against any person they held responsible for the deaths of M.T. and V.T., which would have enabled them to propose evidence and investigating measures to be taken. Had they done so, the competent State Attorney's Office would have issued a reasoned decision on their complaint. Even if such a complaint had been dismissed, the applicants could have then continued the criminal prosecution of their own motion.

31. Secondly, the applicants could have brought a civil action for compensation against the State under sections 1100 and 1101 of the Civil Obligations Act and under the Convention, which was directly applicable in Croatia.

32. Lastly, the fact that the State's liability existed only where a causal link between a harmful act and the actual damage was proven was a universally accepted principle of liability for damages that was not specific to the Croatian legal system.

33. The applicants contended that under domestic law the third to fifth applicants had no right to seek compensation for the death of V.T. A civil action for compensation from the State, which was a possibility open to all the applicants in respect of the death of M.T. and to the first and second applicants in respect of the death of V.T, would have had no prospect of success. That was because the requirements established by the Supreme

Court, namely, that the acts of the responsible authorities had to be unlawful and that they had to have acted with intent to cause damage to third persons or at least acceptance of that outcome would have been impossible to prove. Furthermore, if they had lost they would have had to bear the costs of representation of the State in the proceedings by a State Attorney's Office, which was entitled to the fees set out in the Scale of Lawyers' Fees. According to the standards of the Supreme Court's case-law, the applicants could have claimed about HRK 800,000 in compensation. As the costs of representation of the State were to be assessed according to the value of the claim, they would have amounted to about HRK 80,000. Thus they would have exceeded the applicants' joint annual income, which was about HRK 14,000 since the only member of their family living in the same household who had an income was the first applicant. In view of the fact that their possible claim had no prospect of success, the risk of having to bear the State Attorney's fees, from which they had no right of exemption, was very high. Bearing these costs would have financially ruined them, which was why they had not lodged a civil action against the State.

34. As to the Government's objection that they should have lodged a criminal complaint against the persons they considered responsible for the deaths of their close relatives, the applicants argued that all information known to them had also been known to the relevant State authorities and that in those circumstances it had been incumbent on the authorities to take appropriate steps to investigate the deaths of M.T. and V.T.

*The Court's assessment*

35. The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. The rule of exhaustion of domestic remedies referred to in Article 35 of the Convention requires that normal recourse should be had by an applicant only to remedies that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Selmouni v. France* [GC], no. 25803/94, §§ 74 and 75, ECHR 1999-V).

36. Article 35 provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the complaints invoked and

offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 68).

37. The Court would emphasise that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, 19 March 1991, Series A no. 200, § 34). It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see *Van Oosterwijck v. Belgium*, 6 November 1980, Series A no. 40, § 35). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others*, cited above, § 69).

38. In respect of a substantive complaint of failure of the State to take adequate positive measures to protect a person's life in violation of Article 2, the possibility of obtaining compensation for the death of a person will generally, and in normal circumstances, constitute an adequate and sufficient remedy (see, *E. and Others v. the United Kingdom*, no. 33218/96, § 110 and, *mutatis mutandis*, *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I).

39. The Court notes at the outset that the newly introduced sections 1100 and 1101 of the Civil Obligations Act, which entered into force on 1 January 2006, provide a possibility of seeking compensation in connection with the death of one's spouse, child or parent and that compensation may also be awarded to the siblings, grandparents, grandchildren and a common-law spouse where these persons and the deceased permanently shared the same household. The Court therefore finds that under domestic law the third to fifth applicants, being her aunts and uncles, have no right of compensation for the killing of V.T. It follows that the Government's objection in respect of the third to fifth applicants in connection with the death of V.T. must be rejected.

40. As to the first and second applicants' right of compensation for the deaths of both M.T. and V.T. and the third to fifth applicants' right of compensation for the death of M.T., the Court notes that sections 1100 and 1101 of the Civil Obligations Act do provide a legal ground for seeking compensation from the State. The Court will now examine whether the Government have shown that a civil action for compensation against the State is a remedy that has to be exhausted in the circumstances of the present case.

41. The Court notes that after M.M. had killed M.T. and V.T. no responsibility of the State officials involved was established in respect of

the relevant authorities' duty to protect the lives of the victims. In these circumstances it might be said that a civil action for damages against the State does not have much prospect of success, in particular in view of the requirement under domestic law and practice that the State's liability be engaged only in the event of unlawful conduct on the part of the authorities or unlawful failure to act and intent on the part of the authorities to cause damage to a third person or acceptance of that outcome.

42. However, and notwithstanding the chances of success of a potential civil action concerning the lawfulness of the acts of the relevant authorities, the Court notes that in any event the issue here is not a question of whether the authorities acted unlawfully or whether there was any individual responsibility of a State official on whatever grounds. Much more broadly, the central question of the present case is the alleged deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for. In this connection the Court notes that the Government have not shown that these issues, and in particular the applicants' complaint under Article 2 of the Convention related to the insufficiencies of domestic law and practice preceding the deaths of M.T. and V.T., could be examined in any proceedings relied on by the Government.

43. As to the Government's argument that after the killings of M.T. and V.T. the applicants could also have lodged a criminal complaint, the Court notes that a step in that respect was taken by an investigating judge of the Varaždin County Court when, on 17 August 2006, he ordered a search of a flat and vehicle of a certain M.G. who had been suspected of having procured weapons to M.M. and by the Čakovec State Attorney's Office when, on 28 November 2006, it asked the Međimurje Police Department to collect all information concerning M.M.'s psychiatric treatment while he had been serving his prison sentence. However, those steps did not lead to any criminal or other proceedings against any of the persons involved. The Court cannot see how an additional criminal complaint about the same issues lodged by the applicants might have led to a different outcome. In this connection the Court reiterates that in cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *McKerr v. the United Kingdom*, no. 28883/95, § 111, ECHR 2001-III, and *Slimani v. France*, no. 57671/00, § 29, ECHR 2004-IX (extracts)).

44. It follows that the remedies proposed by the Government did not have to be exhausted. In making this conclusion, the Court has taken into consideration the specific circumstances of the present case as well as the fact that a right as fundamental as the right to life is at stake (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, § 147) and that the Convention is intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective (see, for example, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 34, ECHR 1999-I). Accordingly, the Government's objection has to be rejected.

45. The Court finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

*The parties' arguments*

46. The applicants complained that the State had failed to comply with their positive obligation because, although it had been well known to the authorities that M.M.'s threats against M.T. and V.T. had been serious, they had failed to order and carry out a search of his premises and vehicle in the course of the first set of criminal proceedings against him in which he had been charged with making serious threats against MT. and V.T. They argued that, before his release from prison, the relevant authorities had failed to properly administer his psychiatric treatment and evaluate his mental condition and the likelihood that he would carry out his threats. They alleged insufficiencies of the regulation concerning the enforcement of a prison term and also maintained that the domestic law was defective because an accused found guilty of a crime could be given compulsory psychiatric treatment only for the duration of his or her prison term. The applicants also complained that the domestic authorities had failed to conduct a proper and thorough investigation into the State's possible responsibility for the deaths of their close relatives.

47. The Government argued that the domestic authorities had taken M.M.'s threats seriously and had for that reason remanded him in custody, where he had stayed during the whole trial. He had been sentenced to a prison term commensurate with the seriousness of his conviction and within the statutory framework of the offence he had been charged with. Furthermore, his compulsory psychiatric treatment had been ordered during his prison term, as provided for under domestic law.

48. As to their procedural obligation under Article 2, the Government contended that the competent State Attorney's Office had ordered the police to collect relevant information concerning the deaths of M.T. and V.T. The police had, *inter alia*, interviewed the prison governor, and this had shown how the measure of compulsory psychiatric treatment had been administered. The State Attorney's Office had not found that there had been any failure on the part of the prison authorities amounting to a criminal offence. As to their participation in the investigation, the applicants had failed to lodge a separate criminal complaint and had not shown that they had ever sought to be informed about the investigation.

*The Court's assessment*

*a. Substantive aspect of Article 2 of the Convention*

**General principles**

49. The Court reiterates that Article 2 enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, *Reports of Judgments and Decisions* 1998-III, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

50. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the Court is also careful, when considering positive obligations, not to interpret Article 2 in such a way as to impose an impossible or disproportionate burden on authorities (see *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 116). Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

51. A positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected

to avoid that risk (see *Osman*, cited above, § 116; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-III; and *Bromiley v. the United Kingdom* (dec.), no. 33747/96, 23 November 1999).

**Application of these principles to the present case**

52. The Court has examined firstly whether the relevant authorities were or should have been aware that M.M. presented a risk for the lives of M.T. and V.T. The Court notes that the competent State Attorney's Office instituted criminal proceedings against M.M. on charges of making serious threats against M.T. and V.T., which resulted in M.M. being found guilty as charged and sentenced to five months' imprisonment. The domestic courts established that M.M. had been making threats against M.T. and V.T. for a long period of time, namely, from July to December 2005. They found further that he had not refrained from repeating those threats both before the employees of the Čakovec Welfare Centre and the police, including his announcement that he was going to blow M.T. and V.T. up with a bomb on the latter's first birthday, which was 1 March 2006. He repeatedly claimed that he was in possession of a bomb and could well have had other weapons. That these threats were taken by the domestic authorities as being meant seriously is shown by the fact that M.M. was sentenced to an unconditional prison term. Furthermore, a psychiatric examination of M.M. carried out in the course of the criminal proceedings established that he was suffering from a mixed personality disorder and was in need of compulsory psychiatric treatment in order to develop the ability to cope with difficult situations in life in a more constructive manner. It was established further that there was a danger that he would repeat the same or similar offences, which appears crucially important in the present case.

53. The above findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly show that the domestic authorities were aware that the threats made against the lives of M.T. and V.T. were serious and that all reasonable steps should have been taken in order to protect them from those threats. The Court will now examine whether the relevant authorities took all steps reasonable in the circumstances of the present case to protect the lives of M.T. and V.T.

54. The Court firstly notes that although M.M. had mentioned on several occasions that he had a bomb, and could well have had other weapons, no search of his premises and vehicle was ordered in the course of the initial criminal proceedings against him. No such search was ordered and carried out, although the relevant authorities had been aware of his above statements as early as 4 January 2006, when the Čakovec Social Welfare Centre filed a report containing such allegations with the Međimurje Police Department.

55. The Court notes further that a psychiatric report drawn up for the purposes of the criminal proceedings against M.M. stressed the need for

continued psychiatric treatment in order to help him develop the capacity for coping with difficult situations in life in a more constructive manner. When the decision ordering his compulsory psychiatric treatment became final and enforceable following the adoption of the appellate court's judgment of 28 April 2006, M.M. had already spent two months and twenty-five days in detention. Since he was sentenced to five months' imprisonment, it follows that his psychiatric treatment could only have lasted two months and five days before his release from prison. The Court considers that in such a short period M.M.'s psychiatric problems, in view of their gravity as established in the psychiatric examination carried out during the criminal proceedings against him, could hardly have been addressed at all.

56. Moreover, the Government have failed to show that the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered. The documents submitted show that the treatment of M.M. in prison consisted of conversational sessions with the prison staff, none of whom was a psychiatrist. Furthermore, the Government have failed to show that an individual programme for the execution of M.M.'s prison term was designed by the Varaždin prison governor as required under section 69 of the Enforcement of Prison Sentences Act. Such individual programme in respect of M.M. takes on additional importance in view of the fact that his prison term was combined with a measure as significant as compulsory psychiatric treatment ordered by the domestic courts in relation to the serious death threats he had made in order to help him develop the capacity to cope with difficult situations in life in a more constructive manner.

57. The Court notes further that the regulation concerning the enforcement of a measure of compulsory psychiatric treatment, namely the relevant provisions of the Enforcement of Prison Sentences Act, is of a very general nature. In the Court's view, the present case shows that these general rules do not properly address the issue of enforcement of obligatory psychiatric treatment as a security measure, thus leaving it completely to the discretion of the prison authorities to decide how to act. However, the Court considers that such regulations need to be sufficient in order to ensure that the purpose of criminal sanctions is properly satisfied. In the present case neither the regulation on the matter nor the court's judgment ordering M.M.'s compulsory psychiatric treatment provided sufficient details on the administration of this treatment

58. Since no adequate psychiatric treatment was provided to M.M. in the prison there was also no assessment of his condition immediately prior to his release from prison with a view to assessing the risk that, once at large, he might carry out his previous threats against the lives of M.T. and V.T. The Court finds such a failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report

expressly stated that there was a strong likelihood that he might repeat the same or similar offences. In this connection the Court notes that the appellate court established in its judgment of 28 April 2006 that M.M. had not shown any self-criticism as regards his acts or any remorse for what he had said. Furthermore, the Court notes that M.M. said on several occasions that he had meant to kill M.T. and V.T. on the latter's first birthday which was on 1 March 2006. In view of the fact that M.M. spent that day in prison, a fresh assessment of the threat he posed to the lives of M.T. and V.T. appears to have been all the more necessary before his final release.

59. The Court also notes that the first instance court ordered a measure of compulsory psychiatric treatment against M.M. during his imprisonment and afterwards as necessary as recommended by the psychiatrist (see § 7 above). However, the appellate court reduced that measure to the duration of his prison term since under Croatian law there is no possibility of extending compulsory psychiatric treatment beyond a prison term for those in need of such treatment.

60. In view of the above the Court considers that no adequate measures were taken to diminish the likelihood of M.M. to carry out his threats upon his release from prison (see *Osman v. the United Kingdom*, cited above, § 116).

61. The facts of this case, as established above, are sufficient to enable the Court to find a violation of the substantive aspect of Article 2 of the Convention on account of failure of the relevant domestic authorities to take all necessary and reasonable steps in the circumstances of the present case to afford protection for the lives of M.T. and V.T.

*b. Procedural aspect of Article 2 of the Convention*

62. The Court reiterates that the obligation to protect life under Article 2 of the Convention requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, cited above, § 161, and *Kaya*, cited above, p. 329, § 105). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see, *mutatis mutandis*, *Paul and Audrey Edwards*, cited above, § 69). The authorities must take the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention (see, for example, *mutatis mutandis*, *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII, § 63).

63. In the present case it was clear from the beginning that the perpetrator of the acts in question was a private individual, M.M., and his responsibility in that respect has never been put into question. However, M.M. killed himself and therefore any further application of criminal law mechanisms in respect of him became futile.

64. It now remains to be established whether in the circumstances of the present case the State had a further positive obligation to investigate the criminal responsibility of any of the State officials involved. The Court firstly reiterates that although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. The Court has already held that in the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII and *Tarariyeva v. Russia*, no. 4353/03, § 75, ECHR 2006-... (extracts)). The same should apply in respect of the possible responsibility of State officials for the deaths occurring as a result of their negligence. However, the applicants' complaint in respect of the substantive aspect of Article 2 of the Convention is not whether there was any individual responsibility of a State official on whatever grounds. The Court considers that the central complaint concentrates on the deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for.

65. In view of the nature of the applicants' complaint under the substantive aspect of Article 2 of the Convention and the Court's finding in this respect which imply that the procedures involved were necessarily insufficient from the standpoint of the substantive aspect of Article 2, the Court considers that there is no need for it to examine separately the

applicants' complaint under the procedural aspect of Article 2 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. The applicants further complained that they had no effective remedy at their disposal in respect of their Article 2 complaints. They relied on Article 13 of the Convention, which reads as follows:

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

### A. Admissibility

67. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

68. The Government argued that the applicants could have requested a criminal investigation into the deaths of M.T. and V.T. and also brought a civil action for compensation against the State under sections 1100 and 1101 of the Civil Obligations Act.

69. In reply to the Government's observations, the applicants submitted that there had been no need for them to lodge a separate criminal complaint because the authorities had been aware of all the facts surrounding the deaths of M.T. and V.T. As to the civil remedy relied on by the Government, they argued that it was not accessible to them.

70. The Court notes at the outset that the applicant's complaint under Article 13 of the Convention is linked to their complaints under Article 2 of the Convention, which are twofold (see paragraph 29 above). The Court proceeds by examining these two aspects of the alleged violation of Article 13 separately.

71. As regards the applicant's complaint that they had no effective remedy in respect of their complaint concerning the procedural aspect of Article 2 of the Convention, the Court considers that in view of its findings in respect of that aspect of Article 2, no separate issue is left to be examined under Article 13 of the Convention.

72. As regards the applicant's complaint that they had no effective remedy in respect of their allegations concerning the substantive violation of Article 2 of the Convention, the Court finds that what the applicants

challenge is the whole system for the protection of the lives of persons from the acts of dangerous criminals, including the legal framework within which the competent national authorities are to operate. In the Court's view, these are more questions of general policing in the national system for the prevention of crimes and not issues which could be properly addressed in any particular proceedings before the ordinary courts. It is not for an ordinary court to say whether the regulatory standards in operation are right or not, but to decide individual cases by applying the existing laws.

73. In this connection the Court reiterates that Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98, § 85 and *Leander v. Sweden*, 26 March 1987, Series A no. 116, § 77). In Croatia the Convention has been incorporated into the national legal system and the right to life is also guaranteed by the Constitution and there is a possibility of challenging the constitutionality of the laws before the Constitutional Court. However, the applicants' main complaint under the substantive aspect of Article 2 of the Convention is not that the existing laws and practices are unconstitutional but that they are deficient in view of the requirements of Article 2 of the Convention, a claim that cannot be challenged before the national courts, since it is for the legislators and politicians involved in devising general criminal policy to deal with such issues.

74. However, the role of an international court for the protection of human rights is quite different from that of the national courts and it is for the former to examine the existing standards for the protection of the lives of persons, including the legal framework of a given State. In these circumstances the Court considers that after having established the State's responsibility for the deaths of M.T. and V.T. by finding a violation of the substantive aspect of Article 2 of the Convention, no separate issue needs to be examined under Article 13 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

76. Each applicant claimed 60,000 euros (EUR) in respect of non-pecuniary damage.

77. The Government deemed the applicants' claim for just satisfaction unsubstantiated and unfounded.

78. The Court notes that it has found that the authorities, in relation to the death of the applicants' two close relatives breached the Convention. In these circumstances the Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis and having regard to the awards made in comparable cases, it awards the applicants EUR 40,000 jointly under that head, plus any tax that may be chargeable to them.

### B. Costs and expenses

79. The applicants also claimed HRK 9,150 for the costs and expenses incurred before the Court.

80. The Government did not comment.

81. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,300 for the proceedings before the Court, plus any tax that may be chargeable to the applicants.

### C. Default interest

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

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the deaths of M.T. and V.T.;

3. *Holds* that there is no need to examine separately the complaint under the procedural aspect of Article 2 of the Convention;

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

5. *Holds*

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

(i) EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants;

(ii) EUR 1,300 (one thousand three hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants;

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

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Søren Nielsen | Christos Rozakis |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Nicolaou is annexed to this judgment.

# CONCURRING OPINION OF JUDGE NICOLAOU

It seems to me that what was primarily and urgently required in the present case was effective police protection of the victims, mother and child. That is not to say that psychiatric help, together with social support measures, directed towards the perpetrator of the crimes, should not also have been tried in the search for a better solution to what was, obviously, a very difficult situation.

There is, of course, no way of knowing whether compulsory psychiatric treatment of " a predominantly psychotherapeutic approach", as prescribed by expert appointed, would have been effective at least in preventing the loss of life. What, however, is important here is that the courts, both at first instance and on appeal, considered that it was necessary to make such order, described in the relevant law as a "security measure". It must be assumed that the courts were aware of the regulatory framework in which the order would take effect, including possible difficulties in its enforcement due to the lack of detailed rules. They must, nonetheless, have expected compliance in the absence of which the order would have been devoid of meaning and purpose. There was, unfortunately, no real compliance. As is pointed out in paragraph 56 of the judgment, it has not been shown "that the compulsory psychiatric treatment ordered was actually and properly administered".

It would, undoubtedly, have been helpful to have had specific rules spelling out the practical steps for the enforcement of psychiatric treatment orders. But I find it difficult to accept that without such rules the order in question was, from its inception, ineffectual. The authorities have not explained convincingly that they did all that was possible to provide an environment in which the order would stand a chance of success. There is in fact no indication that specialist psychiatric help was made available to M.M. and neither is there any indication that efforts were made to enforce the order. It has been said that M.M. was himself reluctant to cooperate; but it should not be assumed that this would have persisted or that it would have prevailed if appropriate expert help, in the right context, had been forthcoming. Therefore, I am unable to subscribe to the view, expressed in paragraph 42 of the judgment, that "in any event the issue here is not a question of whether the authorities acted unlawfully or whether there was any individual responsibility of a State official on whatever grounds".

In Croatia, under a rule established by domestic case-law, the fact that a person in authority is at fault, whether by act or omission, will not render the State vicariously liable for compensation unless it is shown "that there was an intent on the part of the authorities to cause damage to a third person

or acceptance of that outcome". That restriction seems to me to be inconsistent with full State responsibility which must be regarded as an indispensable component in the protection of life under Article 2.

Having regard to the circumstances of the present case, the prospect of civil liability should not be associated with suppositions concerning what should have been the duration of sufficient treatment that would signal either success or failure. In the absence of actual experience, that could have been gained from properly administered treatment, no valid assessment was possible. Therefore, domestic provisions relating to length of treatment cannot here be directly relevant; a problem regarding duration would arise only where it was positively shown that a longer period of treatment was called for.

Finally and perhaps most importantly, it should have been apparent, if those responsible had carefully reflected on the situation, that the murder victims were, after M.M.'s release from prison, imperatively in need of police protection without which their lives remained in mortal danger. Sadly, nothing at all was done in that direction and, as it seems, no one has been held accountable in any way. In such circumstances individual fault should not be completely discounted by reason of imperfections in regulatory provisions concerning the enforcement of psychiatric treatment orders.