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

GRAND CHAMBER

CASE OF ŠILIH v. SLOVENIA

(Application no. 71463/01)

JUDGMENT

STRASBOURG

9 April 2009

This judgment is final but may be subject to editorial revision.

In the case of Šilih v. Slovenia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Christos Rozakis, *President*,
Nicolas Bratza,
Peer Lorenzen,
Josep Casadevall,
Ireneu Cabral Barreto,
Rıza Türmen,
Karel Jungwiert,
Boštjan M. Zupančič,
Rait Maruste,
Snejana Botoucharova,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Dean Spielmann,
Päivi Hirvelä,
Giorgio Malinverni,
András Sajó,
Nona Tsotsoria, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 2 April 2008 and on 18 February 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 71463/01) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Slovenian nationals, Ms Franja Šilih and Mr Ivan Šilih ("the applicants"), on 19 May 2001.

2. The applicants complained that their son had died as a result of medical negligence and that their rights under Articles 2, 3, 6, 13 and 14 of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for his death.

3. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. On 11 October 2004 the President of the Chamber decided that the admissibility and merits should be examined jointly, in accordance with

Article 29 § 3 of the Convention and Rule 54A and, under Rule 54 § 2 (b), that the Government should be invited to submit written observations on the admissibility and merits of the case.

5. On 28 June 2007 the Chamber composed of Corneliu Bîrsan, President, Boštjan M. Zupančič, Jean-Paul Costa, Alvina Gyulumyan, Davíd Thór Björgvinsson, Ineta Ziemele, Isabelle Berro-Lefèvre, judges, and also of Santiago Quesada, Section Registrar, delivered a judgment in which it unanimously declared the application partly admissible and held unanimously that there had been a procedural violation of Article 2 of the Convention and that there was no need to examine separately the complaints concerning the length of the civil and criminal proceedings and the alleged unfairness of the criminal proceedings under Article 6 of the Convention, or the alleged violation of Article 13 of the Convention.

6. On 27 September 2007 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 12 November 2007 a panel of the Grand Chamber granted the request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. At the final deliberations, Päivi Hirvelä, substitute judge, replaced Antonella Mularoni, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicants and the Government each filed a memorial on the admissibility and merits. The parties replied in writing to each other's memorials.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 April 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms T. MIHELIČ, State Attorney,
Ms Ž. CILENŠEK BONČINA, State Attorney, *Co-Agents*,
Ms V. KLEMENC, *Adviser*;

(b) *for the applicants*
Mr B. GRUBAR, *Counsel*,
Ms F. ŠILIH,
Mr I. ŠILIH, *Applicants*,
Mr T. ŽIGER,
Mr U. GRUBAR, *Advisers*.

The Court heard addresses by Mr Grubar, Mrs Šilih and Mrs Mihelič as well as Mr Grubar's and Mrs Mihelič's answers to questions put by Judges Maruste and Spielmann.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants, Franja and Ivan Šilih, were born in 1949 and 1940 respectively and live in Slovenj Gradec.

11. On 3 May 1993, at some point between midday and 1 p.m., the applicants' twenty-year-old son, Gregor Šilih, sought medical assistance in the Slovenj Gradec General Hospital for, *inter alia*, nausea and itching skin. He was examined by a duty doctor, M.E. On the basis of a diagnosis of urticaria (a type of allergic reaction), M.E. ordered the administration of intravenous injections of a drug containing glucocorticosteroid (Dexamethason) and an antihistaminic (Synopen). Following the injections, the applicants' son's condition significantly deteriorated. This was probably a result of him being allergic to one or both of the drugs. His skin became very pale, he began to tremble and to feel cold; M.E. noticed signs of tachycardia. A diagnosis of anaphylactic shock was made. Subsequently, at 1.30 p.m., the applicant's son was transferred to intensive care. M.E. ordered the administration of, *inter alia*, adrenaline. By the time the cardiologist arrived, the applicants' son had stopped breathing and had no pulse. Cardiopulmonary resuscitation was given. At around 2.15 p.m. the applicants' son was connected to a respirator and his blood pressure and pulse returned to normal, but he remained in a coma; his brain was severely damaged.

12. On 4 May 1993 he was transferred to the Ljubljana Clinical Centre (*Klinični center v Ljubljani*), where he died on 19 May 1993.

13. The exact timing of the events which led to the death of the applicants' son and the action taken by M.E. in response to his deteriorating condition were disputed in the domestic proceedings.

14. On 13 May 1993 the applicants lodged a criminal complaint (*ovadba*) with the Slovenj Gradec Unit of the Maribor First-Instance Public Prosecutor's Office (*Temeljno javno tožilstvo Maribor, Enota v Slovenj Gradcu*) against M.E. for the criminal offence of "negligent medical treatment" (*nevestno zdravljenje*) which, following the applicants' son's death, was characterised as "a serious criminal offence that [had] caused damage to health" (*hudo kaznivo dejanje zoper človekovo zdravje*). The applicants argued that, through the intravenous injection of the two drugs,

M.E. had given their son the wrong treatment and had subsequently failed to take appropriate corrective measures after his condition deteriorated.

15. In the course of the preliminary proceedings (*predkazenski postopek*) medical documents concerning the treatment administered to the applicants' son were seized by the police and, following his death, the duty investigating judge (*preiskovalni sodnik*) directed the Ljubljana Institute for Forensic Medicine (*Inštitut za sodno medicino v Ljubljani*) to conduct an autopsy and prepare a forensic report.

16. On 26 August 1993 the police submitted a report to the public prosecutor from which it appears that the Ministry of Health (*Ministrstvo za zdravstvo*) requested the Medical Association (*Zdravniško Društvo*) to set up a commission to prepare an opinion in the case. The commission was composed of the same experts as those who were preparing the forensic report (see paragraph 17 below). According to the report, the opinion was sent on 11 June 1993 to the Ministry of Health, which published it in two of Slovenia's main newspapers on 19 June 1993.

17. On 1 July 1993 the Ljubljana Institute for Forensic Medicine submitted their report, which stated, *inter alia*:

> "The anaphylactic shock which ... followed the administration of Dexamethason and Synopen was most likely due to sensitivity to one of the mentioned drugs.
>
> The medical treatment of anaphylactic shock in the Slovenj Gradec Hospital was, on the basis of the medical records, in accordance with established medical practice.
>
> The consequent ventricular fibrillation was influenced by the infection of the heart muscle, which Gregor Šilih must have contracted several weeks before 3 May 1993.
>
> After the ventricular fibrillation occurred, the hospital staff gave resuscitation. According to the medical records, this was performed in accordance with established medical practice.
>
> In the period from Gregor Šilih's admission to the Slovenj Gradec Hospital until his death, we have not found any acts or omissions in his medical treatment which could be characterised as clearly inappropriate or negligent."

18. On 8 April 1994 the public prosecutor dismissed the applicants' criminal complaint on the ground of insufficient evidence.

A. Criminal proceedings

19. On 1 August 1994 the applicants, acting as "subsidiary" prosecutors (*subsidiarni tožilec*), lodged a request for the opening of a criminal investigation (*zahteva za preiskavo*) into M.E.'s conduct.

20. On 8 November 1994, having heard representations from M.E. on 26 October 1994, the investigating judge of the Maribor First-Instance Court (*Temeljno sodišče v Mariboru*) granted their request. On 27 December 1994, on an appeal (*pritožba*) by M.E., the interlocutory-

proceedings panel (*zunaj-obravnavni senat*) of the Maribor First-Instance Court overturned the investigating judge's decision after finding that the evidence in the case-file, in particular the forensic report, did not afford reasonable grounds for suspecting M.E. of manifestly acting in breach of professional standards.

21. An appeal by the applicants and a request for the protection of legality (*zahteva za varstvo zakonitosti*) were dismissed, the latter in a decision of 29 June 1995 by the Slovenj Gradec District Court (*Okrožno sodišče v Slovenj Gradcu*), which obtained jurisdiction in the case after the reorganisation of the judiciary in 1995. The applicants contested that decision. On 5 October 1995 the Maribor Higher Court (*Višje sodišče v Mariboru*) dismissed their appeal on essentially the same grounds as those on which the previous appeal and request for the protection of legality had been rejected, namely that the applicants were not entitled to appeal against the interlocutory-proceedings panel's decision not to institute criminal proceedings against the doctor.

22. Subsequently the applicants obtained a medical opinion from Doctor T.V. who stated, *inter alia*, that myocarditis (inflammation of the heart muscle), which had previously been considered a contributory factor in the death of the applicants' son, could have occurred when he was in anaphylactic shock or even later. As a result, on 30 November 1995 they lodged a request to reopen the criminal investigation (see paragraph 90 below). In addition, they lodged a motion to change the venue of the proceedings to the Maribor District Court (*Okrožno sodišče v Mariboru*). On 31 January 1996 the Maribor Higher Court granted their motion for a change of venue.

23. On 26 April 1996 the interlocutory-proceedings panel of the Maribor District Court granted the applicants' request for the reopening of the investigation. An appeal by M.E. was rejected by the Maribor Higher Court on 4 July 1996.

24. In the course of the investigation, the investigating judge examined witnesses and obtained an opinion from P.G., an expert at the Institute of Forensic Medicine in Graz (Austria). P.G. stated in his report that the administration of the antihistaminic had led to the applicants' son's serious allergic reaction. He expressed doubts as to the pre-existence of myocarditis.

25. On 10 February 1997 the investigating judge closed the investigation.

26. Owing to the complexity of the case, the applicants asked the Maribor District Public Prosecutor's Office (*Okrožno državno tožilstvo v Mariboru*) to take over the conduct of the prosecution. Their request was rejected on 21 February 1997. The Head of the Maribor District Public Prosecutor's Office subsequently explained to the Supreme Public Prosecutor (*Vrhovni državni tožilec*) that, while P.G.'s report confirmed the

existence of reasonable suspicion that M.E. had caused the death by negligence, it was not a sufficient basis on which to lodge an indictment as that required a degree of certainty.

27. On 28 February 1997 the applicants lodged an indictment accusing M.E. of the criminal offence of "causing death by negligence" (*povzročitev smrti iz malomarnosti*).

28. On 7 May 1997, upon M.E.'s objection to the indictment, the interlocutory-proceedings panel of the Maribor District Court directed the applicants to request, within three days, additional investigative measures (see paragraph 93 below).

29. The investigating judge subsequently examined several witnesses and ordered a forensic report by K.H., an Austrian forensic expert in the field of emergency medicine and anaesthesia. K.H. stated in his report that the ultimate reason for the death of the applicants' son was relatively uncertain, so that the issue of the effectiveness of the measures taken by M.E in response to the son's condition was of no relevance.

30. On 22 June 1998 the investigating judge informed the applicants that it had been decided to close the investigation. He reminded them that they must either lodge an indictment or a further request for additional investigating measures within fifteen days (see paragraphs 91-92 below).

31. On 30 June 1998 the applicants asked the investigating judge to question K.H., P.G. and T.V.

32. On 24 November 1998, after questioning K.H., the investigating judge informed the applicants that the investigation had been closed. They were again reminded that they must either lodge an indictment or a further request for additional investigative measures within fifteen days.

33. On 10 December 1998 the applicants lodged an indictment supplemented by evidence that had been obtained in the extended investigation. On 12 January 1999 an interlocutory-proceedings panel rejected M.E.'s objection to the initial indictment as unfounded.

34. On 22 January 1999 M.E. lodged a request for the protection of legality, claiming that the indictment submitted on 10 December 1998 had not been served on her. On 25 February 1999 the Supreme Court (*Vrhovno sodišče*) quashed the Maribor District Court's decision of 12 January 1999 and remitted the case to the District Court with instructions to serve the indictment of 10 December 1998 on M.E. M.E. subsequently lodged an objection to that indictment and on 3 June 1999 the interlocutory-proceedings panel decided to refer the case back to the applicants, directing them to obtain further evidence – by requesting additional investigative measures – within three days from the service of its decision.

35. The applicants complied with the directions and on 21 June 1999 requested additional investigative measures, in particular the examination of K.H., P.G. and T.V. In their request, they complained of the remittal of the

case since they considered that the evidence should have been further assessed at the trial and not at that stage of the proceedings.

36. Further to their request, the investigating judge ordered a supplementary report from K.H. and, on 3 December 1999, informed the applicants that further investigative measures had been taken and that they had 15 days in which to lodge an indictment or request additional measures.

37. Following a request by the applicants on 16 December 1999 for further measures, the investigating judge ordered a reconstruction of the events of 3 May 1993 and the examination of two witnesses.

38. The investigation was closed on 3 May 2000. The applicants were reminded of the requirements under section 186, paragraph 3, of the Criminal Procedure Act ("the CPA" – see paragraph 92 below).

39. In the meantime, on 28 June 1999 the applicants again made an unsuccessful request to the public prosecutor to take over the conduct of the prosecution.

40. On 19 May 2000 the applicants filed a further indictment and the additional evidence they had been directed to obtain.

41. In August 2000 the applicants complained to the Judicial Council (*Sodni svet*) about the length of the criminal proceedings. They also challenged the three judges sitting on the interlocutory-proceedings panel which had previously heard M.E.'s objection to the indictment. On 10 October 2000 the President of the Maribor District Court rejected the applicants' request for the judges to stand down.

42. Following a further objection to the indictment by M.E., the interlocutory-proceedings panel examined the case on 18 October 2000 and decided to discontinue the criminal proceedings. Relying in particular on the opinions of the Ljubljana Institute of Forensic Medicine and K.H., it found that the applicants' son's reaction to the administration of Dexamethason and/or Synopen was a consequence of his sensitivity to those drugs and of myocarditis, which was undoubtedly a pre-existing condition. As regards the conduct of M.E., the interlocutory-proceedings panel found that there was insufficient evidence to substantiate the applicants' accusation that she had committed the criminal offence alleged. The applicants were ordered to pay the court fees and the expenses incurred in the proceedings since 23 January 1999 (the date the CPA was amended so as to require the aggrieved party to pay costs if the proceedings ended with the dismissal of the indictment).

43. On 7 November 2000 the applicants lodged an appeal which the Maribor Higher Court dismissed on 20 December 2000. They then petitioned the Public Prosecutor-General (*Generalni državni tožilec*), asking him to lodge a request for the protection of legality with the Supreme Court. Their petition was rejected on 18 May 2001.

44. In the meantime, on 13 March 2001 the applicants lodged a constitutional appeal with the Constitutional Court (*Ustavno sodišče*),

complaining of procedural unfairness and the length of the proceedings and that they had been denied access to a court since the indictment had been rejected by the interlocutory-proceedings panel. On 9 October 2001 the Constitutional Court dismissed their appeal on the ground that after the final discontinuance of criminal proceedings a "subsidiary" prosecutor could not appeal to the Constitutional Court, as he had no *locus standi* before that court.

45. On 27 March 2001 the applicants also lodged a criminal complaint alleging improper conduct on the part of seven judges of the Maribor District and Higher Courts who had sat in their case. The complaint was dismissed as unfounded by the Maribor District Public Prosecutor's Office on 13 June 2001.

46. Subsequently, the applicants made several attempts to reopen the case. Among other motions filed by the applicants that were rejected as inadmissible by the authorities were the following.

On 3 July 2001 they lodged a "request for the criminal proceedings to be reinstated", which was considered in substance to be a request for the reopening of the case. On 29 August 2001 the interlocutory-proceedings panel of the Maribor District Court dismissed the request on the grounds that the criminal proceedings had been discontinued in a decision that was final and that it would be detrimental to the accused to reopen the case. On 9 November 2001 the Maribor Higher Court rejected an appeal by the applicants dated 4 September 2001.

On 24 June 2002 the applicants lodged with the Maribor Higher Court a "request for immediate annulment of the entire criminal proceedings ... conducted before the Maribor District Court". This was also considered in substance to be a request for the reopening of the case and was likewise dismissed. On 27 November 2002 the Maribor Higher Court rejected an appeal by the applicants.

47. Ultimately, on 17 July 2002 the applicants lodged a fresh indictment against M.E. On 14 July 2003 the Slovenj Gradec District Court struck the indictment out because the prosecution of the alleged offence had become time-barred on 3 May 2003.

B. Civil proceedings

48. On 6 July 1995 the applicants instituted civil proceedings against the Slovenj Gradec General Hospital and M.E. in the Slovenj Gradec District Court for the non-pecuniary damage they had sustained as a result of their son's death in the amount of 24,300,000 Slovenian tolars (SIT).

49. On 10 August 1995 they also instituted proceedings against the head of the internal medical care unit, F.V., and the director of the Slovenj Gradec General Hospital, D.P. Further to a request by the applicants, the court joined the two sets of proceedings.

50. All the defendants in the proceedings had lodged their written pleadings by October 1995.

51. On 30 August 1997, in a supervisory appeal (*nadzorstvena pritožba*) to the President of the Slovenj Gradec District Court, the applicants argued that the civil proceedings should proceed despite the fact that criminal proceedings were pending since the latter had already been considerably delayed.

52. On 21 October 1997, referring to sub-paragraph 1 of section 213 of the Civil Procedure Act (see paragraph 97 below), the court stayed the civil proceedings pending a final decision in the criminal proceedings. It noted that the outcome of the civil proceedings would depend to a large extent on the determination of the preliminary question (*predhodno vprašanje*), namely the verdict in the criminal proceedings. The applicants did not appeal against that decision, which therefore became final on 17 November 1997.

53. On 22 October 1998 Judge S.P. replied to a supervisory appeal by the applicants dated 15 October 1998, *inter alia* in the following terms:

> "[The applicants] are 'subsidiary' prosecutors in the criminal proceedings and therefore are very well aware that the proceedings before the Maribor District Court, where the preliminary question is being determined, have not been completed. Their supervisory appeal concerning the stay of the [civil] proceedings is therefore pure hypocrisy."

Upon a complaint by the applicants lodged with the Ministry of Justice, Judge S.P. was ordered to explain her reply to the applicants.

54. In February 1999 the applicants again filed a supervisory appeal; the stay, however, remained in force.

55. On 27 August 1999 Judge P.P., to whom the case appears to have been assigned in the meantime, sent the applicants a letter, in which he stated, *inter alia*:

> "In the instant case the determination of criminal liability is a preliminary question which is relevant to the determination of the civil claim, since a civil court cannot establish facts which are different from those established by the criminal court."

56. On 8 September 1999 the applicants filed a motion for a change of venue which the Supreme Court rejected on 13 October 1999.

57. On 6 December 1999 the Slovenj Gradec District Court informed the applicants that the reasons for staying the proceedings still obtained.

58. On 12 March 2001 the applicants filed a supervisory appeal requesting that the stay of the civil proceedings be lifted. On 19 May 2001 Judge P.P. scheduled a hearing for 13 June 2001. However, that hearing was subsequently cancelled at the applicants' request after their representative explained that she had been injured in a road accident and was on sick leave.

59. On 11 June 2001 the applicants filed a further motion for a change of venue. On 27 September 2001 the Supreme Court decided to move the

venue to the Maribor District Court on the grounds of "tension that was impeding and delaying the trial".

60. The case was subsequently assigned to Judge M.T.Z. On 3 April 2002 the Maribor District Court held a hearing which was adjourned as the applicants indicated that they wished to lodge a request for the judges officiating at that court to stand down.

61. After lodging a criminal complaint against some of the judges (see paragraph 45 above), the applicants filed a motion on 8 April 2002 for all the judges at the Maribor District Court and Maribor Higher Court to stand down. Having been asked to comment on the applicants' request, Judge M.T.Z. stated, *inter alia*, that she had realised at the hearing on 3 April 2002 that one of the defendants, with whom she had shaken hands at the hearing, was a close acquaintance ("*dober znanec*") of her father. She added that the applicants were constantly lodging objections which had made it impossible to conduct the proceedings properly. It would appear that Judge M.T.Z subsequently herself requested permission to withdraw from the case. On 12 August 2002 the request for the judges to stand down was granted in so far as it concerned Judge M.T.Z. The case was assigned to Judge K.P.

62. On 21 November 2002 and 20 March 2003 the Supreme Court rejected the applicants' motions for a change of venue.

63. A hearing scheduled for 12 June 2003 was adjourned at the applicants' request, after they had alleged that their lawyer was unwilling to represent them since her daughter had been denied medical care in the Ljubljana Clinical Centre. They subsequently informed the court that their lawyer would, in fact, continue to represent them.

64. On 28 October 2003 the Maribor District Court held a hearing at which it examined F.V. and M.E. It would appear from the records of the hearing that the applicants were not allowed to ask a series of twelve questions they wished to put. The judge's decision not to allow the questions was based mostly on objections made by the defendant, although on four occasions the court does appear to have stated reasons for its decision not to allow the question concerned.

65. On 8 December 2003 the applicants filed a motion for Judge K.P. to stand down. That request was rejected on 18 December 2003.

66. A hearing scheduled for 16 January 2004 was adjourned because the applicants had lodged a further motion for a change of venue. On 5 March 2004 the applicants lodged another motion. Both motions were rejected by the Supreme Court (on 22 January 2004 and 13 May 2004 respectively).

67. It appears that hearings scheduled for 23 and 24 March 2005 were adjourned because of the applicants' newly appointed lawyer's commitments in another, unrelated case.

68. On 4 May 2005 the applicants filed written submissions and amended their claim for damages. They also requested that the proceedings be expedited.

69. On 12 October 2005 Judge D.M., to whom the case had apparently meanwhile been assigned, was ordered by the President of the Maribor District Court to treat the case with priority and to report every sixty days on the status of the proceedings. The President explained his decision by referring to the length of the proceedings, the case's high profile and the intervention by the Ombudsman (*Varuh človekovih pravic*).

70. A hearing was held on 23, 25 and 27 January 2006 before Judge D.M. The applicants withdrew their claims in respect of F.V. and D.P. After the hearing, they requested Judge D.M. to stand down on the grounds that she had refused to allow them adequate time to reply to their opponent's extensive submissions which had been filed on the same day. Their request was rejected by the President of the Maribor District Court on 30 January 2006. However, on 31 January 2006 Judge D.M. herself asked to withdraw from the proceedings on the ground that her full name had been mentioned in a newspaper article on 28 January 2006 which had also stated that she had been asked to stand down owing to the alleged unequal treatment of the parties in the proceedings. The president of the court upheld her request as being "certainly well-founded".

71. The case was subsequently assigned to Judge A.Z.

72. Hearings were held on 16 June and 25 August 2006.

73. On 25 August 2006 the Maribor District Court delivered a judgment rejecting the applicants' claim, which ultimately amounted to SIT 10,508,000 in respect of non-pecuniary damage and SIT 5,467,000 in respect of pecuniary damage. The applicants were ordered to pay legal costs to the defendants. Relying on the expert opinions, the court concluded that M.E. could not have foreseen the applicants' son's reaction to the drugs that were administered to him and that she and the hospital staff had acted in accordance with the required standard of care. In addition, the court rejected as unsubstantiated the applicants' claim that the hospital was not properly equipped.

74. On 25 October 2006 the applicants lodged an appeal with the Maribor Higher Court. They argued that the first-instance court had not correctly established all the relevant facts, had wrongly applied the substantive law and had committed a procedural error by not allowing or taking into account certain evidence and, in particular, by refusing to obtain a further expert opinion.

75. On 15 January 2008 the Maribor Higher Court rejected the appeal as unsubstantiated and upheld the first-instance court's judgment.

76. On 28 February 2008 the applicants lodged an appeal on points of law (*revizija*).

77. On 10 July 2008 the Supreme Court rejected the applicants' appeal on points of law after noting that, apart from the reference to the European Court of Human Rights' judgment finding a violation of Article 2 of the Convention, it raised essentially the same complaint as their appeal to the Higher Court, namely the refusal to obtain or consider certain evidence the applicants considered relevant. It rejected the complaint as unsubstantiated, finding that the lower courts had acted in accordance with the law. It further held that the European Court of Human Rights' judgment, which related to the requirement for the prompt examination of cases concerning death in a hospital setting, could not have influenced its conclusion as to the lawfulness of the refusal to obtain or consider the evidence in question.

78. On 15 September 2008 the applicants lodged a constitutional appeal with the Constitutional Court alleging a violation of the following constitutional guarantees: the right to equality before the law, the inviolability of human life, the right to equal protection, the right to judicial protection and the right to legal remedies.

The proceedings are still pending.

C. The criminal complaint filed against the first applicant

79. On 29 April 2002 the Maribor District Public Prosecutor lodged a bill of indictment (*obtožni predlog*) against the first applicant alleging that she had engaged in insulting behaviour by saying to an official at the Maribor District Court "I have had enough of this f*** court, the damn State does not do anything, isn't it aware that our son was killed!". The prosecution was based on a criminal complaint filed by the Maribor District Court.

80. On 5 October 2004 the Maribor District Court withdrew the criminal complaint as a result of the Ombudsman's intervention (see paragraph 85 below). The Maribor Local Court subsequently dismissed the bill of indictment.

D. Findings of the Ombudsman

81. The applicants lodged several petitions with the Ombudsman's office concerning the conduct of the civil proceedings. Their case was reported in the Ombudsman's Annual Reports of 2002, 2003 and 2004.

82. In a letter to the President of the Slovenj Gradec District Court on 24 April 2001, the Deputy Ombudsman stressed that the issue of criminal liability could not be regarded as a preliminary question in the civil proceedings instituted against the doctor and the hospital. He further stated that there was no justification for staying the civil proceedings.

83. In a letter to the applicants of 29 August 2002 and his Annual Report of 2002 (pp. 42 and 43), the Ombudsman criticised the conduct of Judge

M.T.Z. He stressed that the judge had expressed concerns about her ability to appear impartial only after the applicants had filed the request for her to stand down and after the Ombudsman's intervention in the case, although she had been aware of the reasons for the concerns beforehand.

84. The section of the Ombudsman's Report of 2003 (pp. 226-228) dealing with the applicants' case and in particular criticising aspects of the judge's conduct of the civil proceedings states, *inter alia*:

> "In the record of the hearing [of 28 October 2003] reference is made to twelve questions which the plaintiffs were not permitted to ask. ... As regards the majority of these twelve questions, the record contains no indication why the judge did not allow the plaintiffs to put the questions. In each instance, there was a prior objection by the defendants' representatives to the question.
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> ...
>
> Although [the applicants'] reactions, statements and proposals were perhaps extreme on occasion, the authorities, including the courts, ought to have taken into account their emotional distress ... [a factor which] may necessitate the trial being conducted in a particularly tolerant and flexible way, [though] without breaching procedural rules to the detriment of the defendants. However, the record of the hearing gives the impression of a tense rather than dispassionate atmosphere at the hearing, an impression that is reinforced also by the records of the exchanges between the judge and the plaintiffs' representative."

85. In his Annual Report of 2004 (pp. 212-214), the Ombudsman criticised the Maribor District Court for filing the criminal complaint against the first applicant. The report drew attention to the Maribor District Court's explanation that it was required by law to file and pursue the criminal complaint as it would be guilty of a criminal offence if it did not. The Ombudsman stressed that there was no legal basis for such a conclusion. On the contrary, a criminal charge for an offence of insulting behaviour could only be pursued on the basis of the aggrieved party's criminal complaint, which in the instant case was the Maribor District Court's complaint. Following the Ombudsman's intervention and in view of the arguments set out in his letters, the Maribor District Court decided to withdraw the criminal complaint against the first applicant.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

86. The Criminal Code (*Kazenski zakonik*, Official Gazette no. 63/94), as amended, defines, under the heading "Criminal Offences causing Damage to Health" criminal offences concerning injury caused by negligent health care. In addition, Article 129 of the Criminal Code provides that

anyone who causes the death of another by negligence shall be sentenced to imprisonment for not less than six months and not more than five years. These offences are subject to mandatory prosecution by the public prosecutor, but a "subsidiary" prosecution by an aggrieved party will also lie (see paragraph 88 below).

B. The Criminal Procedure Act

87. Criminal proceedings in Slovenia are regulated by the Criminal Procedure Act (*Zakon o kazenskem postopku*, Official Gazette no. 63/94 – "the CPA") and are based on the principles of legality and officiality. Prosecution is mandatory when reasonable suspicion (*utemeljeni sum*) exists that a criminal offence subject to mandatory prosecution has been committed.

88. Public prosecutions are conducted by the public prosecutor's office. However, if the public prosecutor dismisses the criminal complaint or drops the prosecution at any time during the course of the proceedings, the aggrieved party has the right to take over the conduct of the proceedings in the capacity of "subsidiary" prosecutor, that is, as an aggrieved party acting as a prosecutor (CPA, section 19(3)). A "subsidiary" prosecutor has, in principle, the same procedural rights as the public prosecutor, except those that are vested in the public prosecutor as an official authority (CPA, section 63(1)). If the "subsidiary" prosecutor takes over the conduct of the proceedings, the public prosecutor is entitled at any time pending the conclusion of the main hearing to resume the conduct of the prosecution (CPA, section 63(2)).

89. Criminal investigations are conducted by the investigating judge at the request of a public or "subsidiary" prosecutor. If the investigating judge does not agree with a request to open an investigation, he must refer it to an interlocutory-proceedings panel of three judges, which then decides whether to open a criminal investigation. If the investigating judge grants the request, the accused may lodge an appeal with the interlocutory-proceedings panel. Parties to the proceedings may appeal against the interlocutory-proceedings panel's decision to the Higher Court (*višje sodišče*). Appeals do not stay the execution of the decision to open an investigation (section 169 of the CPA).

90. If a request for an investigation has been dismissed owing to a lack of reasonable suspicion that the suspect has committed a criminal offence, the criminal proceedings may be reopened at the request of the public or "subsidiary" prosecutor provided new evidence is adduced on the basis of which the interlocutory-proceedings panel is able to satisfy itself that the conditions for instituting criminal proceedings are met (CPA, section 409).

91. Section 184 of the CPA provides that the investigating judge must end the investigation once the circumstances of the case have been

sufficiently elucidated. The prosecutor must within the following fifteen days either request further investigative measures, lodge an indictment or drop the charges.

92. As regards the aggrieved party's role in the investigation, the relevant part of section 186 of the CPA provides:

> "(1) An aggrieved party acting as a prosecutor ... may request the investigating judge to open an investigation or propose additional investigative measures. During the course of the investigation they may also submit other proposals to the investigating judge.
>
> (2) The institution, conduct, suspension and termination of an investigation shall be governed, *mutatis mutandis*, by the provisions of the present Act applying to ... the investigation conducted at the request of the public prosecutor...
>
> (3) When the investigating judge considers that the investigation is complete he or she shall inform the aggrieved party acting as a prosecutor... The investigating judge shall also advise such aggrieved party .... that he or she must file the indictment ... within fifteen days, failing which he or she may be deemed to have withdrawn from the prosecution and a decision may be taken to discontinue the proceedings. The investigating judge shall also be bound to give such warning to the aggrieved party acting as a prosecutor ... in cases where the panel has dismissed his or her motion to supplement the investigation because it is of the opinion that the matter has been sufficiently investigated."

93. After the investigation has ended, court proceedings may be conducted only on the basis of an indictment (CPA, section 268).

Under section 274 of the CPA, the accused may lodge an objection to the indictment within eight days after its receipt. The objection is examined by the interlocutory-proceedings panel. Section 276 of the CPA provides, *inter alia*:

> "(2) If in considering the objection the interlocutory-proceedings panel discovers errors or defects in the indictment (section 269) or in the procedure itself, or finds that further investigations are required before the decision on the indictment is taken, it shall return the indictment to the prosecutor with directions to correct the established defects or to supplement ... the investigation. The prosecutor shall within three days of being informed of the decision of the panel submit an amended indictment or request a ... supplementary investigation. ..."

94. In addition, the relevant part of section 277 of the CPA provides:

> "(1) In deciding an objection to the indictment the interlocutory-proceedings panel shall not accept the indictment and shall discontinue the criminal proceedings if it finds that:
>
> ...
>
> (3) a criminal prosecution is statute-barred ...
>
> (4) there is not enough evidence to justify reasonable suspicion that the accused has committed the act with which he is charged."

C. The Code of Obligations

95. Under the provisions of the Obligations Act (*Zakon o obligacijskih razmerjih*, Socialist Federative Republic of Yugoslavia's ("SFRJ") Official Gazette no. 29/1978,) and its successor from 1 January 2002, the Code of Obligations (*Obligacijski zakonik*, Official Gazette no. 83/2001), health institutions and their employees are liable for pecuniary and non-pecuniary damage resulting from the death of a patient through medical malpractice. The employer may incur civil liability for its own acts or omissions or vicarious liability for damage caused by its employees provided that the death or injury resulted from the employee's failure to conform to the relevant standard of care. Employees are directly liable for death or injury under the civil law only if it is caused intentionally. However, the employer has a right to bring a claim for a contribution from the employee if the death or injury was caused by the latter's gross negligence.

D. The Civil Procedure Act

96. Section 12 of the Civil Procedure Act (*Zakon o pravdnem postopku*, SFRJ Official Gazette no. 4-37/77), as amended, provides:

> "When the decision of the court depends on a preliminary determination of the question whether a certain right or legal relationship exists, but [the question] has not yet been decided by a court or other competent authority (preliminary question), the court may determine the question by itself, save as otherwise provided in special legislation.
>
> The court's decision on the preliminary question shall be effective only in the proceedings in which the question was determined.
>
> In civil proceedings, the court shall be bound with respect to the existence of a criminal offence and criminal liability by a finding of guilt by a criminal court judgment that is final."

97. The relevant part of section 213 of the Civil Procedure Act provides as follows:

> "In addition to the examples specifically given in this Act, the court may order a stay of proceedings:
>
> 1. if it decides not to determine the preliminary question itself (section 12)..."

98. The relevant part of section 215 of the Civil Procedure Act provides:

> "If the court has stayed the proceedings in accordance with the first line of the first paragraph of ... section 213, the proceedings shall resume once the [other] proceedings are finally concluded (*pravnomočno končan postopek*) ... or when the court finds that there is no longer any reason to await the end [of the other proceedings].
>
> In all cases, the discontinued proceedings shall continue at the relevant party's request, immediately after the reasons justifying the stay cease to exist."

99. Equivalent provisions can be found in sections 13, 14, 206 and 208 of the new Civil Procedure Act (*Zakon o pravdnem postopku*, Official Gazette no. 83/2001), which came into force on 14 July 1999.

E. Regulation concerning the organisation and functioning of the Tribunal of the Medical Association

100. The Regulation on the organisation and functioning of the Tribunal of the Medical Association of Slovenia ("the Medical Tribunal") (*Pravilnik o organizaciji in delu razsodišča Zdravniške Zbornice Slovenije*), issued on 20 March 2002, lays down, *inter alia*, the procedure for establishing the responsibility of doctors for breaches of the professional rules and the disciplinary measures which can be taken as a result. The Commissioner of the Medical Association (*tožilec Zbornice* – "the Commissioner"), who is elected from among the members of the Medical Association, is autonomous and has authority to lodge a case with the first-instance Medical Tribunal. An aggrieved party may request the Commissioner to start the proceedings, but the Commissioner may reject such a request. If so, the aggrieved party may invite the Medical Tribunal to conduct a preliminary investigation. However, the power to file a formal case with the Medical Tribunal is vested solely in the Commissioner.

101. Article 7 of the Regulation provides that the Medical Tribunal must base its decision solely on the indictment and the evidence submitted by the Commissioner and the accused doctor. If the accused doctor or the Commissioner is dissatisfied with the verdict, he or she may appeal to the second-instance Medical Tribunal.

F. The Act on the Protection of the Right to a Trial without Undue Delay

102. On 1 January 2007 the Act on the Protection of the Right to a Trial without Undue Delay (*Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja*, Official Gazette no. 49/2006 – "the 2006 Act") became operational. The 2006 Act provides for two remedies to expedite pending proceedings – a supervisory appeal and a motion for a deadline to be set (*rokovni predlog*) – and, ultimately, for a claim for just satisfaction in respect of damage sustained because of undue delay (*zahteva za pravično zadoščenje*).

103. The above remedies are available, *inter alia*, to parties to civil proceedings and aggrieved parties in criminal proceedings.

104. The acceleratory remedies can be applied for during first- or second-instance proceedings. In addition, the 2006 Act also provides the possibility of redress through a compensatory remedy, namely by bringing a claim for just satisfaction. By virtue of sections 15, 19 and 20 of the 2006

Act a party wishing to lodge a claim for just satisfaction must satisfy two cumulative conditions. Firstly, during the first- and/or second-instance proceedings the applicant must have used the supervisory-appeal procedure or lodged a motion for a deadline. Secondly, the proceedings must have been finally resolved (*pravnomočno končan*). The final resolution of the case in principle refers to the final decision against which no ordinary appeal lies; this is normally the first-, or if an appeal has been lodged, the second-instance court's decision. Moreover, the amount which can be awarded in respect of non-pecuniary damage sustained as a result of the excessive length of the proceedings in each finally resolved case cannot exceed 5,000 euros (EUR) (for a more detailed presentation of the relevant provisions of the 2006 Act, see *Žunič v. Slovenia*, (dec) no. 24342/04, 18 October 2007).

III. DECLARATION OF SLOVENIA UNDER FORMER ARTICLES 25 AND 46 OF THE CONVENTION OF 28 JUNE 1994:

105. On 28 June 1994, when depositing the instrument of ratification of the Convention with the Secretary General of the Council of Europe, the Ministry of Foreign Affairs of the Republic of Slovenia made the following declaration:

> "The Republic of Slovenia declares that it recognizes for an indefinite period of time, in accordance with Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of Protocol No. 4 and Article 7 of Protocol No. 7, the competence of the European Commission of Human Rights to deal with petitions addressed to the Secretary General of the Council of Europe by any person, non-governmental organisation or group of individuals claiming to be the victim of [a] violation of the rights set forth in the Convention and its Protocols, where the facts of the alleged violation of these rights occur after the Convention and its Protocols have come into force in respect of the Republic of Slovenia.
>
> The Republic of Slovenia declares that it recognizes for an indefinite period of time, in accordance with Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of Protocol No. 4 and Article 7 of Protocol No. 7, as compulsory ipso facto and without special agreement, on condition of reciprocity, the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention and its Protocols and relating to facts occurring after the Convention and its Protocols have come into force in respect of the Republic of Slovenia."

IV. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Vienna Convention of 1969 on the Law of Treaties

106. The Vienna Convention on the Law of Treaties (the Vienna Convention) entered into force on 27 January 1980. Article 28, which contains the principle of the non-retroactivity of treaties, provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

B. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission on 9 August 2001)

107. Article 13, which is headed "International obligation in force for a State", provides:

> "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

108. Furthermore, Article 14, which is headed "Extension in time of the breach of an international obligation", reads as follows:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

C. The International Court of Justice

109. The approach adopted by the International Court of Justice (ICJ) in cases raising an issue as to *ratione temporis* jurisdiction has focused on the source or real cause of the dispute (see also the case-law cited in *Blečić v. Croatia* [GC], no. 59532/00, § 74, ECHR 2006-III). In the *Case concerning Right of Passage over Indian Territory (Merits)* (Judgment of 12 April 1960: I.C.J. Reports 1960 p.p. 33-36), the ICJ, relying on the jurisprudence of the Permanent Court of International Justice (PCIJ), found

it had temporal jurisdiction to deal with a dispute concerning India's denial to Portugal of passage between its territory and its two enclaves in Indian Territory in 1954. India argued, *inter alia*, that the dispute was inadmissible *ratione temporis* as the Portuguese claim to a right of passage predated the court's jurisdiction, which had begun on 5 February 1930. The ICJ, however, found that:

> "... it appeared ..., that the dispute submitted to the Court has a threefold subject: (1) The disputed existence of a right of passage in favour of Portugal; (2) The alleged failure of India in July 1954 to comply with its obligations concerning that right of passage; (3) The redress of the illegal situation flowing from that failure. The dispute before the Court, having this three-fold subject, could not arise until all its constituent elements had come into existence. Among these are the obstacles which India is alleged to have placed in the way of exercise of passage by Portugal in 1954. The dispute therefore as submitted to the Court could not have originated until 1954."

110. The ICJ therefore found that there was not, so far as the date of the birth of the dispute was concerned, any bar to its jurisdiction. Referring to the terms of the Indian Declaration of Acceptance of the court's jurisdiction, the ICJ noted that the Declaration did not proceed on the principle of excluding from the acceptance any given dispute, but proceeded in a positive manner on the basis of indicating the disputes which were included within that acceptance. The ICJ found:

> ".... By its terms, the jurisdiction of the Court is accepted 'over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date'. In accordance with the terms of the Declaration, the Court must hold that it has jurisdiction if it finds that the dispute submitted to it is a dispute with regard to a situation subsequent to 5 February 1930 or is one with regard to facts subsequent to that date.
>
> The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the Electricity Company of Sofia and Bulgaria, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'. ... The Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court."

The ICJ went on to find that:

> "...it was only in 1954 that such a controversy arose and the dispute relates both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930. The time-condition to which acceptance of the jurisdiction of the Court was made subject by the Declaration of India is therefore complied with."

D. The United Nations Human Rights Committee

111. The United Nations Human Rights Committee ("the Committee") has recognised that the States have positive obligations to protect the right to life. These include an obligation to carry out effective investigations. The Committee has inferred these obligations from a combination of both Articles 2 (respecting rights and effective remedy) and 6 (right to life) of the International Covenant on Civil and Political Rights ("the Covenant"). In this connection, it is important to note that according to the Committee's jurisprudence, the right to a remedy can only be breached in conjunction with a substantive right, which means that in cases where the death occurred outside its temporal jurisdiction, there could be no breach of Article 2 with regard to Article 6 (see paragraph 112 below – *S.E. v. Argentina*). The Committee, however, found that a lack of investigation into the disappearance or death may result in inhuman treatment (Article 7 of the Covenant) of the victim's family, even if the disappearance or death took place before the entry into force of the Optional Protocol granting a right to submit individual communications (see paragraph 113 below – *Sankara et al. v. Burkina Faso*).

112. In the case of *S.E. v. Argentina* (Communication No. 275/1988, which was declared inadmissible on 26 March 1990*)*, the applicant's three children had been abducted by Argentine security forces in 1976 and their whereabouts had been unknown ever since. On 8 November 1986 the Covenant and the Optional Protocol entered into force in respect of Argentina. In December 1986 and June 1987 the Argentine legislature enacted legislation preventing new investigations into the so-called "dirty-war" and providing an amnesty for members of the security forces for related crimes. The applicant claimed that the enactment of this legislation constituted violations by Argentina of its obligations under Article 2, paragraphs 2 and 3, of the Covenant. Taking into account that in order for the right to a remedy to arise, a violation of a substantive right must be established, the Committee observed that:

> " 5.3. ... the events which could have constituted violations of several articles of the Covenant and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible *ratione temporis*."

113. In the more recent case of *Mariam Sankara et al. v. Burkina Faso* (Communication No. 1159/2003, 28 March 2006), the Committee found it did have jurisdiction *ratione temporis* in relation to the investigation into the disappearance of Thomas Sankara, who had been abducted and murdered in 1987, that is to say well before 4 April 1999, when the State became a party to the Optional Protocol. In 1997, within the ten-year limitation period, his wife lodged a complaint with a court against a person or persons unknown

for the assassination of Mr Sankara and the falsification of a death certificate. She claimed that no inquiry had been conducted. The Committee, which ultimately found violations of Article 7, on account of the suffering of Mr Sankara's family, and Article 14, on account of the breach of the guarantee of equality in the proceedings, considered that:

> "6.2 ... a distinction should be drawn between the complaint relating to Mr Thomas Sankara and the complaint concerning Ms Sankara and her children. The Committee considered that the death of Thomas Sankara, which may have involved violations of several articles of the Covenant, occurred on 15 October 1987, hence before the Covenant and the Optional Protocol entered into force for Burkina Faso. This part of the communication was therefore inadmissible *ratione temporis*. Thomas Sankara's death certificate of 17 January 1988, stating that he died of natural causes - contrary to the facts, which are public knowledge and confirmed by the State party (paras. 4.2 and 4.7) - and the authorities' failure to correct the certificate during the period since that time must be considered in the light of their continuing effect on Ms Sankara and her children."

The Committee went on to find that:

> "6.3 ... it could not consider violations which occurred before the entry into force of the Optional Protocol for the State party unless those violations continued after the Protocol's entry into force. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party. The Committee took note of the authors' arguments concerning, first, the failure of the authorities to conduct an inquiry into the death of Thomas Sankara (which was public knowledge) and to prosecute those responsible - allegations which are not in fact challenged by the State party. These constitute violations of their rights and of the obligations of States under the Covenant. Secondly, it was clear that in order to remedy this situation, the authors initiated judicial proceedings on 29 September 1997, i.e. within the limits of the 10-year statute of limitations, and these proceedings continued after the Covenant and the Optional Protocol entered into force for Burkina Faso. Contrary to the arguments of the State party, the Committee considered that the proceedings were prolonged, not because of a procedural error on the part of the authors, but because of a conflict of competence between authorities. Consequently, insofar as, according to the information provided by the authors, the alleged violations resulting from the failure to conduct an inquiry and prosecute the guilty parties have affected them since the entry into force of the Covenant and the Optional Protocol because the proceedings have not concluded to date, the Committee considered that this part of the communication was admissible *ratione temporis*."

E. The Inter-American Court of Human Rights

114. The Inter-American Court of Human Rights (IACHR) has established the procedural obligations arising in respect of killings or disappearances under several provisions of the American Convention on Human Rights ("the American Convention"). In cases concerning breaches of procedural obligations, in particular where it found that the substantive aspect of the right to life had also been violated, the IACHR was ready to

find a violation of Article 4 (right to life) taken together with Article 1 § 1 (obligation to respect rights) of the American Convention (see *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, and *Godínez Cruz Case v. Honduras*, judgment of 20 January 1989). In many cases, in particular those where the substantive limb of Article 4 had not been breached, the IACHR examined such procedural complaints autonomously under Article 8, which, unlike the European Convention, guarantees the right to a fair trial for the determination of rights and obligations of any nature, and Article 25, which protects the right to judicial protection, taken together with Article 1 § 1. The IACHR followed the latter approach in cases where the killing or disappearance took place before the recognition of its jurisdiction by a respondent State.

115. In *Serrano-Cruz Sisters v. El Salvador* (judgment of 23 November 2004 – Preliminary Objections), which concerned the disappearance of two girls thirteen years before El Salvador recognised the IACHR's jurisdiction, the IACHR decided that:

> "77. ... the facts that the Commission alleges in relation to the alleged violation of Articles 4 (Right to Life), 5 (Right to Personal Integrity) and 7 (Right to Personal Liberty) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz, are excluded owing to the limitation to the recognition of the Court's jurisdiction established by El Salvador, because they relate to violations which commenced in June 1982, with the alleged 'capture' or 'taking into custody' of the girls by soldiers of the Atlacatl Battalion and their subsequent disappearance, 13 years before El Salvador recognized the contentious jurisdiction of the Inter-American Court.
>
> 78. In view of these considerations and pursuant to the provisions of Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court admits the preliminary objection *ratione temporis*..."

116. As regards alleged deficiencies in the domestic criminal investigations into the disappearances in this case, the IACHR found that the allegations concerned judicial proceedings and thus independent facts which had taken place after the recognition of the IACHR's jurisdiction. It therefore concluded that it had temporal jurisdiction to deal with these allegations as they constituted specific and autonomous violations concerning the denial of justice that had occurred after the recognition of the IACHR's jurisdiction. It noted, more specifically, that:

> "80. ... the Commission has submitted to the Court's consideration several facts related to an alleged violation of Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, which allegedly took place after recognition of the Court's jurisdiction and which occurred in the context of the domestic criminal investigations to determine what happened to Ernestina and Erlinda Serrano Cruz...
>
> ...

84. The Court considers that all the facts that occurred following El Salvador's recognition of the Court's jurisdiction and which refer to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, are not excluded by the limitation established by the State, because they refer to judicial proceedings that constitute independent facts. They commenced after El Salvador had recognized the Court's jurisdiction and can constitute specific and autonomous violations concerning denial of justice occurring after the recognition of the Court's jurisdiction.

...

94. Therefore, the Court decides to reject the preliminary objection *ratione temporis* in relation to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, and to any other violation whose facts or commencement was subsequent to June 6, 1995, the date on which the State deposited with the OAS General Secretariat the instrument recognizing the Court's jurisdiction."

117. In *Moiwana Village v. Suriname* (judgment of 15 June 2005) Suriname made a preliminary objection arguing that the IACHR lacked jurisdiction *ratione temporis*, since the acts complained of by the Commission and the victims (alleged massacre in 1986 by army forces of forty villagers and the destruction of village buildings, causing the subsequent displacement of the surviving villagers) had occurred one year prior to Suriname's becoming a State Party to the American Convention and its recognition of the IACHR's jurisdiction. The IACHR, referring to Article 28 of the Vienna Convention, noted that:

"39. ... [a]ccording to this principle of non-retroactivity, in the case of a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects."

118. Noting that the obligation to investigate arose from the allegations of a massacre and relying on the continuing nature of the alleged failure to investigate the past events, the IACHR found in this case the following:

"43. ... [T]he Court distinguishes between alleged violations of the American Convention that are of a continuing nature, and those that occurred after November 12, 1987. With respect to the former, the Tribunal observes that the perpetration of a massacre in 1986 has been alleged; in consequence, an obligation arose for the State to investigate, prosecute and punish the responsible parties. In that regard, Suriname initiated an investigation in 1989. Yet, the State's obligation to investigate can be assessed by the Court starting from the date when Suriname recognized the Tribunal's competence. Thus, an analysis of the State's actions and omissions with respect to that investigation, in light of Articles 8, 25 and 1.1 of the Convention, falls within the jurisdiction of this Court. ...

44. Consequently, the instant preliminary objection is dismissed on the grounds set out above.

...

141. The Court has held above that it lacks jurisdiction over the events of November 29, 1986 in Moiwana Village; nevertheless, the Tribunal does have competence to examine the State's fulfilment of its obligation to investigate those occurrences (*supra* paragraph 43). The following assessment will establish whether that obligation was carried out pursuant to the standards set forth in Articles 8 and 25 of the American Convention.

...

163. In consideration of the many facets analyzed above, the Court holds that Suriname's seriously deficient investigation into the 1986 attack upon Moiwana Village, its violent obstruction of justice, and the extended period of time that has transpired without the clarification of the facts and the punishment of the responsible parties have defied the standards for access to justice and due process established in the American Convention.

164. As a result, the Tribunal declares that the State violated Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members."

THE LAW

I. THE SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

119. In its judgment of 28 June 2007, the Chamber declared admissible the complaints concerning the procedural aspect of Article 2 of the Convention, the length of the civil and criminal proceedings and the fairness of the criminal proceedings under Article 6 and the alleged lack of an effective remedy under Article 13. The complaints concerning the substantive aspect of Article 2, the fairness of the civil proceedings under Article 6, and the complaints under Articles 3 and 14 were declared inadmissible.

120. The Court reiterates that in the context of Article 43 § 3 the "case" referred to the Grand Chamber embraces all aspects of the application as it has been declared admissible by the Chamber. Yet this does not mean that the Grand Chamber may not also examine, where appropriate, issues relating to the admissibility of the application in the same manner as a Chamber, for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings"), or where such issues have been joined to the merits or are otherwise relevant at the merits stage (*K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII).

121. In view of the foregoing and having regard to the parties' submissions before the Grand Chamber, the Court will proceed to examine the part of the application which was declared admissible by the Chamber.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION IN ITS PROCEDURAL LIMB

122. The applicants complained that the criminal and civil proceedings they had instituted did not allow for the prompt and effective establishment of responsibility for their son's death.

The relevant part of Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life..."

A. The Government's preliminary objections

123. The Government raised two preliminary objections altogether. In the proceedings before the Chamber they pleaded a failure to exhaust domestic remedies. In the proceedings before the Grand Chamber they contested the Court's jurisdiction *ratione temporis* to deal with the applicants' complaint.

1. Jurisdiction ratione temporis

(a) The Chamber judgment

124. The Chamber examined the *ratione temporis* issue of its own motion in its judgment of 28 June 2007. It held that it had no jurisdiction *ratione temporis* to deal with the applicants' complaint concerning the substantive limb of Article 2 as the applicants' son's death had clearly taken place before the date of the ratification of the Convention by Slovenia. As to the procedural aspect of Article 2, the Chamber, having regard to the previous case-law on the issue and to the principle of the time of interference established in *Blečić v. Croatia* (§§ 72 and 82, cited above), found that its competence to examine this complaint would depend on the facts of the case and the scope of the right involved.

125. In this connection, the Chamber held that the State's obligation to set up an effective judicial system for establishing the cause of and responsibility for the death of an individual in receipt of medical care had an autonomous scope. It also observed that it was not disputed in the present case that the applicants' son's condition had started significantly to deteriorate in the hospital and that his death was potentially related to the medical treatment he had received. Moreover, the Chamber was satisfied that the two sets of proceedings that had been instituted were theoretically capable of leading to the establishment of the exact circumstances which had led to the death and potential responsibility for it at all levels.

126. The Chamber went on to determine whether the facts constitutive of the alleged procedural violation of Article 2 fell within the period under

the Court's temporal jurisdiction. It observed that the criminal proceedings had been successfully reopened on 4 July 1996 and that the civil proceedings were instituted in 1995. Taking into consideration that the alleged defects in the proceedings had originated at the earliest on the date the proceedings were instituted, which was after the date of the ratification, the Chamber concluded that it had temporal jurisdiction to examine the applicants' complaint concerning the procedural aspect of Article 2. Referring to *Broniowski v. Poland* ((dec.) [GC], no. 31443/96, § 74, ECHR 2002-X) the Chamber also held that it could have regard to the facts prior to ratification inasmuch as they might be relevant for the understanding of facts occurring after that date.

(b) Submissions of those appearing before the Court

(i) The Government

127. Relying on the Court's position in *Blečić v. Croatia* (cited above, §§ 63-69) and on the fact that the Chamber had considered *the ratione temporis* issue of its own motion in its judgment of 28 June 2007, the Government raised a plea of inadmissibility on account of the Court's lack of jurisdiction *ratione temporis*.

128. The Government stressed before the Grand Chamber that while the criminal and civil proceedings concerning the death of the applicants' son had both started after the ratification of the Convention by Slovenia on 28 June 1994, the death had occurred before that date.

129. They argued that by declaring the complaint concerning the procedural aspect of Article 2 admissible, the Chamber had contravened the general principles of international law on the non-retroactivity of treaties, adding that this section of the Chamber's judgment was inconsistent with the Court's established case-law, in particular the decisions in *Moldovan and Others* and *Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001; *Voroshilov v. Russia* (dec.), no. 21501/02, 8 December 2005; *Stamoulakatos v. Greece (no. 1)*, 26 October 1993, § 33, Series A no. 271; *Kadiķis v. Latvia* (dec.) no. 47634/99, 29 June 2000; and *Jovanović v. Croatia* (dec.), no. 59109/00, ECHR 2002-III.

130. In their submission, the above case-law established that the acts or omissions by which a Convention right was allegedly infringed and the proceedings related thereto were indissociable and so could not be examined separately. On that point, the Government argued that the initial event – the applicants' son's death – was non-existent so far as the Court was concerned and the Court was therefore precluded from examining whether it gave rise to any obligation.

131. The Government further asserted that individual aspects of Article 2, such as the procedural aspect, could have no independent existence. By examining the procedural aspect of Article 2, the Chamber

had not looked at the death merely as a background fact but had inevitably examined the alleged violation of the substantive limb of Article 2 of the Convention.

132. In support of that contention, the Government pointed to the difference between the cases under Article 2 and the length-of-proceedings cases under Article 6 of the Convention, which fell partly outside and partly within the Court's jurisdiction *ratione temporis*. In their submission, the examination of the length of proceedings did not depend on the subject-matter of the proceedings. Likewise, the length of the proceedings after ratification of the Convention was independent of the part of the proceedings conducted before that date. In contrast, in Article 2 cases, the Court did not examine the proceedings as an independent issue but as part of the investigation of a concrete event.

133. The Government further submitted that the Chamber's conclusion in respect of its *ratione temporis* jurisdiction disregarded the principles set out in paragraphs 68 and 77-81 of the *Blečić* judgment (cited above). In particular, they emphasised that the remedies should not be able to bring the interference within the Court's jurisdiction and that affording a remedy usually presupposed a finding that the interference had been unlawful under the law in force when the interference occurred.

134. Finally, the Government maintained that in cases such as the present one neither the initial event nor the subsequent proceedings could be understood as constituting a continuing violation.

(ii) The applicants

135. The applicants did not dispute the Government's right to raise the preliminary objection *ratione temporis* before the Grand Chamber.

136. They argued that it was not possible simply to ignore the fact that during the period within the Court's temporal jurisdiction the domestic authorities had done nothing to establish the cause of their son's death.

137. In their submission, the States had a particular obligation to create an effective judicial system to establish the cause of death of an individual in receipt of medical care. This obligation was an autonomous one.

138. Referring to *Yağcı and Sargın v. Turkey* (judgment of 8 June 1995, Series A no. 319-A), they submitted that after ratification of the Convention the State had to comply with the Convention; subsequent events came within the Court's competence even if they were the prolongation of a pre-existing situation. Since the defects in the proceedings had occurred after Slovenia had ratified the Convention, the Court had jurisdiction *ratione temporis* to deal with the complaint concerning the procedural limb of Article 2 of the Convention.

(c) The Grand Chamber's assessment

139. For the reasons stated in its judgment in *Blečić* (cited above, §§ 66-9) and noting that there is nothing that would lead it to reach a different conclusion in the present case, the Court finds that the Government are not precluded from raising the *ratione temporis* objection at this stage of the proceedings (see paragraphs 124, 127 and 135 above). The Court will therefore examine whether it has temporal jurisdiction to deal with the applicants' complaint concerning the procedural aspect of Article 2.

(i) General principles

140. The Court reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party or, as the case may be, prior to the entry into force of Protocol No. 11, before the date on which the respondent Party recognized the right of individual petition, when this recognition was still optional ("the critical date"). This is an established principle in the Court's case-law (see *Blečić,* § 70, cited above) based on the general rule of international law embodied in Article 28 of the Vienna Convention (see paragraph 106 above).

141. The Court further notes that, in applying the principle of non-retroactivity, it has been prepared in previous cases to have some regard to facts which occurred prior to the critical date because of their causal connection with subsequent facts which form the sole basis of the complaint and of the Court's examination.

142. For example, in its consideration of cases concerning length of proceedings where the civil claim was lodged or the charge was brought before the critical date, the Court has repeatedly taken into account by way of background information facts which occurred prior to this point (*Foti and Others v. Italy*, 10 December 1982, § 53, Series A no. 56; *Yağcı and Sargın*, cited above, § 40; and *Humen v. Poland* [GC], no. 26614/95, §§ 58-59, 15 October 1999).

143. In an Article 6 case concerning the fairness of criminal proceedings which started prior to the critical date and continued afterwards, the Court looked at the proceedings as a whole in order to assess their fairness. This resulted in it having regard to the safeguards provided at the investigation stage prior to the critical date in order to determine whether they compensated for the deficiencies at the subsequent trial stage (*Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, §§ 60, 61 and 84, Series A 146).

144. By way of further example, in the case of *Zana v. Turkey* ([GC], 25 November 1997, §§ 41-42, *Reports of Judgments and Decisions* 1997-VII) the Court examined the interference with the applicant's right under Article 10 caused by his criminal conviction in the period within the

Court's temporal jurisdiction even though the conviction related to statements made by the applicant before the critical date. Moreover, it found in a more recent case that it had temporal jurisdiction in respect of a complaint concerning the use of evidence obtained through ill-treatment even though the ill-treatment – but not the subsequent criminal proceedings – pre-dated the ratification of the Convention (*Haroutyounian v. Armenia*, no. 36549/03, §§ 48-50, 28 June 2007).

145. In several other cases, events prior to the critical date have been taken into account, to varying degrees, as a background to the issues before the Court (see, for example, *Hokkanen v. Finland*, 23 September 1994, § 53, Series A no. 299-A; and *Broniowski*, cited above, § 74).

146. The problem of determining the limits of its jurisdiction *ratione temporis* in situations where the facts relied on in the application fell partly within and partly outside the relevant period has been most exhaustively addressed by the Court in the case of *Blečić v. Croatia* (cited above). In that case the Court confirmed that its temporal jurisdiction was to be determined in relation to the facts constitutive of the alleged interference (§ 77). In so doing, it endorsed the time of interference principle as a crucial criterion for assessing the Court's temporal jurisdiction. It found in this respect that "[i]n order to establish the Court's temporal jurisdiction it is ... essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated" (§ 82). The Court also indicated that if the interference fell outside the Court's jurisdiction, the subsequent failure of remedies aimed at redressing that interference could not bring it within the Court's temporal jurisdiction (§ 77).

147. The Court notes that the test and the criteria established in the *Blečić* case are of a general character, which requires that the special nature of certain rights, such as those laid down in Articles 2 and 3 of the Convention, be taken into consideration when applying those criteria. The Court reiterates in this connection that Article 2 together with Article 3 are amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324).

(ii) The Court's jurisdiction ratione temporis *in respect of the procedural complaints under Article 2 of the Convention*

(α) The relevant case-law developed so far

148. The Court has dealt with a number of cases where the facts concerning the substantive aspect of Article 2 or 3 fell outside the period under the Court's competence while the facts concerning the related

procedural aspect, that is the subsequent proceedings, fell at least partly within that period.

149. The Court held in *Moldovan and Others* and *Rostaş and Others v. Romania* (decision cited above) that it had no jurisdiction *ratione temporis* to deal with the procedural obligation under Article 2 as that obligation derived from killings which had taken place before Romania ratified the Convention. However, it took the events preceding ratification (for example, the involvement of State agents in the burning of the applicants' houses) into account when examining the case under Article 8 (*Moldovan v. Romania (no. 2)*, nos. 41138/98 and 64320/01, §§ 102-09, ECHR 2005-VII (extracts)).

150. In its decision in the case of *Bălăşoiu v. Romania* (no. 37424/97, 2 September 2003), which concerned Article 3 of the Convention, the Court came to a different conclusion. In circumstances comparable to those in the *Moldovan* case it decided to assume jurisdiction *ratione temporis* to examine the procedural limb of the complaint notwithstanding the dismissal of the substantive complaint. It based its decision on the fact that the proceedings against those responsible for the ill-treatment had continued after the critical date (see, in contrast, the decision in *Voroshilov*, cited in paragraph 129 above).

151. In *Kholodov and Kholodova v. Russia* ((dec.), no. 30651/05, 14 September 2006), the Court declined temporal jurisdiction on the grounds that it was unable to affirm that any procedural obligation existed as it had not been able to examine the substantive limb of the application. It stated:

> "Since the Court is prevented *ratione temporis* from examining the applicants' assertions relating to the events in 1994, it cannot examine whether or not these events gave rise to an obligation on the part of the Russian authorities to conduct an effective investigation in the present case (see *Moldovan and Others v. Romania* (dec.), no. 41138/98, 13 March 2001). Likewise, the alleged failure to ensure identification and punishment of those responsible cannot be said to have constituted a continuous situation since the Court is unable to conclude that such an obligation existed (see *Voroshilov v. Russia* (dec.), no. 21501/02, 8 December 2005)."

152. Having regard to the varying approaches taken by different Chambers of the Court in the above cases, the Grand Chamber must now determine whether the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date or alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occur after that date.

(β) "Detachability" of the procedural obligations

153. The Court recalls that procedural obligations have been implied in varying contexts under the Convention (see, for example, *B. v. the United Kingdom*, 8 July 1987, § 63, Series A no. 121; *M.C. v. Bulgaria*, no. 39272/98, §§ 148-153 , ECHR 2003-XII; and *Cyprus v. Turkey* [GC], no. 25781/94, § 147, ECHR 2001-IV) where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory, but practical and effective (*İlhan v. Turkey* [GC], no. 22277/93, § 91, ECHR 2000-VII). In particular, the Court has interpreted Articles 2 and 3 of the Convention, having regard to the fundamental character of these rights, as containing a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of these provisions (*McCann and Others*, cited above, §§ 157-64; *Ergi v. Turkey*, 28 July 1998, § 82, *Reports* 1998-IV; *Mastromatteo v. Italy* [GC], no. 37703/97, § 89, ECHR 2002-VIII; and *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 101-06, *Reports* 1998-VIII).

154. The Court notes the State's obligation to carry out an effective investigation or to provide for the possibility of bringing civil or criminal proceedings as may be appropriate to the case (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I) has in the Court's case-law been considered as an obligation inherent in Article 2 which requires, *inter alia*, that the right to life be "protected by law". Although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 148, ECHR 2004-XII; and *İlhan*, cited above, §§ 91-92).

155. In the sphere of medical negligence, the procedural obligation under Article 2 has been interpreted by the Court as imposing an obligation on the State to set up an effective judicial system for establishing both the cause of death of an individual under the care and responsibility of health professionals and any responsibility on the part of the latter (see *Calvelli and Ciglio,* cited above, § 49).

156. The Court observes that the procedural obligation has not been considered dependent on whether the State is ultimately found to be responsible for the death. When an intentional taking of life is alleged, the mere fact that the authorities are informed that a death had taken place gives rise *ipso facto* to an obligation under Article 2 to carry out an effective official investigation (*Yaşa v. Turkey*, 2 September 1998, § 100, *Reports* 1998-VI; *Ergi*, cited above, § 82; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 171, 24 May 2005). In cases where the death was caused unintentionally and in which the procedural obligation is applicable, this obligation may come into play upon the institution of proceedings by the

deceased's relatives (*Calvelli and Ciglio*, cited above, § 51, and *Vo v. France* [GC], no. 53924/00, § 94, ECHR 2004-VIII).

157. Moreover, while it is normally death in suspicious circumstances that triggers the procedural obligation under Article 2, this obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see, *mutatis mutandis*, *Brecknell v. the United Kingdom*, no. 32457/04, §§ 66-72, 27 November 2007, and *Hackett v. the United Kingdom*, (dec.) no. 34698/04, 10 May 2005).

158. The Court also attaches weight to the fact that it has consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, where appropriate, has found a separate violation of Article 2 on that account (for example, *Kaya v. Turkey*, 19 February 1998, §§ 74-78 and 86-92, *Reports* 1998-I; *McKerr v. the United Kingdom*, no. 28883/95, §§ 116-61, ECHR 2001-III; *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, §§ 53-69 and 80-86, 7 February 2006; and *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 286-89 and 323-57 ECHR 2007-...). In some cases compliance with the procedural obligation under Article 2 has even been made the subject of a separate vote on admissibility (see, for example, *Slimani v. France*, no. 57671/00, §§ 41-43, 27 July 2004, and *Kanlıbaş v Turkey*, (dec.), no. 32444/96, 28 April 2005). What is more, on several occasions a breach of a procedural obligation under Article 2 has been alleged in the absence of any complaint as to the substantive aspect of Article 2 (*Calvelli and Ciglio*, cited above, § 41-57; *Byrzykowski v. Poland*, no. 11562/05, §§ 86 and 94-118, 27 June 2006; and *Brecknell*, cited above, § 53).

159. Against this background, the Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the *Blečić* judgment (cited above, § 88). In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.

160. This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights, which, though under different provisions, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (see paragraphs 111-18 above).

161. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural

obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended.

162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.

163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.

Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account (*Vo*, cited above, § 89) – will have been or ought to have been carried out after the critical date.

However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

(iii) Application of the above principles to the present case

164. In its declaration of 28 June 1994 (see paragraph 105 above), Slovenia recognised the jurisdiction of the Convention organs to deal with individual petitions "where the facts of the alleged violation of [these] rights occur after the Convention and its Protocols have come into force in respect of the Republic of Slovenia". While framed in positive terms, the Slovenian declaration does not introduce any further limitations on the Court's temporal jurisdiction beyond those already emerging from the general principle of non-retroactivity considered above.

165. Applying the above principles to the circumstances of the present case, the Court notes that the death of the applicants' son occurred only a little more than a year before the entry into force of the Convention in respect of Slovenia, while, with the exception of the preliminary investigation, all the criminal and civil proceedings were initiated and conducted after that date. The criminal proceedings opened effectively on 26 April 1996 (see paragraph 23 above) following the applicant's request of 30 November 1995, and the civil proceedings were instituted in 1995 (see paragraph 48 above) and are still pending.

166. The Court notes and the Government did not dispute that the applicants' procedural complaint essentially related to the aforementioned judicial proceedings which were conducted after the entry into force of the Convention precisely with a view to establishing the circumstances in which the applicants' son had died and any responsibility for it.

167. In view of the above, the Court finds that the alleged interference with Article 2 in its procedural aspect falls within the Court's temporal

jurisdiction and that it is therefore competent to examine this part of the application. It will confine itself to determining whether the events that occurred after the entry into force of the Convention in respect of Slovenia disclosed a breach of that provision.

2. Exhaustion of domestic remedies

168. Before the Grand Chamber, the Government, relying on their observations from the Chamber proceedings, objected that the applicants had failed to exhaust domestic remedies. They argued, firstly, that the complaint was premature as the civil proceedings were still pending and that after the termination of the criminal and civil proceedings, the applicants would also be able to lodge a civil claim for compensation against the State on the basis of the alleged violation of their rights in the proceedings, in accordance with Article 26 of the Slovenian Constitution (see *Lukenda v. Slovenia*, no. 23032/02, § 9, ECHR 2005-X).

Secondly, they argued that the applicants had failed to avail themselves of the remedies available in respect of the complaints of undue delay.

The applicants contested the Government's arguments.

169. In its judgment of 28 June 2007, the Chamber found that the length-of-proceedings remedies were insufficient as it was not merely the length of the proceedings which was in issue, but the question whether in the circumstances of the case seen as a whole the State could be said to have complied with its procedural requirements under Article 2 of the Convention (see *Byrzykowski*, cited above, § 90).

As regards the first limb of the objection, the Chamber observed that the applicants had resorted to all the remedies available to them in the criminal proceedings. As to the civil proceedings, which were still ongoing, the Chamber considered that this part of the Government's objection was closely linked to the substance of the applicants' complaint under the procedural aspect of Article 2 and that its examination should therefore be joined to the merits of the case.

170. The Grand Chamber notes that the parties have not put forward any new arguments on the issue of the exhaustion of domestic remedies with regard to the Article 2 complaint in their written or oral submissions in the proceedings before it. For its part, it sees no reason to depart from the approach taken by the Chamber.

B. Merits

1. The Chamber judgment

171. In its judgment of 28 June 2007, the Chamber found no indication that there had been any failure on the part of the State to provide a

procedure whereby the criminal and civil responsibility of persons who might be held answerable for the applicants' son's death could be established. It went on to examine how this procedure had worked in the concrete circumstances. In that connection, it did not find it necessary to determine separately whether the criminal proceedings ending with the dismissal of the indictment by the interlocutory-proceedings panel were effective since the applicants had also instituted civil proceedings against the doctor and the hospital. The Chamber referred in this respect to the Court's judgments in *Calvelli and Ciglio v. Italy* and *Vo v. France* (cited above). The Chamber noted that the criminal proceedings were, as is usual, limited only to the determination of the charge brought against the doctor concerned and that the scope of the civil responsibility was significantly broader than criminal responsibility and did not necessarily depend on it.

172. As regards the effectiveness of the proceedings, the Chamber found that staying the civil proceedings pending the outcome of the criminal proceedings could be considered reasonable. It noted, however, that although the decision to stay the proceedings was issued in October 1997, no steps were taken in the civil proceedings for almost six years.

173. While the criminal proceedings took almost five years to be concluded with no charges being brought against the accused, it then took the civil court in the first-instance proceedings an additional five years to reach a verdict. During that time, the applicants made numerous applications of a procedural nature, such as for a change of judge and/or of venue, many of which had no prospect of improving their situation. However, even after taking into account the applicants' contribution to the length of the proceedings as a result of those applications, the Chamber considered that the way the civil proceedings had been handled (for example, the case had come before six different judges and was still pending after almost twelve years) could not be regarded as effective or, therefore, as satisfying the procedural requirements under Article 2.

2. The parties' submissions

(a) The applicants

174. The applicants argued that the judicial system had failed to provide an effective and prompt examination of the cause of and responsibility for their son's death.

175. They criticised the way the civil proceedings had been conducted, arguing that the authorities had been reluctant to investigate their case and had treated them in a discriminatory fashion. They also disagreed with the Government about the need to stay the civil proceedings. In their submission, the establishment of criminal liability did not constitute a preliminary question for the purposes of the Civil Procedure Act as civil liability could be established even if no criminal offence had been

committed. It could also be apportioned between various parties and relate to different heads of damage.

176. The applicants further criticised the way the courts had dealt with their requests for certain judges to stand down and the attitude displayed by some of the judges in their conduct and correspondence with the applicants and the authorities.

177. In their observations before the Grand Chamber, the applicants criticised the public prosecutor's persistent refusal to pursue the prosecution of Doctor M.E. In this respect, they emphasised that the Maribor District Court's decision of 12 January 1999 showed that there was reasonable suspicion that a criminal offence had been committed. As a result of the public prosecutor's reluctance to proceed with the investigation, the applicants had been left with no option but to take over the conduct of the prosecution themselves and this had placed them at a disadvantage. Moreover, it had taken the authorities more than seven years to investigate the case and rule on the indictment and the criminal proceedings had failed to produce any significant result.

178. In their oral submissions in the proceedings before the Grand Chamber, the applicants concentrated also on the issue of the impartiality of forensic experts involved in medical negligence cases in Slovenia, arguing that the limited number of doctors in Slovenia and the fact that Slovenian doctors, including forensic experts, were in the same trade union (FIDES), made it difficult to ensure strict impartiality. In the applicants' case, it was that trade union which had requested the applicants to reimburse the expenses for the legal representation provided to Doctor M.E. in the proceedings before the Maribor District Court and the Maribor Higher Court. The applicants also argued that the impartiality of the proceedings before the Medical Tribunal, to which only the accused doctor and the Medical Association's Commissioner were parties, should be called into question.

179. The applicants alleged, in general, that there was a tendency on the part of the civil and criminal courts in Slovenia not to find against doctors accused of causing death by negligence.

(b) The Government

180. In the Government's submission, the Chamber had found a violation of Article 2 on the grounds that both the criminal and civil proceedings were ineffective. The preliminary investigation into the applicants' son's death and, in particular, the subsequent criminal proceedings had entirely satisfied the procedural obligation imposed by Article 2. While the criminal proceedings were guided by the principles of substantive truth and officiality, that was not the position with civil proceedings. For that reason, as a matter of principle, the civil proceedings

were not capable of satisfying the procedural requirements imposed by Article 2 of the Convention.

181. The Government noted that the initial measures following the applicants' son's death took place before the Convention entered into force. They submitted that, when examining the procedural aspect of Article 2, the Court was therefore required to take into account the status of the investigation and its findings as at that date. Moreover, the criminal proceedings instituted by the applicants had not led to any different conclusion than that reached in the initial investigations. In their oral submissions before the Grand Chamber, the Government also argued that the public prosecutor had conducted a thorough review of the decision not to assume the conduct of the prosecution in 1997 and 1999, adding that the fact that, ultimately, the court in the criminal proceedings had struck down the indictment proved the correctness of the public prosecutor's decision.

182. The Government criticised the lack of clarity in the Chamber's judgment as regards the alleged deficiencies in the criminal proceedings. They argued that the main set of criminal proceedings ending with the decision of 20 December 2000 had been conducted as quickly as possible given the complexity of the case, which had required an extensive investigation, including the appointment of various experts from Slovenia and abroad, and a chronological reconstruction of the events. There had been no significant defects or delays in the criminal proceedings. The domestic courts had sought carefully to establish the circumstances of the applicants' son's death and any criminal liability on the part of the doctor concerned.

183. The Government commented on the burden of proof borne by the applicants in the criminal proceedings. They maintained that, as "subsidiary" prosecutors, the applicants were required to abide by the fundamental objective of criminal proceedings and the rules applied therein and, in particular, the safeguards aimed at ensuring respect of the rights of the accused.

184. The Government's observations further concentrated on the applicants' inability to lodge a constitutional appeal in the criminal proceedings. They submitted that this remedy was not open to an aggrieved party in the criminal proceedings for many legitimate reasons, including the *non bis in idem* principle.

185. As regards the general effectiveness of the criminal proceedings in practice, the Government referred to data from the Slovenian courts which showed that "subsidiary" prosecution in cases of death resulting from alleged medical negligence was rare. Such cases were normally dealt with by the public prosecutor. In support of that contention, the Government submitted figures showing that in twelve recent medical malpractice cases criminal proceedings for the offence of causing death by negligence had

been instituted by the public prosecutor. In just two of the cases the aggrieved party had later taken over the conduct of the prosecution.

186. With regard to civil liability, the Government averred that the Obligations Act and the Code of Obligations afforded effective protection of the right to life. In support of that contention, they produced copies of judgments that had been delivered between 1998 and 2003 in five cases of alleged medical error. In four of these cases the health-care institutions had been ordered to pay damages to the plaintiffs. They also provided a list of 124 claims against health-care institutions that had been lodged with the Ljubljana and Maribor District Courts between 1995 and 2004, at least 57 of which had been finally resolved (*pravnomočno končanih*). The remainder, including 6 from 1995, appeared to be still pending before courts of first or second instance.

187. As regards the present case, the Government argued that the issues dealt with by the courts were very complex. In addition, the applicants' conduct, in particular their repeated challenges of the judges and motions for a change of venue, had obstructed the proper conduct of the proceedings. The Government considered that the objective circumstances in the case had not warranted such a large number of requests and motions. The applicants bore sole responsibility for the delays in the proceedings after they had been resumed.

188. Civil liability did not depend on the establishment of criminal responsibility and, in particular, the civil courts were not bound by the defendant's acquittal. As regards the staying of the civil proceedings, while the civil courts were not obliged to wait until the criminal proceedings had been concluded they had power to do so in appropriate cases. In the instant case, the decision to stay the civil proceedings was reasonable in view of the extensive process of evidence gathering that was concurrently taking place in the criminal court. Moreover, the applicants had not appealed against that decision.

189. The Government further argued that the Chamber had erred in stating that "the court [had done] nothing for almost six years" as only three years and seven months had passed between the stay of the proceedings and their resumption. Furthermore, the Government considered it unjustified for the Chamber to have emphasised that as many as six judges had examined the case and to have held the State responsible for that. The national courts had acted solely in accordance with domestic law and decided the applicants' requests and motions as quickly as possible. As regards the two judges that had stood down, the circumstances that had led to their withdrawal were linked entirely to the applicants.

190. It would further appear from the Government's observations before the Grand Chamber that they disputed the Ombudsman's findings in the case, in particular those concerning the staying of the proceedings and the conduct of the hearing of 28 October 2003. They argued that under

domestic law the Ombudsman did not have power to interfere in proceedings pending before the domestic courts except in the case of undue delay or manifest abuse of authority. Nor was it the European Court's role to examine whether the manner in which the domestic authorities had taken the evidence was appropriate.

191. In their observations before the Chamber, the Government also referred to the proceedings before the Medical Tribunal in order to demonstrate the effectiveness of the system of protection of the right to life. They explained that the tribunal had jurisdiction to establish possible misconduct by a doctor. As a result, disciplinary measures, including the suspension or revocation of a licence, could be imposed. They added that the applicants had not availed themselves of that remedy.

3. The Grand Chamber's assessment

(a) Relevant principles

192. As the Court has held on several occasions, the procedural obligation of Article 2 requires the States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among other authorities, *Calvelli and Ciglio*, cited above, § 49, and *Powell v. the United Kingdom*, (dec.), no. 45305/99, ECHR 2000-V).

193. The Court reiterates that this procedural obligation is not an obligation of result but of means only (*Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II).

194. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system 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 personal integrity is not caused intentionally, the procedural 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 (*Mastromatteo*, cited above, § 90). 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 responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (*Calvelli and Ciglio*, cited above, § 51, and *Vo*, cited above, § 90).

195. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which

prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Paul and Audrey Edwards*, cited above, § 72). The same applies to Article 2 cases concerning medical negligence. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays (see *Calvelli and Ciglio*, cited above, § 53; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Byrzykowski*, cited above, § 117).

196. Lastly, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services (see *Byrzykowski*, cited above, § 117).

(b) Application of the above principles in the instant case

197. The Court notes that the fact that the applicants' son's condition started significantly to deteriorate in the hospital and that his death was possibly related to the medical treatment he received has not been disputed either before the Court or in the domestic proceedings. It further observes that the applicants alleged that their son's death was a result of negligence on the part of the doctor. It follows that the State was under a duty to ensure that the proceedings instituted with regard to the death complied with the standards imposed by the procedural obligation of Article 2 of the Convention.

198. In this connection, the Court notes that the applicants used two legal remedies with the aim of establishing the circumstances of their son's death and responsibility for it. Following the preliminary investigation, they instituted criminal proceedings against Doctor M.E. and civil proceedings for compensation against both the hospital and the doctor.

199. Although no disciplinary proceedings were instituted as a result of the death, the Government have not shown that such proceedings before the Medical Tribunal – to which they referred in the Chamber proceedings (see paragraph 191 above) – would have afforded an effective remedy at the material time.

200. As regards the criminal proceedings, the Court observes that the forensic report by the Ljubljana Institute of Forensic Medicine was drafted soon after the death. Subsequently, the public prosecutor refused to initiate

criminal proceedings against the doctor. Criminal proceedings were then instituted at the applicants' request and were conducted by the applicants in their capacity as "subsidiary" prosecutors. In this respect, it is to be noted that the applicants first requested the opening of a criminal investigation into Doctor M.E.'s conduct on 1 August 1994. An initial decision to open the investigation was overturned in December 1994. A further request lodged by the applicants on 30 November 1995, after they had obtained a new medical opinion, was upheld and the investigation was reopened on 26 April 1996 – almost three years after the applicants' son's death and almost two years after the applicants' initial request. After commencing in 1996, those proceedings continued for more than four years, during which period the case was twice remitted for further investigation after the indictment was lodged on 28 February 1997. They were finally discontinued by the interlocutory-proceedings panel's decision of 18 October 2000.

201. Furthermore, despite the public prosecutor's continuing refusal to institute criminal proceedings (see paragraphs 18, 26 and 39 above), the domestic courts found that sufficient grounds existed to open the investigation (see paragraph 23 above) and a significant volume of evidence, including new forensic reports, was gathered. It was the applicants who pursued the criminal proceedings and bore the burden of the investigation, which continued for a considerable period.

202. The Court is not called upon to determine whether in the present case the criminal proceedings should have been conducted *ex-officio* or to identify what sort of steps the public prosecutor should have taken as the procedural obligation under Article 2 does not necessarily require the State to provide criminal proceedings in such cases (see paragraph 194 above), even if it is clear that such proceedings could by themselves have fulfilled the requirements of Article 2. The Court therefore confines itself to noting that the criminal proceedings, in particular the investigation, were excessively long and that neither the conduct of the applicants nor the complexity of the case can suffice to explain such length.

203. Unlike the Government, the Court finds it significant that the applicants had recourse to civil proceedings in which they were entitled to an adversarial trial enabling any responsibility of the doctors or hospital concerned to be established and any appropriate civil redress to be obtained (see, *mutatis mutandis*, *Powell*, cited above, and *Vo*, cited above, § 94). It is common ground that the scope of any civil liability was significantly broader than the scope of any criminal liability and not necessarily dependent on it. The civil proceedings were instituted on 6 July 1995 and, after more than thirteen years, are still pending before the Constitutional Court (see paragraph 78 above).

204. As the Government rightly pointed out, the civil proceedings were stayed for three years and seven months pending the outcome of the criminal proceedings which the applicants were pursuing concurrently (see

paragraphs 52-58 above). However, for the two years before they were officially stayed, the civil proceedings were in fact already at a standstill (see paragraphs 49-52 above).

205. The Court appreciates that evidence adduced in criminal proceedings may be of relevance to decisions in civil proceedings arising out of the same incident. Accordingly, it does not find that the stay of the civil proceedings was in itself unreasonable in the present case. Having said that, it stresses that the stay did not release the domestic authorities from their obligation to examine the case promptly. In this respect, the Court would recall its above findings concerning the processing of the case in the criminal proceedings. In addition, it would also note that the civil court before which the applicants' case was pending remained responsible for the conduct of the civil proceedings and ought therefore to have weighed the advantages of a continued stay against the requirement of promptness when deciding whether or not to resume the proceedings.

206. The Court further notes that during the stay of the civil proceedings, expert evidence was being gathered in the criminal proceedings. This evidence was available to the civil court when the civil proceedings resumed. Therefore, and in the light of the steps subsequently taken in the civil proceedings, the Court considers that from that point onward the time taken to bring the civil proceedings to an end could no longer be explained by reference to the particular complexity of the case. It observes, however, that after the criminal proceedings were discontinued it took the domestic courts a further five years and eight months to rule on the applicants' civil claim.

207. In this connection, the Court notes that during that period the applicants repeatedly challenged the judges sitting in their case and lodged several motions for a change of venue. Many of these steps caused unnecessary delays and had no prospect of improving their situation. However, some of the applicants' requests turned out to be well-founded. For instance, the second motion for a change of venue was upheld and the proceedings were, as a result, moved to the Maribor District Court. The applicants were also successful on two occasions with their call for individual judges to stand down, although it would appear that the judges concerned ultimately withdrew on their own initiative.

208. The Court would accept that the requests for a change of venue and for certain judges to stand down delayed the proceedings to a degree. In the present case, however, it considers that the delays that occurred after the stay was lifted were in many instances not reasonable in the circumstances. For example, as a result of the change of venue following the applicants' request of 11 June 2001, no hearing was held for a further nine months (paragraphs 59-60 above). After the hearing of 3 April 2002, the proceedings were dormant for four months, as the courts were apparently dealing with the applicants' motions for the judges to stand down.

Subsequently Judge M.T.Z. withdrew from the proceedings. During the following ten months, the only action taken by the courts was to reject two motions for a change of venue; no other steps were taken (see paragraphs 61-63 above). In addition, after the adjournment of a hearing scheduled for 23 and 24 March 2005, and despite the applicants' letter of 4 May 2005 requesting that the proceedings be expedited, it took the court ten months to schedule the next hearing, possibly because the conduct of the case had been taken over by yet another judge (see paragraphs 67-70 above). After the withdrawal of Judge D.M. on 31 January 2006, four and a half months elapsed before the next hearing was held by a new judge on 16 June 2006 (see paragraphs 70-72 above). It is worth noting that, subsequent to that hearing, the new judge concluded the first-instance proceedings in less than three months (see paragraph 73 above).

209. When considering the present case, the Court cannot fail to note the Ombudsman's public reports and interventions concerning the conduct of the proceedings (see paragraphs 81-85 above). The situation reflected therein could arguably have contributed to the applicants' mistrust of the manner in which the proceedings were being conducted and triggered some of their repeated challenges to the judges and the court. As regards the Government's argument that the Ombudsman lacked authority to interfere in the impugned domestic proceedings (see paragraph 190 above), the Court is of the opinion that it is not within its competence to decide on the Ombudsman's powers under the domestic law, an issue which, moreover, bears no relevance to the applicants' complaints.

210. Lastly, the Court considers it unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings. While it accepts that the domestic courts are better placed to assess whether an individual judge is able to sit in a particular case, it nevertheless notes that a frequent change of the sitting judge will undoubtedly impede the effective processing of the case. It observes in this connection that it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, including those enshrined in the procedural obligation of Article 2 (see, *mutatis mutandis*, *R.M.D. v. Switzerland*, 26 September 1997, § 54, *Reports* 1997-VI).

211. Having regard to the above background, the Court considers that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention. Consequently, there has been a violation of Article 2 in its procedural aspect and the Government's preliminary objection concerning the exhaustion of civil domestic remedies in respect of the procedural limb of this provision is dismissed.

III. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

212. The applicants complained under Article 6 § 1 of the Convention of the unfairness of the criminal proceedings and the length of both sets of proceedings. The relevant part of Article 6 reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

213. The applicants also complained that the Constitutional Court and other competent authorities had failed to respond to their complaints concerning the conduct of the proceedings relating to their son's death. They relied on Article 13 of the Convention, which provides:

> "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."

214. As regards Article 6 of the Convention, the Government, referring to the judgment in *Perez v. France* ([GC], no. 47287/99, § 70, ECHR 2004-I), argued before the Grand Chamber that the complaints concerning the criminal proceedings were incompatible *ratione materiae*. In addition, they argued that the part of the application that related to the criminal proceedings that had ended with the Maribor Higher Court's decision of 5 October 1995 should be declared inadmissible in accordance with Article 35 § 1 of the Convention. With regard to the civil proceedings, they argued, referring, *inter alia*, to the judgment in *Grzinčič v. Slovenia* (no. 26867/02, ECHR 2007-... (extracts)), that the applicants should have used the remedies available since 1 January 2007 under the 2006 Act (see paragraphs 102-04 above) and that the related complaint was therefore inadmissible for non-exhaustion of domestic remedies. They further maintained that the impugned proceedings had been conducted properly and as promptly as possible.

215. The applicants submitted that on the date the 2006 Act became operational, their application was already pending before the Court and the impugned civil proceedings had already been pending for almost twelve years before the domestic courts. On 25 August 2006 the first-instance court had delivered its judgment. The use of the remedies under the 2006 Act would therefore have been totally ineffective in their case.

216. Having regard to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 2 in its procedural limb, the Court considers that it is not necessary also to examine the case under Article 6 § 1 and Article 13 of the Convention (see, *mutatis mutandis*, *Öneryıldız*, cited above, § 160).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

217. 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

218. Before the Chamber, the applicants claimed SIT 1,300,000 (approximately EUR 5,440) in respect of pecuniary damage allegedly resulting from the expenses they had incurred as a result of the inactivity of the courts in the domestic proceedings and the Public Prosecutor's refusal to institute criminal proceedings. They further claimed SIT 1,800,000 (approximately EUR 7,540) in respect of non-pecuniary damage.

219. The Chamber's conclusion as regards the applicants' claim for damage was as follows:

> "150. The Court finds that the applicants have failed to submit documentary evidence of the expenses they allegedly incurred as a result of the inactivity of the courts in the domestic proceedings. As regards the remainder of the claim for pecuniary damage, the Court does not discern any causal link between the violation found and the pecuniary damage alleged... It therefore rejects this claim.
>
> 151. As to non-pecuniary damage, the Court, deciding on an equitable basis and having regard to the sums awarded in similar cases and the violation which it has found in the present case, awards the applicants the full sum claimed, namely EUR 7,540."

220. In the proceedings before the Grand Chamber, the applicants invited the Court to uphold the Chamber's conclusion.

221. The Government disputed the applicants' claim.

222. The Grand Chamber sees no reason to depart from the Chamber's finding. It accepts that the violation of the applicants' right under the procedural limb of Article 2 of the Convention caused the applicants non-pecuniary damage such as distress and frustration. Making its assessment on an equitable basis, it awards the applicants the full sum claimed under this head, namely EUR 7,540.

B. Costs and expenses

223. The Chamber's conclusion as regards the applicants' claim for the reimbursement of their costs and expenses was as follows:

> "154. Under the Court's case-law, an applicant is entitled to the 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, having regard to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court."

224. The applicants claimed EUR 5,000 in respect of the proceedings before the Grand Chamber. However, their itemised claims amounted to EUR 2,864 only, broken down as follows. Relying on the domestic scale of lawyer's fees, the applicants claimed EUR 1,184 in respect of legal fees for the work done by their representative in the written and oral proceedings before the Grand Chamber. In addition they claimed EUR 855 in respect of travel and subsistence related to his attendance at the hearing and a further EUR 825 in respect of their own travel and subsistence expenses.

225. The Government submitted that for the purposes of calculating legal fees incurred in the proceedings before the Grand Chamber, the amount set out in lawyer's scale rates for representation before the Constitutional Court should be used. Accordingly, the overall costs and expenses in respect of legal representation came to a total of EUR 1,635. The Government disputed the applicants' entitlement to the reimbursement of their travel and subsistence expenses on the grounds that their attendance at the hearing had not been necessary, since they had been represented by counsel.

226. The Court has consistently held that costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

227. The Grand Chamber sees no reason to depart from the Chamber's finding regarding the amount awarded in respect of the costs and expenses incurred in the proceedings before the Chamber. As regards the proceedings before the Grand Chamber, the Court considers that the costs and expenses claimed in respect of the applicants' representative's work and attendance at the hearing, namely EUR 2,039, were actually and necessarily incurred and were reasonable as to quantum. Having regard to the fact that the applicants were represented by their counsel at the hearing and in view of the nature of the case, the Court considers that the expenses incurred as a result of their attendance were not necessary and therefore rejects this part of the claim.

228. Consequently, the Court awards the applicants a total sum of EUR 4,039 in respect of costs and expenses.

C. Default interest

229. 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

1. *Dismisses* by fifteen votes to two the Government's preliminary objection concerning a lack of jurisdiction *ratione temporis*;

2. *Joins* unanimously *to the merits* the Government's preliminary objection concerning the exhaustion of civil domestic remedies in respect of the procedural limb of Article 2 of the Convention and *dismisses* it;

3. *Dismisses* unanimously the Government's preliminary objection relating to the non-exhaustion of other remedies;

4. *Holds* by fifteen votes to two that there has been a violation of Article 2 of the Convention in its procedural limb;

5. *Holds* by fifteen votes to two that there is no need to examine separately the complaints under Articles 6 (length of the civil and criminal proceedings and fairness of the criminal proceedings) and 13 of the Convention;

6. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicants, within three months, the following amounts:
      (i) EUR 7,540 (seven thousand five hundred and forty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,039 (four thousand and thirty-nine euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 April 2009.

Michael O'Boyle	Christos Rozakis
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) Concurring opinion of Judge Lorenzen;

(b) Concurring opinion of Judge Zupančič;

(c) Concurring opinion of Judge Zagrebelsky joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó;

d) Joint dissenting opinion of Judges Bratza and Türmen.

C.L.R.
M.O'B.

CONCURRING OPINION OF JUDGE LORENZEN

I voted with the majority in favour of finding a violation of Article 2 in its procedural limb. However, I am not able fully to agree with the majority's reasoning in respect of the Court's jurisdiction *ratione temporis.*

As demonstrated in paragraphs 148-152 of the judgment, the Court has not always been consistent in its case-law when determining whether it has jurisdiction to examine complaints of a violation of the procedural requirements under Articles 2 and 3 where the facts concerning the substantive aspect of these Articles fall outside the period under the Court's competence even if the subsequent proceedings fall at least partly within that period. In the case of *Blečić v. Croatia* ([GC], no. 59532/00, ECHR 2006-III) the Court established general principles to be applied in respect of its jurisdiction *ratione temporis* but did not address the specific question of its temporal jurisdiction under Articles 2 and 3 in the above situation.

For the reasons stated in paragraphs 153-162 of the judgment I can agree that the Court has – in certain circumstances – jurisdiction *ratione temporis* to examine procedural complaints relating to deaths which have taken place outside its temporal jurisdiction, but that, for obvious reasons of legal certainty, such jurisdiction cannot be open-ended. In this respect, I fully agree with what is said in paragraph 161 of the judgment. However, I fail to see that the criteria established by the majority in paragraph 163 are in conformity with this requirement. Thus, it is not easy to understand what is meant by the requirement for "a genuine connection" between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect. Furthermore the fact that the majority seem ready to accept such a connection "based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner" appears to confirm that the jurisdictional limits will be difficult to identify, if they exist at all. I find it incompatible with the declared intention to respect the principle of legal certainty to define the Court's temporal jurisdiction in such a vague and far-reaching way.

In my opinion, there must be a clear temporal connection between on the one hand the substantive event – death, ill-treatment etc. – and the procedural obligation to carry out an investigation and, on the other, the entry into force of the Convention in respect of the respondent State. This will be the case where the event occurred and an investigation was initiated before the entry into force of the Convention, but a significant part of that investigation was only carried out after that date. Likewise where the event occurred or was only discovered so close to the critical date that it was not possible to commence an investigation before that date. Where on the other hand no investigation was carried out despite knowledge of the event or where the investigation was terminated before the critical date, I would say

that the Court would have jurisdiction only where an obligation to carry out investigative measures was triggered by relevant new evidence or information (see, *mutatis mutandis*, *Brecknell v. the United Kingdom*, no. 2457/04, §§ 70-71, 27 November 2007).

In the present case, the death of the applicant's son occurred a little more than a year before the entry into force of the Convention in respect of Slovenia and, with the exception of the preliminary investigation, all the criminal and civil proceedings were initiated and conducted after that date (see paragraph 165 of the judgment). In these circumstances, I agree that there is a sufficient temporal connection between the relevant events and the entry into force of the Convention to find that the Court has jurisdiction *ratione temporis* to examine the applicants' procedural complaint under Article 2. For the reasons stated in the judgment I agree that there has been a violation of that Article.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I concur in the outcome in this case but consider it useful to add the following remarks.

In *Moldovan and Others* and *Rostaş and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01, 13 March 2001), the critical language of the decision goes as follows:

> "In the present case, the Court notes that the killings happened in September 1993 before the entry into force of the Convention with regard to Romania, i.e. 20 June 1994. However, in accordance with the generally recognised rules of international law, the Convention only applies in respect of each contracting party to facts subsequent to its coming into force for that party. The possible existence of a continuing situation must be determined, if necessary *ex officio*, in the light of the special circumstances of each case (e.g., nos. 8560/79 and 8613/79 (joined), Dec. 3.7.79, D.R. 16, p. 209). The Court must therefore verify whether it is competent *ratione temporis* to examine the present complaint." (Emphasis added.)

It would appear that in *Blečić v. Croatia* ([GC], no. 59532/00, § 75, ECHR 2006-III), the Grand Chamber somehow attempted to endorse the *Moldovan* decision by including it in the summary of the relevant case-law. The subsequent cases, such as *Kholodov and Kholodova v. Russia* ((dec.), no. 30651/05, 14 September 2006), have since then been employing a formula combining the approaches from *Moldovan and Blečić*:

> "Admittedly, the investigation into Mr Dmitriy Khodolov's death and the trial of putative perpetrators continued long after the ratification of the Convention by the Russian Federation. However, the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within its temporal jurisdiction (see *Blečić v. Croatia* [GC], no. 59532/00, § 77, ECHR 2006-...).
>
> Since the Court is prevented *ratione temporis* from examining the applicants' assertions relating to the events in 1994, it cannot examine whether or not these events gave rise to an obligation on the part of the Russian authorities to conduct an effective investigation in the present case (see *Moldovan and Others v. Romania* (dec.), no. 41138/98, 13 March 2001).
>
> Likewise, the alleged failure to ensure identification and punishment of those responsible cannot be said to have constituted a continuous situation since the Court is unable to conclude that such an obligation existed [in the first place] (see *Voroshilov v. Russia* (dec.), no. 21501/02, 8 December 2005).
>
> The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy where there is an "arguable claim" of a violation of a substantive Convention provision (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).
>
> As the Court has found that [the facts underlying the] applicants' complaint under Article 2 of the Convention [are] outside its jurisdiction *ratione temporis*, it is not competent to examine whether the applicants had an "arguable claim" of a breach of a substantive Convention right. Accordingly, their allegations under Article 13 also fall

> outside the Court's competence *ratione temporis* (see *Meriakri v. Moldova* (dec.), no. 53487/99, 16 January 2001). It follows that this part of the application is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4." (Emphasis added.)

The logic of the decision in *Kholodov* rests upon the spurious premise. It maintains, almost explicitly but at any rate implicitly, that since the facts of the case are outside the Court's temporal jurisdiction, criminal procedures originating in these facts, too, are outside the Court's temporal jurisdiction.

However, it is an established and logical precept for the court of last resort not to (re)consider the facts, i.e., to leave this business to the national courts. Thus, to maintain that our Court is prevented from gauging the derivative procedures because it is prevented from examining the facts, which it almost never does, of the historical event is at best formalistic and at worst absurd.

The key question, therefore, is the meaning of the phrase "facts subsequent to its coming into force for that party." More specifically, the meaning of the word "facts" is the central issue.

The sophisticated approach to this question (of interpretation) would maintain, as Hobbes and Alf Ross did, that outside the norm there are no "facts", that facts *per se* do not exist.

In *Streletz, Kessler and Krenz v. Germany* ([GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II) we even had a situation in which the simultaneous and clear existence of both the "facts" and the norms, because they were not enforced, was, until the change of (legal) regime, insufficient.

At the very least, the facts do not become legally relevant unless (1) the applicable norm pre-exists and (2) the norm is applied.

The problem with *Moldovan*, a Section decision, is simply that it sets out from a naïve premise that facts and laws (*questiones facti, questiones juris*) may exist separately – and independently of one another. It is true, of course, that the historical event (the killing) may have happened at a certain point in time, e.g., before the entry into force of the Convention. However, if that event ("facts") had not been registered by the legal system, its legal echoes would never reach, for example, Strasbourg.

Concerning *ratione temporis* jurisdiction there are surprisingly few combinations of event and procedures that comprise the gamut of experiment. (1) Both the historical event and the subsequent procedures might have been in the period prior to the Convention's entry into force in respect of the country concerned. Clearly, even if the procedures were allegedly in violation of the procedural limb of Article 2 or 3, the case was *ad acta* before the Convention's entry into force. (2) Both the historical event and the subsequent procedures might have been posterior to the Convention's coming into force in respect of the country concerned, in which case, likewise, there is no *ratione temporis* issue. (3) However, if the

historical event occurred prior to the Convention's entry into force whereas the procedures were posterior to that date, there are further possible combinations: thus, in *Kholodov*, the case was processed to a preponderant extent after the entry into force of the Convention, whereas in *Blečić* the reverse was true.

Here it is interesting to note that in *Blečić* the Court maintained, in paragraph 85, that:

> "... the alleged interference with the applicant's rights lies in the Supreme Court's judgment of 15 February 1996. The subsequent Constitutional Court decision only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist. That decision, as it stood, did not constitute the interference. Having regard to the date of the Supreme Court's judgment, the interference falls outside the Court's temporal jurisdiction."

The clear implication of this is that although in *Blečić* both the historical event *and* most of the procedures took place prior to the coming into force of the Convention in respect of Croatia, it would have sufficed for the ultimate judgment of the Croatian Supreme Court to have been posterior to the coming into force of the Convention for the case to fall within the European Court's temporal jurisdiction. In other words, the *Moldovan* and *Kholodov* decisions are unmistakably irreconcilable with *Blečić*.

Moreover, this Court's subsidiary supervision of human rights, even by the language of Article 41, comes into play only after the domestic procedures have proved inefficacious. The Contracting Party, in this case Slovenia, cannot be expected to be able to prevent medical negligence and its sequelae. *Ultra posse nemo tenetur* – No one can be expected to do the impossible.

The State may, however, be expected to react vigorously through its institutionalised procedures. At issue in all cases in which the State is not directly involved in the killing, torture etc. as, for example, in *Selmouni v. France* ([GC], no. 25803/94, ECHR 1999-V) and *Jalloh v. Germany* ([GC], no. 54810/00, ECHR 2006-...), are solely its investigative, prosecutorial and judicial procedures indirectly consequent upon the incriminated killing or torture. The rest is the horizontal effect known as *Drittwirkung*.

It follows that the so-called "procedural limb" of Article 2 or 3, often in conjunction with Article 13, habitually represents the only possible "facts subsequent to the Convention's coming into force for that party" (*supra, Moldovan*). In this sense, it can, after *Šilih*, be maintained that the "logic" of *Moldovan, Kholodov* and similar cases has been superseded by the language of paragraphs 159, 162 and 163 of *Šilih*. Likewise, the impact of *Blečić* seems to have been narrowed down to holding merely that the inadmissibility decision by the Constitutional Court does not suffice to bring the case within the European Court's temporal jurisdiction.

CONCURRING OPINION OF JUDGE ZAGREBELSKY JOINED BY JUDGES ROZAKIS, CABRAL BARRETO, SPIELMANN AND SAJÓ

(Translation)

Like the majority, I consider that there has been a violation of the procedural limb of Article 2 of the Convention in the present case, which concerns a death which occurred prior to the entry into force of the Convention in respect of the respondent State. I agree with the reasoning set out in paragraphs 153 et seq. of the judgment, which enables the Court to conclude that the State is under an obligation to start and carry out an effective investigation even when the death took place before the critical date (see paragraph 159). This obligation "binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it" (see paragraph 157).

With the exception of crimes that are not subject to statutory limitation, events that occurred in the distant past will not necessarily give rise to the application of the aforementioned principle. When the Convention enters into force in respect of a State, the likelihood is that there will no longer be any victims able to claim to be entitled to an investigation or to complain to the Court of the lack or ineffectiveness of an investigation. In any event, if the criminal law is no longer applicable owing to the expiration of the limitation period or if an investigation would be pointless because of the disappearance of evidence and witnesses, there will be no justification for imposing the obligation. However, this is an issue relating to the merits of the case before the Court whereas the question examined in the present judgment concerns the determination of the Court's jurisdiction *ratione temporis* and, consequently, the admissibility of the application.

Despite this, the majority have found it necessary to indicate that "having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended" (see paragraph 161 of the judgment). To my mind, the Court may indeed be led by restrictions of a legal or factual nature to decide in certain cases that the State is not under a procedural obligation. However, as I have already mentioned, this would not entail calling into question the Court's jurisdiction *ratione temporis*, but excluding a violation of the procedural limb of Article 2.

In my view, the introduction (for which there was no need in the present case) of the notion of "limits" on the "detachability" of the procedural obligation from the substantive obligation under Article 2 weakens the reasoning of the Court and makes the application of the legal principle established by the Grand Chamber difficult, debatable and unforeseeable.

This is particularly true and troublesome in the light of the vague wording used in paragraph 163 to define the "limits" in question. The Court will be forced to carry out complex and questionable assessments on a case-by-case basis that will be difficult to dissociate from the merits of the case. The impact this is likely to have on "legal certainty" (which the Court has rightly referred to) is, I would venture, both obvious and harmful.

JOINT DISSENTING OPINION OF JUDGES BRATZA AND TÜRMEN

1. To our regret, we are unable to agree with the majority of the Grand Chamber that the Court has jurisdiction *ratione temporis* to examine the applicants' complaint that the domestic authorities failed to deal with their claim arising out of their son's death with the level of diligence required by Article 2 of the Convention. In our view, the Government's preliminary objection to the Court's jurisdiction is well-founded and should have been upheld. In consequence, we have voted against the finding of the majority that there has been a violation of Article 2 in its procedural aspect.

2. In its *Blečić* judgment (*Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III), the Court reiterated that, according to the general rules of international law, the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the Convention with regard to that Party. It was the application of this rule which led the Chamber in the present case to reject as inadmissible the applicants' complaint of a violation of the substantive aspect of Article 2, the Chamber noting that the applicants' son had died in hospital on 19 May 1993 and that their complaint was obviously based on facts which occurred and ended before the date of ratification (28 June 1994) and was therefore incompatible *ratione temporis* with the provisions of the Convention (see paragraph 90 of the judgment of the Chamber).

3. In the *Blečić* case the Court held that the Court's temporal jurisdiction was to be determined "in relation to the facts constitutive of the alleged interference" with a Convention right and that if such interference occurred prior to ratification, the subsequent failure of remedies aimed at redressing that interference could not bring it within the Court's temporal jurisdiction (paragraph 77). The Court went on to note that, where the interference pre-dated ratification, while the refusal to remedy it post-dated ratification,

> "... to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention came into force in respect of that State. However, this would be contrary to the general rules of non-retroactivity of treaties" (paragraph 79).

4. The issue raised by the present case differs from that in *Blečić.* The complaint concerns not, as in that case, a failure to remedy after the date of ratification an "interference" with a Convention right occurring before that date but an alleged breach, occurring after the date of ratification, of the positive obligation of the State under Article 2 to investigate a death occurring before that date. Nevertheless, the principles established in the *Blečić* case are, in our view, of some importance in the present case. The procedural obligation, if any, imposed on a State under Article 2 arises in

principle at the moment when a death occurs at the hands of agents of a State or, as in the present case, when the relevant authorities of the State are made aware of a credible allegation that the death resulted from medical negligence on the part of hospital authorities. Although the obligation is an autonomous one, in the sense that it is not dependent on the existence of a substantive violation of Article 2, it is an obligation which not only derives from the death but is integrally linked with it. Where, as in the present case, the death occurs prior to the date of ratification, no Convention obligation is imposed on the State under Article 2 in either its substantive or procedural aspect and the Court has no temporal jurisdiction to examine a complaint of a violation of Article 2 in either of its aspects. To hold otherwise would, as in the *Blečić* case, result in the Convention being binding for that State in relation to a fact or situation (the death and the omission to investigate the death) that had taken place before the Convention came into force.

5. This principle was established in the Court's decision in the case of *Moldovan and Others* and *Rostaş and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01, 13 March 2001), in which the applicants complained, *inter alia*, of a violation of the procedural aspects of Article 2 in relation to killings which had occurred in September 1993 before the entry into force of the Convention with regard to Romania on 20 June 1994. They further complained under Article 3 that the authorities had failed properly to investigate the participation of police officers in the attacks on Roma residents during the Pogrom on the same date and that the destruction of their property and belongings amounted to treatment contrary to that Article.

In a decision which was cited with approval by the Grand Chamber in the *Blečić* case, the Court unanimously rejected the claims under both Articles as falling outside its competence *ratione temporis*. As to the former complaint the Court noted that

> "... the alleged obligation under the Convention of the Romanian authorities to conduct an effective investigation capable of leading to the identification and punishment of all individuals responsible for the deaths of the applicants' relatives is derived from the aforementioned killings whose compatibility with the Convention cannot be examined by the Court. It follows that the complaint is inadmissible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3."

The Court reached the same conclusion in relation to the Article 3 complaint, holding that the obligation to carry out an effective investigation resulted from attacks which had occurred prior to the date of ratification and whose compatibility with the Convention could not, accordingly, be examined by the Court.

6. The Court arrived at the same result in the case of *Voroshilov v. Russia* ((dec.), no. 21501/02, 8 December 2005), dismissing a complaint under the procedural aspect of Article 3 and under Article 13. The ill-treatment of which complaint was made took place in July and September

1997 before the entry into force of the Convention in respect of the Russian Federation on 5 May 1998.

Citing the decision in the *Moldovan* case with approval, the Court observed that the procedural obligation under Article 3 arises when an individual makes a credible assertion of having suffered treatment contrary to Article 3. It continued:

> "However, since the Court is prevented from examining the applicant's assertion relating to the events lying outside its jurisdiction *ratione temporis*, it is unable to reach a conclusion as to whether the applicant has made a "credible assertion" as required by the above provision. Accordingly, it cannot examine whether the Russian authorities had an obligation under the Convention to conduct an effective investigation in the present case... Likewise, the alleged failure to conduct the investigation cannot be held to constitute a continuous situation raising an issue under Article 3 in the present case, since the Court is unable to conclude that such an obligation existed."

The Court went on to reject the Article 13 complaint on the same basis, holding that it was "not competent to examine whether the applicant had an 'arguable claim' of a breach of a substantive Convention right and that his submissions in respect of Article 13 therefore also fall outside the Court's competence *ratione temporis* (see *Meriakri v. Moldova* (dec.), no. 53487/99, 16 January 2001)".

7. The Court similarly declined jurisdiction to examine whether there had been a breach of the procedural obligations of the State in respect of a death which had occurred in 1994 in the case of *Kholodov and Kholodova v. Russia* ((dec., no. 30651/05, 14 September 2006). The investigation into the death had commenced prior to the date of ratification but, as the Court found, had continued long after that date, eventually resulting in the final acquittal of the alleged perpetrators in March 2005. The Court rejected the complaint, citing with approval its earlier decisions in the cases of *Moldovan* and *Voroshilov*:

> "Since the Court is prevented *ratione temporis* from examining the applicants' assertions relating to the events in 1994, it cannot examine whether or not these events gave rise to an obligation on the part of the Russian authorities to conduct an effective investigation in the present case... Likewise, the alleged failure to ensure identification and punishment of those responsible cannot be said to have constituted a continuous situation since the Court is unable to conclude that such an obligation existed...".

8. The decision of a differently constituted Chamber of the Court in the case of *Bălăşoiu v. Romania* ((dec.), no. 37424/97, 2 September 2003) represented a major departure from the precedent set in the *Moldovan* case some two and a half years before. The Chamber there decided that it had temporal jurisdiction to examine a procedural complaint under Article 3 concerning ill-treatment which had allegedly occurred in July 1993, having rejected the substantive complaint on *ratione temporis* grounds. It based its decision on the fact that the proceedings against those responsible for the ill-treatment had continued after the date of ratification of the Convention by

Romania and had ended with a final judgment of the Supreme Court of Justice in 2002. However, it was not explained in the decision how the case was to be distinguished from the *Moldovan* case, which had been cited by the respondent Government in argument. Nor was it explained how the mere fact that an investigation or proceedings continued after the date of ratification could confer temporal jurisdiction on the Court to examine whether there had been compliance with the State's procedural obligations under Article 3 when, at the time of the events complained of, the State was not bound by the Convention and no such procedural obligation was thus imposed on the State.

9. While we share the view of the majority that this apparent conflict in the Court's case-law requires to be resolved, we cannot agree with the majority's apparent preference for the approach in the *Bălăşoiu* case or with their reasoning, which is founded on the alleged "detachability" of the procedural obligation from the substantive obligation. It is argued that the procedural obligation has not been considered dependent on whether the State is ultimately found to be responsible for the death and that the Court has consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, where appropriate, has found a separate violation of Article 2 on that account even where no substantive violation has been found.

We have no quarrel with these propositions or with the majority's view that the procedural obligation has evolved into a "separate and autonomous duty". Where we differ from the majority is as to their view that the obligation is "detachable" from the death which gives rise to it, in the sense that it is an obligation which can be imposed on a State on or after the date of ratification even where the death took place before that date. Nor can we agree with the suggestion which is implicit in the judgment that, because the procedural obligation "binds the State throughout the period in which the State could reasonably be expected to take measures to elucidate the circumstances of the death", a State which fails to carry out such an investigation into a death occurring before the date of ratification or which continues beyond that date an investigation which it has commenced without any Convention obligation to do so, can become liable for a breach of its procedural obligations from the moment of ratification. Divorcing the procedural obligation from the death which gave rise to it in this manner would, in our view, be tantamount to giving retroactive effect to the Convention and rendering nugatory the State's declaration recognising the Court's competence to receive individual applications (cf., *Kadiķis v. Latvia* (dec.), no. 47634/99, 29 June 2000; *Jovanović v. Croatia* (dec.), no. 59109/00, ECHR 2002-II).

10. This interpretation is open in our view to two further objections. In the first place, it would appear to give rise to an inconsistency in the Court's approach, depending on whether the lack of effective investigation into a

death occurring before the date of ratification is examined under the procedural aspect of Article 2 or under Article 13, whose requirements have been held to be similar to but "broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation" (see the Court's *Kaya v. Turkey* judgment of 19 February 1998, § 107, *Reports of Judgments and Decisions* 1998-I). While, applying the principle of "detachability", a complaint of a lack of effective investigation could lead to the finding of a violation of Article 2, a similar complaint under Article 13 would appear to be inadmissible. This is not merely because the Court would be unable to examine whether the applicant had an "arguable claim" of a breach of a substantive Convention right (see the *Voroshilov* case referred to above), but for the more fundamental reason that, where the substantive complaint is inadmissible as being incompatible with the Convention, a complaint under Article 13 is similarly inadmissible, there being no "arguable claim" in such circumstances (see, for example, *Aliev v. Ukraine* (dec.), no. 41220/98, 25 May 1999).

11. More importantly, the majority's approach would also, as the judgment recognises, give rise to serious issues of legal certainty, if the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occurred before the date of ratification were to be regarded as open-ended. The judgment seeks to dispel such risk by laying down first that, where the death occurs before the date of ratification, only procedural acts and/or omissions occurring after that date could fall within the Court's temporal jurisdiction and secondly, that there should exist "a genuine connection between the death and the entry into force of the Convention... for the procedural obligation imposed by Article 2 to come into effect" (judgment paragraphs 162-163).

12. In our view, neither requirement is such as to prevent future uncertainties arising. In particular, it is unclear whether by a "genuine connection" between the death and the entry into force of the Convention is meant a close temporal link between the two or some other and, if so, what connection. This question does not appear to be resolved by the subsequent explanation in the judgment that "a significant proportion of the procedural steps required by this provision... will have been or ought to have been carried out after the critical date". The application of this principle appears to us to be especially problematic in the case of "omissions", where no, or no effective, procedural steps to investigate a death have been taken prior to the date of ratification and no such steps are taken after that date. In such an event, even if a Convention obligation to investigate the death could be held to arise at the moment of ratification, it is difficult to see how the "significant proportion" test is to be applied to the facts of any particular case. The uncertainty is in our view further compounded by the concluding statement in paragraph 163 of the judgment that the Court would not exclude that, in certain undefined circumstances, the connection between

the death and the entry into force of the Convention could also be based "on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner".

13. For these reasons, we are in favour of following the case-law set by the decision in the *Moldovan* case, which appears to us to be more faithful to the principles governing the liability of States for acts or omissions occurring before the entry into force of the Convention, to ensure greater coherence in the Court's case-law and to be more compatible with the important principle of legal certainty.

14. We would accordingly conclude that, even though in the present case the investigative measures and legal proceedings relating to the death which had begun before the date of ratification by the respondent State continued after that date, the complaint concerning the breach of the procedural obligations of the State falls outside the temporal jurisdiction of the Court.

15. Since we are unable to share the majority's view that Article 2 was violated in the present case, we also voted against their conclusion that, having regard to this finding, it was unnecessary to examine separately the complaints under Article 6 and 13 of the Convention. Had the complaints been examined, we would have found a violation of Article 6 of the Convention on the grounds of the excessive length of the proceedings, but no violation of Article 13.

16. As to Article 41, we are divided as to whether sums should have been awarded in respect of non-pecuniary damage and costs and expenses, Judge Bratza voting in favour of such an award in deference to the view of the majority under Article 2, but Judge Türmen voting against the making of any award.