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# COMPENSATION OF DAMAGES TO VICTIMS OF WAR CRIMES





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## TABLE OF CONTENT

Introduction .....	5
1. Summary of the report.....	7
2. Conclusion and recommendation .....	14
3. Individual cases.....	15
3.1. Morinj .....	14
3.2. Bukovica .....	20
3.3. Deportation of refugees.....	23
3.4. Štrpci .....	26
3.5. Kaluđerski laz .....	28
3.6. Murino case.....	30



## INTRODUCTION

The state's obligation to provide compensation of damages to victims of war crimes and violations of human rights is an international legal standard.

In this context, particularly relevant is the 2006 UN General Assembly Resolution *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>1</sup>, rooted in the international treaties on human rights and humanitarian law that are binding upon Montenegro.<sup>2</sup> The Chapter IX of this Resolution - *Reparations for harm suffered* defines the objective of reparations as "promotion of justice by redressing gross violations of international human rights law or serious violations of international humanitarian law"<sup>3</sup>. States are urged to provide adequate, effective and prompt reparations for victims of acts or omissions which can be attributed to the state<sup>4</sup>. Victim status is acquired regardless of whether the offender has been identified, caught, charged or convicted.<sup>5</sup>

1 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

2 The resolution is based on Art. 2 of the International Covenant on Civil and Political Rights (*Sl. list SFRJ – Međunarodni ugovori*, 7/71), Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (*Sl. list FNRJ – Međunarodni ugovori*, 6/1967), Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Sl. list SFRJ – Međunarodni ugovori*, 9/91), Art. 39 of the Convention on the Rights of the Child (*Sl. list SFRJ – Međunarodni ugovori*, 15/90 and 2/97 and *Sl. list SRJ*, 7/02), Art. 13 of the European Convention on Human Rights (*Sl. list SCG – Međunarodni ugovori*, 9/2003), Art. 3 of the Hague Convention on the Laws and Customs of War on Land of 18 October 1907 (IV Hague Convention), Art. 91 of the Additional Protocol to the Geneva Convention of 12 August 1949 on the Protection of Victims of International Armed Conflicts of 8 June 1977 (*Sl. list SFRJ – Međunarodni ugovori* 16/1978), and Art. 68 and 75 of the Rome Statute of the International Criminal Court ((*Sl. list SRJ – Međunarodni ugovori*, br. 5/2001, which lays down the right to an effective remedy (Basic principles and guidelines, *Op.cit*, Preamble).

3 *Op. cit.*, §15 ("Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law..."). Additionally, in terms of reparations, the states are urged to establish national programmes for reparation and other types of assistance to the victims, to provide for adequate mechanism for execution of decisions on reparations and to provide with full and effective reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of nonrepetition (§15-23).

4 *Op.cit.*, §15. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, states that the victim should receive compensation in case of a breach of national criminal law by government officials or other persons acting in an official or quasi-official capacity (<http://www.un.org/documents/ga/res/40/a40r034.htm>).

5 *Op.cit.*, paragraph 9. Victims are considered, when appropriate and in accordance with domestic law, immediate family members or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization (paragraph 8).

This is particularly significant for Montenegro, where war crimes have been unsuccessfully prosecuted - although the victims were generally undisputed, the convictions of perpetrators had been scarce.

The most relevant international institutions have continuously warned Montenegro about its obligation to provide reparations for victims of war crimes, including the Council of Europe upon Montenegro's accession<sup>6</sup>, the Committee against Torture<sup>7</sup> and the UN Committee for Human Rights<sup>8</sup> when considering the reports submitted by Montenegro, the UN, under the procedure of the Universal Periodic Review (UPR)<sup>9</sup>, the European Commission<sup>10</sup>, *Amnesty International*<sup>11</sup>, and others.

6 "It is necessary to take all the steps to ensure the permanent, safe and sustainable return of refugees and displaced persons, as well as to ensure the reparation for refugee families who have suffered human rights violations", Accession of the Republic of Montenegro to the Council of Europe, Council of Europe-Political Affairs Committee, 2007, §19.4.2.

7 "The Committee is deeply concerned at the impunity enjoyed by perpetrators of crimes under international law, in view of the absence of final convictions in proceedings in domestic courts. Regarding the four war crimes cases, namely Kaluderski laz, Morinj, Deportation of Muslims, and Bukovica, there is a concern that the court failed to fully apply domestic criminal law and to comply with relevant international legal standards. The Committee expresses its concern that the majority of victims of violations of war crimes in Montenegro have yet to be afforded the right to reparation)... The State party should intensify its efforts to fight impunity for war crimes by: ... c) Ensuring access to justice and reparations for victims, in the light of the Committee's general comment No. 3 on the implementation of article 14 by States parties (*Concluding observations on the second periodic report on Montenegro*, Committee Against Torture, 17 June 2014, § 13).

8 "The Committee expresses concern that the State party has not provided sufficient disaggregated and detailed data in its report or its replies to the list of issues to allow the Committee to assess the impact of the measures taken by the State party to give full effect to the provisions of the Covenant or to measure the enjoyment of economic, social and cultural rights in the State party (art. 2)." (*Concluding observations on the initial report of Montenegro*, Human Rights Committee, CCPR/C/MNE/CO/1, 21 November 2014, § 6).

9 "119.13. Guarantee the right of victims to truth, justice, reparation and non-repetition, especially by taking all necessary measures to put an end to impunity and bring to justice all presumed perpetrators in line with the law and international standards (Switzerland); Take the necessary measures to ensure that all persons who have allegedly committed war crimes are tried before the national courts and that victims receive due redress (Spain); Report of the Working Group on the Universal Periodic Review – Montenegro, UN General Assembly, Human Rights Council, A/HRC/23/12, 21 March 2013.

10 "Montenegro also needs to ensure that victims of war crimes have access to justice and compensation", Montenegro 2015 Report, European Commission, SWD (2015) 2010 final, Brussels 10 November 2015, p. 52.

11 Amnesty International, Montenegro: *The right to redress and reparation for the families of the "disappeared"*, EUR 66/001/2006.



## 1. SUMMARY OF THE REPORT

A strong positive international influence together with the commitment of local attorneys, NGOs, and the media, have led to a change in the attitude of the Montenegrin government and courts over the past ten years on the issue of compensation of damages to victims of war crimes. From disregard and further victimisation of the victims, relevant Montenegrin institutions have begun to accept reparations as an international standard. However, many problems have occurred in practice that significantly hindered or prevented victims' access to justice.

The following problems stand out:

1. Inconsistent approach of the state to settlement with victims of war crimes;
2. Inconsistent court practice with regard to assessing the amount of non-material damages;
3. The State raising the objection of time-bar of victims' claims and very restrictive interpretation of conditions for the onset of time-bar by the courts;
4. Staying civil proceedings for damages until completion of criminal proceedings, when unsuccessful criminal prosecution obstructs compensation.

In addition, time is running out inexorably. Given that more than two decades have passed since the crimes occurred, many victims did not live to see moral and material compensation for the suffering endured.

On one hand, there have been, in principle, successful proceedings for redress, in terms of the settlement of the state with the victims of Deportation of refugees, and proceedings conducted by prisoners from the military camp in Morinj and relatives of passengers abducted from the train in Štrpci. On the other hand, proceedings for damages for crimes committed in the area of Bukovica<sup>12</sup>, Kaluđerski laz,<sup>13</sup> and during the attack of the NATO alliance on Murino<sup>14</sup> remain unsuccessful. All those claims were dismissed because of the alleged time-bar.

<sup>12</sup> Only one proceeding, initiated in the 1990s for the destruction of property, was finalized and compensation was awarded. All others were rejected for obsolescence, see chapter 3.2.

<sup>13</sup> In this case, one verdict awarded a final judgment, and that judgment was enforced, with a view to subsequently overturning the Supreme Court of Montenegro, see chapter 3.5.

<sup>14</sup> As in the case of Kaluđerski Laz, in the Murino case it also happened that the only final judgment ordering compensation was enforced and then overturned by the Supreme Court, see 3.6.

The settlement of the state with the victims of the Deportation of Bosnian refugees from Montenegro, reached in December 2008 after nearly four years of trials, presents an example of good practice of regional and even wider importance.<sup>15</sup> Unfortunately, this example was not repeated in Montenegro. After the settlement, court proceedings were conducted in which other victims of the same crime were either not compensated, or compensation did not reach the amounts achieved by the settlement.<sup>16</sup>

The inconsistent practice of courts awarding different amounts to persons in the same factual situations was particularly remarkable in the case of former prisoners of the Morinj military camp. The reparations awarded to some of the victims due to unlawful detention at the camp, for the same time period and the same conditions endured, differed more than twice in amount, and the compensation awarded was at times two times lower than the amount prescribed for unlawful detention during peacetime.<sup>17</sup>

According to the Government's report on the implementation of the Action Plan for Chapter 23 in negotiations on joining the European Union, during the second half of 2015 Montenegrin courts considered 133 cases for compensation of damages to victims of war crimes.<sup>18</sup> At the end of the first half of 2016, the proceedings were conducted in 43 cases, and a total of 110 decisions adopting claims became final, awarding a total of € 1,097,445.84 to the victims.<sup>19</sup>

Almost all those cases concerned reparations to former prisoners of the Morinj military camp and have therefore been related to the only criminal proceedings for war crimes in Montenegro in the last 13 years that ended in a conviction.<sup>20</sup> The only exceptions are the last one of the ten civil cases led by victims of Deportation of refugees following the settlement, and two proceedings regarding Murino (the case of the NATO intervention), which have been pending on appeal.

15 For more details see chapter 3.3.

16 *Ibid.*

17 For more details see chapter 3.1.

18 The semi-annual report on the implementation of the Action Plan for Chapter 23 Judiciary and Fundamental Rights, the Government of Montenegro, 30 December 2015.

19 Action Plan for Chapter 23 Judiciary and Fundamental Rights, semi-annual report January-June 2016, the Government of Montenegro, 2016, p. 38.

20 Judgment of the Court of Appeal Kž - S no. 44/13 from 2/27/2014, upholding the judgment of the High Court in Podgorica Ks. br. 19/12 from 7/31/2013. Previously in Montenegro in 2004 the only defendant convicted of the crime in Štrpci (Bosnia and Herzegovina), Nebojša Ranisavljević, and in 1994 five (in absentia) years for the murder of the Klapuh family in northern Montenegro.

Only in the case of Moringj, where the occurrence of war crimes was confirmed in a final conviction, the question of time-bar of victims' claims did not pose a problem. In other cases, claimants' requests submitted after the expiry of a general period of time-bar (of maximum five years from the occurrence of the damage) were dismissed, or stayed until the completion of criminal proceedings determining responsibility for the war crime. The reason for this was the position of the Supreme Court that the privileged, longer period of time-bar, prescribed by law for when damage occurs as a result of a crime, does not apply when the court does not establish the existence of a crime in criminal proceedings.<sup>21</sup> As the criminal proceedings for the Deportation of refugees and for the crimes in Bukovica and Kaluđerski laz ended in acquittals, i.e. verdicts not establishing that what had happened to the victims was a war crime (despite criticism of such findings by international experts<sup>22</sup>), the door for reparations was closed to all those failing to submit their claims within the regular time-bar. Victims of the NATO intervention in Murino suffered the same fate, as in their case there had been no criminal procedure whatsoever, which could have provided for the extended time-bar.<sup>23</sup>

In the normal course of events, the general time-bar term of three years from learning about the damage and the person responsible to up to five years from the occurrence of damage in any case<sup>24</sup>, makes sense as a sanction for a negligent creditor.<sup>25</sup> This deadline is based on a reasonable assumption that a damaged party in several years can manage to organise to claim compensation in due time. The purpose of deadline is to provide for legal certainty and prevent excessive workload for the courts. However, when damage occurs as a result of a criminal offence, and particularly as a consequence of a war crime, occurring in the context of armed conflicts

21 Legal position, Civil Section of the Supreme Court of Montenegro, 11/25/2011, Supreme Court Bulletin 2/2011.

22 Maurizio Salustro, international prosecutor and judge hired by the European Commission in the report "Peer Based Assessment Mission to Montenegro on Domestic Handling of War Crimes", which has not been officially published. Daily *Vijesti* published excerpts from this report in two editions: "The Montenegrin authorities should have been prosecuted as accomplices or at least helpers", 17 December 2014, and "Salustro: You looked after torturers because they are family men", 18 December 2014, and the Delegation of the European Union in Podgorica did not deny these texts. See also the Committee against Torture (*Concluding observations on the second periodic report on Montenegro*, Committee Against Torture, 17 June 2014, & 13), the Human Rights Committee (*Concluding observations on the initial report of Montenegro*, Human Rights Committee, CCPR/C/MNE/CO/1, 11/21/2014, item 9).

23 In this case the state failed to warn the population about an imminent attack of the NATO alliance. The Supreme Court of Montenegro reiterated its position that a civil court could not determine whether a criminal offence had been committed for the purpose of applying the privileged time-bar period, and since criminal proceedings was not initiated, the Court found that the claim for damages became time-barred after three years (Rev. 956/13 of 1 November 2013, p. 3)

24 Art. 376 of the Law on Obligations of Montenegro.

25 See *Statute of limitations in claims*, Mirjana Stojanović, 6 January 2013, available at: [http://www.paragraf.rs/100pitanja/ugovori/zastarelost\\_potrazivanja.html](http://www.paragraf.rs/100pitanja/ugovori/zastarelost_potrazivanja.html).

and longlasting hostilities, while communication is prevented and/or discouraged, it is particularly unfair to insist on a regular time-bar. This is corroborated by the aforementioned UN resolution, which warns that the time-bar in civil lawsuits filed by victims “should not be unduly restrictive” and that the status and rights of victims should not depend on whether the perpetrator was identified or convicted.<sup>26</sup>

The Montenegrin law as such is not restrictive, but its interpretation by the Supreme Court, which in recent years took a highly restrictive interpretation of the statute of limitation at the expense of the victims, is.

The Montenegrin Law on Obligations stipulates a longer time-bar where the damage was caused by criminal offence - in that case a claim for damages against the responsible person expires upon the expiry of a deadline for the time-bar of criminal prosecution.<sup>27</sup> The Civil Procedure Law (CPL)<sup>28</sup> gives the court the right to resolve in a lawsuit as a preliminary question an issue not yet decided by a court or other competent authority (Art. 14). It is not written that the preceding question cannot be a question as to whether the damage occurred as a result of a criminal offence for the purposes of deciding on an appropriate time-bar.<sup>29</sup> With respect to the existence of a criminal offence and criminal liability, the civil court is bound only by a final judgment finding the accused guilty (CPL Art. 15). This means that when a criminal court finds that a person has committed a crime and is held criminally responsible, then the civil court is obliged to hold that person responsible for the damage resulting from the commission of the crime. However, if the criminal court does not find the defendant guilty of the crime, the civil court can still determine his liability for damages, that is, it can determine the liability of the person responsible for his actions (such as the state) and to oblige them to compensate for damages.

Therefore, the CPL does not in itself prohibit a civil court from establishing the existence of a crime for the purpose of applying time limitations. The Supreme Court of Montenegro has also previously held a less restrictive

26 Resolution of the UN General Assembly from 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, op. cit, § 7 and 9.

27 Art. 386 of the Law on Obligations (*Sl. list CG*, 47/2008). Previously the same was prescribed by Art. 377 of the Law on Obligations (*Sl. list SFRJ*, 29/78, 39/85, 57/89 and *Sl. list SRJ*, 31/93),

28 Published in Official Gazette of the Republic of Montenegro RCG, 22/2004, 28/2005 – Decision Constitutional Court RCG, 76/2006 and Official Gazette of Montenegro, No. 47/2015 – other law and 48/2015.

29 For this (linguistic) interpretation of the CPL, see, for example, judgment of the Podgorica Higher Court in the Murino case (Gz. 4027/12), subsequently overturned by the Supreme Court. For more detail please see 3. 6.

approach in this regard. In its judgment delivered in 2001, this court found that a trial court is authorized to determine, as a preliminary question, whether the damage was caused by an act that contained the elements of the crime “in accordance with the principle of providing greater legal protection for the victim’s right to compensation for damage caused by a criminal offence”:

... In the event of existence of procedural obstacles, due to which it was absolutely impossible to initiate and complete a proceedings against the offender, either because s/he has died or is unavailable to the prosecuting authorities, or is unknown, or in the case of multiple perpetrators, a civil court is entitled to determine - as a preliminary issue - whether the damage was caused by an act containing the elements of a criminal offence, given that a crime may exist even in the absence of criminal proceedings. Nonetheless, it should be noted that the aim of civil court’s actions is not to establish criminal responsibility (which can be determined only in criminal proceedings), but to apply special rules with regard to time-bar of claims for damages under the provision of Art. 377 of Law on Obligations, in accordance with the principle of providing greater legal protection for the right of a damaged party to compensation for damage caused by a criminal offence.<sup>30</sup>

However, ten years later, with regard to the claims for redress of prisoners of the Morinj military camp, the Civil Division of the Supreme Court held that the criminal court has the exclusive jurisdiction to determine whether a crime had been committed or not and that the civil court may not, on its own, conclude that a damage was caused by a crime in order to apply the extended time-bar.<sup>31</sup>

The position that the criminal court has exclusive jurisdiction to determine whether or not the crime was committed is incorrect, because although the criminal court most often does determine whether the crime was committed, *it does not do so in every case where the crime exists*. For example, in the case previously cited, the Supreme Court remarked that “a crime may still

30 Judgment Rev. 469/2000 of 5 May 2001, published in the Bulletin of the Supreme Court of the Republic of Montenegro, January-December 2001, Podgorica 2002, p. 35.

31 “... (T)he longer period of time-bar may be applied only when the crime is established in the criminal judgment. Whether one’s actions have elements of a crime can only be established by a criminal court in final judgment. The exception is when there are circumstances which exclude criminal liability or criminal prosecution of the defendant. In this case, the trial court is entitled, in order to assess whether the claim for damages caused by the criminal act has become time-barred, to examine whether the damage was caused by actions that contain elements of a criminal act.” Legal opinion, Civil Division of the Supreme Court of Montenegro, 25 November 2011, III and IV, *op.cit.*

exist even when there is no criminal proceeding” (for example, because the perpetrator died, or was unavailable, or was mentally ill, received amnesty or pardon, or had perhaps been unjustifiably shielded by the prosecuting authorities). Even when criminal proceedings are being conducted against a certain individual, the court is only obliged to determine whether the accused had been guilty of the act he had been charged with or not<sup>32</sup>, and so, it is possible for the court to answer that task by determining that the person charged with the offence is not the one responsible, without determining at all whether the offence in question was committed or not. The High Court in Bijelo Polje acted in this way in the Kaluđerski laz case, considering the assassination of civilians who escaped to Montenegro from Kosovo in 1999. The court did not determine whether a criminal offence, and which offence for that matter, had been committed in relation to the assassinated victims; it had acquitted the accused while disregarding this question.<sup>33</sup> On the other hand, the claims for redress launched against the state due to civilian deaths in Kaluđerski laz were stayed whilst the criminal proceedings were pending, only to be rejected due to the position of the Supreme Court that the criminal court is the only one in charge of determination of the existence of a criminal act.<sup>34</sup>

The restrictive stance that a civil court’s decision depends on a criminal court’s ruling is particularly unfair in cases where the state is objectively responsible for the actions of its officials<sup>35</sup>, who are the most frequent perpetrators of war crimes. In such cases, for the purpose of compensation of the victims, it is not important which particular state officer committed the crime and caused damage, but that the offence was committed and that the damage was inflicted. In Montenegro, as elsewhere, the practice has rebutted the assumption that individual perpetrators of crimes will be adequately prosecuted, and that criminal proceedings will determine whether a war crime was committed in a particular case. The absence of the rule of law is particularly visible in the omissions in the prosecution of war

32 Art. 373, para. 2 Criminal Procedure Code, op. cit. The court is not bound by the prosecutor’s legal qualification, so it can determine from the facts of the judgment that it is in the middle of another act, but, as the practice of the Bijelo Polje court shows, it is not certain that the court will determine whether and what crime occurred, especially if it is the responsibility of another person. For war crimes victims who seek redress from the state that is objectively responsible for the acts of its officials, it does not matter which officer is individually responsible for the war crime, while for the criminal court this is a key issue.

33 For more details see report “War Crime Trials”, Human Rights Action, 2016.

34 In one of the proceedings for damages initiated in connection with the crime in Kaluđerski Laz, the Higher Court in Podgorica even argued, without explanation, that if the damage was caused by a crime, the privileged time-bar limitation only flows to the (direct) offender, who has in this case remained unknown, and not to the state, which is objectively responsible for the damage to its officials (Gz. No. 1190/2015), more details in 3.5.

35 Art. 170-172, 180, Law on obligations, Sl. SFRJ, No. 29/78, 39/85, 57/89 i Sl. list SRJ, No. 31/93; Art. 164-166, 187 Law on Obligations, Sl. list CG, No. 47/2008.



crimes<sup>36</sup>, but this should also not result in the victims' loss of the right to be compensated in civil proceedings. That is why the UN General Assembly Resolution emphasises that for the purpose of ensuring reparations, a person will be considered a victim regardless of whether the perpetrator of the crime in the particular case has been identified, caught, charged, or convicted.<sup>37</sup>

As demonstrated, the disputed conditionality of a claim for damages from the state upon the result of criminal proceedings was not imposed upon the civil court judges by the Civil Procedure Law, but by the legal opinion of the Supreme Court. Legal opinions as such do not count as a source of law in Montenegro<sup>38</sup>, although *de facto* they are. The Venice Commission has already criticised the attempt of the Government to introduce mandatory execution of legal opinions in the Law on Courts, contrary to the Constitution of Montenegro and the principle of the independence of a judge.<sup>39</sup>

In practice, the judges of first instance courts, who were in the best position to evaluate the facts of the case, as well as the judges of the higher courts, often supported the claims of injured parties for redress from the state, while the Supreme Court denied them and protected the state through the described legal construction, due to which many clearly justified claims of war crime victims have been dismissed as time-barred.<sup>40</sup>

36 This is explained in detail in the report "War Crime Trails in Montenegro", B. Ivanisevic, T. Gorjanc Prelevic, Human Rights Action, 2016.

37 *Op. cit.*, point 9. Victims are considered, where appropriate and in accordance with domestic law, by immediate family members and protégés of the immediate victim and the victims who have suffered harm in an effort to assist victims in distress and prevent their victimization (Count 8)

38 The Constitution of Montenegro stipulates that the courts shall rule on the basis of the Constitution, laws and ratified and published international agreements only (Article 11, para 2).

39 "Binding positions can be deemed problematic from the perspective of the internal independence of judges... In order to avoid a misunderstanding, the non-mandatory character should be stated explicitly". European Commission for Democracy through Law (Venice Commission), *Opinion on the Draft Laws on Courts and on Rights and Duties of Judges and on the Judicial Council of Montenegro*, Opinion No. 783/2014, 15 December 2014, item 22.

40 See below the Murino case, where the compensation was awarded by a final court decision and even paid before the Supreme Court ordered its return and declared the claim time-barred. In Kaluderski laz case, the compensation was also awarded by a final court decision in one case before the Supreme Court decided on the request for review. In Bukovica case the trial courts also adopted several claims. In case of the so-called Deportation of refugees, the High Court in Podgorica quashed the decision on stay of the civil proceedings pending the completion of criminal trial and ensured that the trials for damages be continued until eventually the court settlement had been executed.

## 2. CONCLUSION AND RECOMMENDATION

This report criticises the inconsistent and unfair approach of state authorities in relation to reparations to war crime victims, and challenges the Supreme Court's conclusion on the time-bar of claims filed against the state by the victims of crimes in Bukovica, Kaluđerski laz, Murino, and several of them in the case of the Deportation of refugees.

Even if the time-bar did really apply, this would not invalidate the victims' right to reparations, only the opportunity to enforce this right through the courts.<sup>41</sup> Thus, the right of victims to reparations is still pending, as a natural and moral obligation upon Montenegro, which its government should voluntarily fulfil.

The report aims to encourage the Government of Montenegro to start negotiations on reparations with all identified victims of apparent errors and failures of state authorities in the context of armed conflict involving the territory of Montenegro during the period 1991-1999. The worst eventuality is to allow for the victims to be denied just compensation due to the essentially unjust defiance of the state.

The number of war crime victims is limited, their claims are modest, same as the amounts of damages awarded in the practice of courts thus far. In recent years, the victims were awarded a total of 1.1 million euros, and settlement with the remaining victims would not exceed this amount. On the other hand, the state, for example, paid as much as 71.3 million euros in legal costs for the lost court cases from 2012 to 2015<sup>42</sup>, without any commotion. Total funds required for compensation of the remaining victims would be a negligible burden on the state budget, especially when compared to the importance of the permanent resolution of the problem of reparations to war crime victims for both the future and the history of Montenegro.

41 Art. 369, para 1 of the Law on Obligations, *op.cit.*

42 "Radulović: The state paid twice the value of the dispute - as recently shown in the Report of the State Audit Institution, the total expenditure, as per the report of the Ministry of Finance, for all legal claims paid from the budget of Montenegro for the period 2012-2015 amounted to 71.3 million euros", Portal *Café del Montenegro*, 13 April 2016: <http://www.cdm.me/ekonomija/radulovic-drzava-platiladuplo-u-odnosu-na-vrijednost-sporova>.

### 3. INDIVIDUAL CASES

#### 3.1. MORINJ

A total of 207 civil suits (by 187 Croatian and 20 Bosnian nationals) were launched in 2012 before the Basic Court in Podgorica by war and civilian prisoners from the so-called Centre for the reception of prisoners of war in Morinj, Montenegro, which operated from October 1991 to August 1992.<sup>43</sup>

Following the completion of criminal proceedings in April 2014, which resulted in the conviction of four people for war crimes in the Morinj military camp, the civil proceedings that were previously initiated and then stayed, in accordance with the legal position of the Supreme Court of Montenegro, had continued.<sup>44</sup>

The amounts of claims varied depending on whether the claimants had been detained at the camp as prisoners of war or as civilians, the number of days they had spent there, and the intensity of torture and abuse they suffered.<sup>45</sup>

The Supreme Court held that only civilian captives had the right to damages for unlawful deprivation of liberty, while the prisoners of war were not entitled to compensation since it was legitimate to capture members of the armed forces of a party to the conflict.<sup>46</sup> The prisoners of war were awarded compensation only for the harm caused by torture, inhumane or degrading treatment, in cases where such treatment had been established.

Damages awarded in final verdicts for unjustified deprivation of liberty remained significantly inconsistent even after the Supreme Court had

43 Information on the number of lawsuits was provided by attorney Zdravko Begović, legal representative of the claimants, former prisoners from the Morinj camp, June 2016.

44 Legal opinion, Civil Division of the Supreme Court of Montenegro, Bulletin of the Supreme Court, February 2011 (<http://sudovi.me/podaci/vrhs/dokumenta/642.pdf>), para IV: "Civil proceedings for nonpecuniary damages brought by former prisoners of the Centre for the reception of prisoners in Morinj, in which an objection was raised to time-bar of claims, should be discontinued until the final completion of the criminal proceedings pending against a number of persons for war crimes against prisoners of war and war crimes against the civilian population." However, not all proceedings were discontinued, some were completed in 2012, see judgments of the Supreme Court upon appeals on points of law from 2012, Rev. 361/2012 and 532/2012.

45 Information on the number of lawsuits provided by attorney at law Zdravko Begović, legal representative of the claimants - victims of war crimes in the Morinj camp, June 2016.

46 *Legal opinion of Supreme Court of Montenegro* from 25.11.2011, para. II, page. 8. <sup>47</sup> Constitution of Montenegro, Art. 124, para. 1 (Sl. list CG, 1/2007, 38/2013).

reviewed the appeals on points of law, despite the fact that this court should ensure unified and consistent application of the law by the courts.<sup>47</sup>

The compensation amounts determined by this court for unlawful detention of civilians in camp Morinj varied from €95 per day<sup>48</sup> to €144,6 per day<sup>49</sup> without justification. Even in the cases where the claimants had spent an identical number of days at the camp, the Supreme Court confirmed the amounts which differed by €4.000, i.e. €48 per day, for the unlawful deprivation of liberty.<sup>50</sup> Although the number of days spent in the camp was mentioned in the text of the verdict, again the total amount of compensation was determined arbitrarily, with formal remarks such as “in the judgment of this court... this is adequate compensation... which will serve the purpose of compensation”,<sup>51</sup> without justifying the basis for the total amount, which should have been the one same daily amount for illegal deprivation of liberty in the same prison camp. Such practice is manifestly unfair and in contravention with the right to a fair trial. The European Court of Human Rights has stated that inconsistent or contradictory adjudication of claims brought by persons in identical situations constitutes a violation of the right to a fair trial, and creates a situation of legal uncertainty and reduces public confidence in the judiciary.<sup>52</sup>

The Guidelines of the Civil Division of the Podgorica High Court from 2004 instruct that € 3,000 - 4,000 be awarded for one month of unjustified deprivation of liberty, or € 100 -133 per day. These amounts should apply to peacetime conditions, i.e. to stay in prisons managed by the State Bureau of Criminal Sanctions and not in a military camp. In any case, as the Supreme Court has maintained that the claimants spent time “in a military camp on the territory of a foreign country in inhumane and cruel conditions, in daily fear for their lives<sup>53</sup>” and that they were therefore “undoubtedly entitled to non-pecuniary damages for mental suffering due to unjustified deprivation of liberty,” one could have well expected the amounts of damages to be higher than those envisaged for peacetime conditions. However, as the Supreme Court did not establish consistent practice, nor did it, in its Legal opinion from 2011, provide any guidelines to the lower courts in relation

47 Constitution of Montenegro, Art. 124, para. 1 (Sl. list CG, 1/2007, 38/2013).

48 Rev. 1074/2015, 20 October 2015.

49 Rev. 919/2015, 29 October 2015.

50 Of two claimants who both have spent 83 days each in Morinj prison camp, one was awarded €12.000 i.e. €144 per day (Rev. 926/2015, from 23 September 2015), and other one was awarded €8000, i.e. €95 per day (Rev. 1075/2015, from 27 October 2015).

51 For example, Rev. 766/2016, of 1 November 2016.

52 ECtHR, case *Vinčić and others v. Serbia*, 2009, paragraph 56.

53 E.g. see Rev 919/15 from 7.10.2015.

to compensation of damages for incarceration in Morinj, *it occurred that the Higher court in Podgorica in some cases with final decisions awarded damages of only € 66.6 per day of captivity, which is two times lower than the amount set forth for peacetime conditions and more than two and a half times lower than the amount awarded to another prisoner of the same camp, upheld by the Supreme Court.*<sup>54</sup> Due to described inconsistent practice, some claimants filed constitutional appeals in July 2016.<sup>55</sup>

Damages awarded for physical pain and mental anguish due to violation of human rights through torture, inhuman and degrading treatment ranged from € 6,000<sup>56</sup> to a maximum of € 18,000.<sup>57</sup> The courts considered the time spent at the camp, the intensity and duration of mental and physical suffering and other circumstances, as well as the case-law in similar cases.<sup>58</sup> The Supreme Court, acting in third instance, either reduced or confirmed the amounts awarded by the lower courts.<sup>59</sup> Moreover, in the cases of captured civilians, who were granted compensation for torture or inhuman and degrading treatment, in addition to the compensation for unjustified deprivation of liberty, those two types of damages were generally the same, suggesting that, in the majority of cases, the time spent in those conditions of captivity was a decisive factor for the Court. In some cases, however, the same amount of compensation was granted to a claimant who had spent twice as much time at the camp, and the Supreme Court did not specify the reason for such a distinction.<sup>60</sup>

54 In the cases in which the lowest amount of € 66.66 was awarded, it was not possible to file a request for review with the Supreme Court (P. 4854/14). The highest amount of € 144,6 per day was confirmed by the judgment of the Supreme Court (Rev. 919/15, 29 October 2015).

55 Information provided by attorney Zdravko Begović on 30 July 2016.

56 Judgment of the Supreme Court of Montenegro, Rev. 159/16 of 16 March 2016.

57 The amount was awarded for period of 6 months and for 6.5 months at the camp, stating that the claimant "during his stay at the Centre for the reception of prisoners in Morinj had been subjected to inhuman and degrading treatment, physical and psychological torture. The acts he had been subjected to were of such a nature that, under the given circumstances, they caused the claimant a sense of fear, anguish, humiliation, physical and mental suffering." Judgments of the Supreme Court of Montenegro, Rev. 1250/2015 of 21 January 2016 and Rev. 1073/2015 of 3 December 2015. For the same amount and similar reasoning see Rev. 491/2016 of 11 May 2016.

58 E.g. Rev. 30/2016 of 13 April 2016.

59 E.g. the amount determined by the Basic Court and High Court was reduced in case Rev. 1073/2015 of 3 December 2015.

60 The same amount of € 11,000 was specified in the first case for 4.5 months spent at the camp, in the second for 2 months and 7 days, and the third - for two months and 3 days, whereby the Court in all three cases found that the claimants had been subjected to physical and psychological pain amounting to torture (judgment of the Supreme Court of Montenegro, Rev. 1246/2015 of 2 March 2016; Rev. 1074/2015 of 20 October 2015 and Rev. 842/2015 of 24 September 2015).

By the end of July 2016, 115 cases had been adjudicated, 15 cases had been pending on appeal before the Podgorica High Court, in two cases the decision of the Supreme Court had been pending on the request for review and in 49 cases the decision of the first instance court had not yet been adopted.<sup>61</sup> In all adjudicated cases the claims were partially adopted. In the opinion of the claimants' legal representative Zdravko Begović, the amounts awarded were not adequate bearing in mind the degree and intensity of physical and mental pain that the claimants endured at the camp. He believes that the court should have considered objective and subjective circumstances of each claimant with more attention.<sup>62</sup> Living conditions in the so-called Centre for the reception of prisoners of war in Morinj were compendiously described by one of the claimants: "two and a half hours at such a place is too long, let alone the two and a half months I have endured there."<sup>63</sup>

So far no claims were rejected, except for a few of those where claimants testified that during their stay at the camp they had not been tortured or particularly humiliated.<sup>64</sup> In those cases, the court refused to accept that the conditions in Morinj military camp were by themselves inhuman and degrading, which is contrary to the practice of other judges in similar cases,<sup>65</sup> and the interpretation of the standard of "inhuman and degrading treatment" by the European Court of Human Rights,<sup>66</sup> the Human Rights Committee<sup>67</sup>, and the Committee against Torture.<sup>68</sup>

61 Information provided by attorney at law Zdravko Begović, claimants' legal representative, on 30 July 2016.

62 *Ibid.*

63 Detainees from Morinj camp seek compensation, daily *Vijesti*, 14 December 2014 (<http://www.vijesti.me/vijesti/logorasi-iz-morinja-traze-naknadu-stete-809849>).

64 For example, P. 4098/2014, the judgment from 2015 confirmed by decision Gž. 2030/2015.

65 In a final criminal verdict it was established that "in Morinj detention centre there was an atmosphere of terror and fear for own life that the victims were constantly exposed to." (K-S 19/2012, judgment of 31 July 2013). In its judgments upon requests for review the Supreme Court determined "that claimants had spent time in a military camp in the territory of another country in inhumane and cruel conditions, in daily fear for life" (e.g. Rev 532/2012). In the judgment of the same court of first instance, the Basic Court in Podgorica, it was found that the claimant, a prisoner "in Morinj was forced to witness acts of violence against other detainees, which caused him mental anguish and fear for own safety, he had to stay in unsanitary conditions and conditions unworthy of a human with dozens of other people in a cold room, where they slept, ate and relieved themselves, he was forced to lie on a board, with only one blanket, and that for the whole period of stay he was allowed only twice to take a bath and change clothes..." and awarded damages for inhuman and degrading treatment (P. 594/2015).

66 E.g. *Bulatović v. Montenegro*, 2014, a violation of Art. 3 of the European Convention on Human Rights only for a stay of several months in overcrowded conditions. Similar in *Longin v. Croatia*, 2012.

67 The Committee has held in several decisions that prisoners' living conditions must comply with the minimum conditions in terms of hygiene, food, living space, beds, clothing, medical assistance in accordance with the Standard Minimum Rules for the Treatment of Prisoners; otherwise, the living conditions are in violation of Art. 10, para 1 of the International Covenant on Civil and Political Rights (see, for example, *Mukong v. Cameroon*, communication No. 458/1991, 1994). This pact bound SFRJ, i.e. the Republic of Montenegro also at the time of Morinj crimes in 1991, as it was ratified in 1971 (*Official Gazette of Montenegro SFR Yugoslavia – International agreements*, No. 7/71).

68 E.g. *Concluding Observations on Croatia*, UN Doc. CAT/C/CR/32/3, 2004.



Although the representative of the state - Protector of Property and Legal Interests of Montenegro regularly raised the objection of the time-bar of claims, yet such objections did not pose a problem in this case because there had been a criminal conviction.<sup>69</sup> Although not all claimants were recognised as injured parties in the criminal proceedings, their *locus standi* was confirmed by the certificate of the Ministry of the Republic of Croatia, establishing the time period that the claimants had spent at the Morinj camp, or the fact that they had been registered by the International Red Cross as prisoners.<sup>70</sup> Given the long period of time that has passed since the commission of war crimes, certain persons were unable to come due to illness or age, but they were heard at their places of residence through legal cooperation.<sup>71</sup>

The legal representative of the victims has so far addressed the Protector of Property and Legal interests of Montenegro three times seeking an out-of-court settlement, but was informed that the Government was not interested in any type of settlement.<sup>72</sup> In January 2015, the Croatian Members of the European Parliament requested in an amendment that in the resolution on Montenegro it be clearly indicated that the Montenegrin authorities are expected to ensure compensation as soon as possible for all the victims of the Morinj camp.<sup>73</sup> The resolution adopted by the European Parliament on 2 March 2015 stipulates that it is expected that “the victims have immediate access to justice and fair compensation.”<sup>74</sup>

Seven claimants have passed away and their actions were suspended.<sup>75</sup>

69 “Specifically, the non-pecuniary loss in question was a result of a criminal offence, as determined in the criminal verdict of the High Court in Podgorica Ks. 19/12 of 31 July 2013 that became final on 20 February 2014, which is why a longer time-bar period is applied, as prescribed by provision of Art. 377 of the then applicable Law on Obligations; lower-instance judgments contain sufficient and clear reasoning pertaining to the said time-bar period, which this Court fully accepts and refers the appellant to them” (Supreme Court of Montenegro, Rev 159/16 of 16 March 2016).

70 Interview with attorney Zdravko Begović. For example, see Rev. 159/16 of 16 March 2016.

71 Information provided by attorney Zdravko Begović in May 2016.

72 Attorney at law Zdravko Begović’s statement given to the HRA researcher in May 2016.

73 “Croatian MEPs seeking damages from Podgorica for victims of Morinj”, Radio Free Europe, 29 January 2015.

74 *European Parliament resolution on the 2014 Progress Report on Montenegro* (2014/2947(RSP), item 15.

75 Information provided by attorney at law Zdravko Begović in July 2016.

### 3.2. BUKOVICA

In the period 2006-2007 a total of 10 lawsuits were lodged by 18 claimants against the state of Montenegro for damages caused by death of kin, torture and destruction of property in the region of Bukovica in 1992 and 1993.<sup>76</sup>

Only in one case did the court oblige the state in a final verdict to pay damages for destroyed property, a house - log cabin, in the amount of € 8.133.<sup>77</sup>

Although in several cases the claims had been partially adopted by the courts of first instance in the amount of € 15,000 each for damages for the death of a father and husband, € 10,000 each for torture and € 19,530 for destroyed property and € 16,769 for destruction of livestock, all these judgments were revoked on appeals filed by the respondent state, and in the end, all the claims were rejected on the grounds of timebar, because in the absence of a criminal judgment of conviction the court did not acknowledge that this was a war crime, i.e. did not allow for the privileged time-bar period (Art. 377, Law on Obligations).<sup>78</sup> In other cases the proceedings were stayed pending the completion of criminal proceedings, and following the adoption of a final acquittal for all the defendants, all civil claims were dismissed as well.<sup>79</sup>

As the Supreme Court also rejected the requests for review, constitutional appeals were lodged, but have not yet been decided. The appeals before the Constitutional Court have been pending for two and three years. In the meantime, a few claimants have passed away.

On the other hand, in 2008 the Government of Montenegro launched the project of construction or reconstruction of 106 destroyed homes in Bukovica, for the families who were forced to leave this area in 1992 and 1993. The project is worth nearly €4.5 million and includes the construction of housing and auxiliary facilities, rehabilitation and reconstruction of the road network, and the reconstruction of the power distribution network.<sup>80</sup>

76 Information obtained from the Humanitarian Law Centre (HLC) and attorney at law Savo Popović, representative of all the claimants, in May 2016.

77 This is a dispute initiated by Mušan Bungur back in the nineties. The judgment was enforced in 2009.

78 Information obtained from the Humanitarian Law Centre and attorney Savo Popović, representative of all the claimants, in May 2016.

79 *Ibid.*

80 "Information on the implementation of infrastructure facilities in Bukovica Local Community – Pljevlja Municipality", the Ministry for Human and Minority Rights, December 2014, available at: [file:///C:/Users/Zeljko/Downloads/28\\_95\\_25\\_12\\_2014%20\(1\).pdf](file:///C:/Users/Zeljko/Downloads/28_95_25_12_2014%20(1).pdf)

By the end of 2015, in their previous locations, 85 residential units with auxiliary facilities were built, asphalt roads were rehabilitated or constructed, alongside the power distribution network. The total amount of funds spent throughout 2015 has been € 4,271,603.27.<sup>81</sup>

However, according to one of the returnees to Bukovica, only six homeowners have so far returned to their new houses, either alone or with their wives only.<sup>82</sup> “It hurts me to see them boast about investing € 4.5 million in Bukovica, while I have nothing to live on. It’s important to spend the money, but nobody cares if someone will indeed return,” said 68-year-old Salim Bečić.<sup>83</sup> President of the Bukovica Local Community Gligorije Topalović finds it inefficient to build houses that nobody wants to come back to, instead of using part of the funds to “buy some livestock for the people, something to live on.”<sup>84</sup>

### Murder of state servant at workplace

Džafer Đogo, road maintenance worker at the Public Company “Forestry”, from the Bukovica village near Pljevlja, was killed at his workplace, on the road to Potkruše village, on 15 June 1993. He was killed by Majoš Vrečo, who was a member of the Army of Republika Srpska of Bosnia and Herzegovina, a native of Pljevlja. He fired three bullets into the victim’s head at close range after ordering him to lie down by the road. The High Court in Bijelo Polje established that the murder was committed for base motives - national hatred, and sentenced the defendant to 14 years in prison.<sup>85</sup> The victim’s family attorney Savo Popović unsuccessfully tried to persuade the state prosecutor to raise the request for protection of legality in order to reclassify the offence into War Crimes against the Civilian Population.<sup>86</sup>

81 *Ibid.*

82 “Bečić: Six persons returned to Bukovica, not 34, as claimed by the authorities”, daily *Vijesti*, 16 June 2015, available at: <http://www.vijesti.me/vijesti/becic-u-bukovicu-se-vratilo-6-porodica-a-ne-34kako-tvrde-zvanicnici-838528>; This information was confirmed for HRA by Jakub Durgut, President of the Association of displaced Bukovica residents.

83 *Ibid.* Bečić gave a similar statement in TV show “Without Borders” hosted by Sead Sadiković, 6 October 2015: <http://www.vijesti.me/tv/pogledajte-magazin-bez-granica-slucuj-bukovica-i-sakrivanje-cinjenica-854451>.

84 TV show “Without Borders” hosted by Sead Sadiković, 6 October 2015: <http://www.vijesti.me/tv/pogledajte-magazin-bez-granica-slucuj-bukovica-i-sakrivanje-cinjenica-854451>.

85 also Information provided by *Humanitarian Law Foundation* Belgrade and lawyer Savo Popovic, see also “Liability has expired”, *Monitor*, 1 July 2011.

86 Supreme State Prosecutor’s Office, Ktz. 131/13 of 4 February 2014 and Ktz. 20/16 of 13 April 2016.

The victim's daughters and son filed a claim for damages against the killer, and subsequently against the state of Montenegro, considering the fact that their father was killed at a workplace operated by the government. It is unbelievable that despite the final murder conviction, the Basic Court in Pljevlja successfully stayed the proceedings for damages against the convicted defendant "until the defendant has served his prison sentence"<sup>87</sup>, although imprisonment did not constitute legal basis for the suspension of the proceedings whatsoever.<sup>88</sup>

The lawsuit for damages against the defendant Vrećo was continued in 2014, upon his release from prison. Since the claimants did not know the correct address of the defendant, the court ordered them to pay an advance of € 3,150 for the costs of engaging a temporary representative for the defendant<sup>89</sup>, which they refused as they were unable to pay that amount.<sup>90</sup>

The claim filed before the Basic Court in Podgorica against the state of Montenegro has been rejected due to time-bar. The Court found that the longer time-bar period stipulated under Art. 377 of the Law on Obligations is applied only in relation to a direct perpetrator of the crime, but not the state, which is held responsible for the damage according to the rules of objective responsibility. This judgment was confirmed by the Podgorica High Court and the Supreme Court of Montenegro. A constitutional appeal

<sup>87</sup> Basic Court in Pljevlja, P. 536/96, Decision of 22 July 1996, which remained unknown until referred to in Decision of 18 April 2014.

<sup>88</sup> Civil Procedure Act of the FRY, which was then in force, in Art. 212 and 213 provided for entirely different circumstances (Published in Official Gazette of SFR Yugoslavia, 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, Sl. list FRY, 27/92, 31/93, 24/94, 12/98, 15 / 98, 3/02):

Art. 212

The proceedings shall be suspended:

1. when the party passes away or loses its procedural capacity and is not represented in the lawsuit;
2. when the party's legal representative passes away or his/her power of attorney ceases, and the party is not represented in the lawsuit;
3. when the party which is a legal entity ceases to exist, or when a competent authority adopts a decision prohibiting its operation;
4. when legal consequences of the bankruptcy proceedings take effect;
5. when the court ceases its work due to war or other reasons;
6. where stipulated by other law.

Art. 213

Apart from cases specifically provided for in this Act, the court shall order suspension of the proceedings: if the court decided not to decide on a preliminary issue itself (Art. 12);

if the party is located in an area cut off from the court due to extraordinary events (floods etc.).

The court may order suspension of the proceedings if decision regarding the claim depends on whether a commercial offence had been committed or a criminal offence prosecuted ex officio, who the offender is and whether he is responsible, especially when there is a suspicion that the witness or expert witness has given false testimony or that the document used as evidence is false.

<sup>89</sup> Basic Court in Pljevlja, P. 487/14.

<sup>90</sup> Information provided by claimants' attorney Savo Popović.

was also filed, and rejected, followed by a petition to the European Court of Human Rights, which had been dismissed without justification in accordance with Arts. 34 and 35 of the Convention.

And so, the children of the murdered state worker, who even had a final conviction in their hands against the direct perpetrator of the crime, which occurred in connection to the armed conflict in Bosnia and Herzegovina, remain deprived of any compensation for sustained harm.

### 3.3. DEPORTATION OF REFUGEES

A total of 200 persons have filed lawsuits against the state of Montenegro, seeking compensation for damage sustained as a result of “deportation” - namely, the illegal arrest of citizens of the Republic of Bosnia and Herzegovina on the territory of the Republic of Montenegro and their extradition as hostages to members of their enemy army of Republika Srpska in the territory of Bosnia and Herzegovina in May and June 1992.<sup>91</sup> A total of 42 civil proceedings were initiated. Claimants were the closest relatives of the 33 murdered victims and 9 survivors of torture at the camps to which they had been extradited as a result of illegal activities of the members of Montenegrin police.<sup>92</sup> The initial claims for compensation for pecuniary and nonpecuniary losses were filed in December 2004. Non-pecuniary damages were sought for mental anguish caused by the death of a close person, fear suffered, and violations of personal rights (discrimination, inhuman and degrading treatment and ineffective implementation of the investigation during the period of twelve to fifteen years since the commission of the crimes).<sup>93</sup> At the time of filing the lawsuits, criminal investigation into the war crime of “deportation” was not yet launched, although ever since its execution the crime had been well known to the public, discussed in the media and in meetings of the Assembly of the Republic of Montenegro.<sup>94</sup>

91 Press release by the Prelević Law Firm, which represented the claimants, available at: [http://www.prelevic.com/human\\_rights\\_deportacija.htm](http://www.prelevic.com/human_rights_deportacija.htm).

92 *Ibid.*

93 “Montenegro: The case of reparations to victims of deportation of refugees from Bosnia & Herzegovina in 1992,” LL.D. Radomir Prelević, Dragan Prelević and LL.M. Tea Gorjanc Prelević, Forum for Transitional Justice No. 2, Humanitarian Law Center: [http://www.hlcrdc.org/images/stories/tranziciona\\_pravda/Forum2.pdf](http://www.hlcrdc.org/images/stories/tranziciona_pravda/Forum2.pdf).

94 *Ibid.* In March 1993, the deputies of the Social Democratic Party Ratko Velimirović, Žarko Rakčević, Ramo Bralić and Dragiša Burzan posed a parliamentary question answered by the then Interior Minister Nikola Pejaković on 8 April 1993. Reply 278/2 available at: [http://www.prelevic.com/deportacija\\_pisani\\_dokazi.htm](http://www.prelevic.com/deportacija_pisani_dokazi.htm).

For the survivors who were deported to the Foča camp, non-pecuniary damages were requested on several grounds: for physical pain, mental suffering due to impairment substantially limiting life activities, defamation, violation of freedom and personal rights, as well as the fear suffered. Pecuniary damages were required on the basis of compensation for loss of earnings, loss of support and medical expenses.<sup>95</sup>

The public prosecutor, who at the time acted also as state representative in property disputes,<sup>96</sup> contested the claims in their entirety, insisting on time-bar, termination of procedures, as well as that the state was not to be held accountable, claiming that there was no causal link between the arrests of refugees in Montenegro and their extradition to their enemy's army on the territory of another country. With regard to the time-bar, the victims mainly insisted that their claims were not time-barred because neither was the prosecution for the criminal offence of War Crime against Civilians, which caused them harm, and which - based on the evidence presented - had clearly taken place<sup>97</sup>. In one case, in which the suit was filed after the expiry of a regular time-bar period, the claim was dismissed. The court found that an extended, privileged time-bar deadline could be applied only in the event when compensation is required of an individual who is a direct perpetrator of the crime, and that the state cannot be held objectively responsible for that person's actions, as stated under Art. 377 of the Law on Obligations.<sup>98</sup> Most of the judges referred to a regular time-bar period, from the date of declaring a missing person dead, and dismissed objections of time-bar.

The state prosecutor proposed a stay of proceedings for compensation of damages, in support of which a criminal investigation request had been filed only two days before the hearing where it was proposed. The claimants argued that they should not suffer as victims because the state had been unable to conduct criminal proceedings against the liable parties for years, that their requests for damages should not be required to wait for final decisions to determine the possible criminal responsibility of particular

95 *Ibid* as above, 10.

96 This solution, which represented an obvious conflict of interest because the public prosecutor had the competence to investigate and prosecute the perpetrators of crimes, while on the other hand he was expected to confront the victims in a civil action, was changed in the Constitution of Montenegro of 19 October 2007, by stipulating in Art. 134 that the Public Prosecutor's Office shall deal exclusively with prosecution, while the Law on State Property of 26 February 2009 established the Protector of Property and Legal interests of Montenegro, representing the State, its bodies and public services, which do not have legal personality before the courts and other state bodies.

97 Sentence P. No. 195/05, Buljubašić Ševala and others, by judge Nenad Otašević.

98 Art. 377, para 1, Law on Obligations: "When the damage was caused by a criminal offence, and a longer period of time-bar is provided for criminal prosecution, claim for damages against the responsible person shall expire when the criminal prosecution becomes time-barred."



perpetrators of crimes for whose harmful actions the state is objectively responsible (Art. 170-172 of the Law on Obligations) having in mind that a civil court is bound only by a criminal conviction. In support of this, the position of the Supreme Court was cited that the victim of a crime deserves stronger legal protection in the sense that a civil court has the jurisdiction to examine whether a harmful action contains elements of a criminal offence.<sup>99</sup> Nevertheless, the proceedings were discontinued in three cases until six months later when the High Court overturned the decision for a stay of proceedings and ordered for the trial to be continued.

The first instance courts adopted 32 first instance trial judgments. In 28 cases the claims were partially approved, and in four they were rejected. None of the judgments became final. The practice of courts of first instance varied with respect to the amount awarded for the death of a close person, as well as the approach to interpretation of the legal requirement of “a more lasting family union” for the damages awarded to siblings. Restrictive interpretation of a more lasting family union as a household prevailed.

After four years of denying the factual and legal basis, on 26 December 2008 the Government of Montenegro adopted a decision on court settlement in all the lawsuits and paid compensation to claimants.

The total amount of compensation paid was € 4,135,000.00, while individually € 30,000 was paid to the children of murdered victims, € 25,000 to parents and wives and € 10,000 to siblings. For one month in captivity the survivors were paid approximately € 7,000, or about € 226 per day.<sup>100</sup>

It is interesting that prior to the settlement, the second instance court, the High Court in Podgorica, had not even decided on the first appeal filed in one of the cases two and a half years prior. Five claimants passed away before the settlement was reached.

The amounts awarded in the settlement were higher than those specified in the 2004 Legal opinions of the Civil Division of the Podgorica High Court on the amount of non-pecuniary damages. For example, for the suffering and future pain over the death of a close person, according to Legal opinions of the High Court, in case of a child fair compensation would amount to € 15,000-20,000, and in the settlement children of murdered fathers were paid € 30,000 each. In case of a parent, spouse or other relative Legal

99 Decision of the Supreme Court from judgment Rev. 469/2000 of 5 May 2001, the Supreme Court of the Republic of Montenegro, Bulletin January - December 2001, Podgorica 2002, p. 35.

100 Information provided by the Prelević Law Firm, which represented the claimants.

opinions specified the amount of € 10,000-15,000, while parents and wives were awarded € 25,000 each in the settlement, and siblings € 10,000 each. After the settlement, in 2009, 54 more claimants filed a total of 10 lawsuits. One procedure is still ongoing in a retrial before the High Court, while nine judgments became enforceable. Following the adoption of a criminal judgment acquitting all the accused for this war crime, in three cases the requests of 21 claimants were rejected due to time-bar, and in two cases claims of siblings were partly rejected as it was found that they had not lived in the same households with the deceased.

In the proceedings that took place after the settlement, a total of € 535,000 was awarded to 26 claimants. However, the amounts of compensation awarded were in some cases lower compared to those awarded in the settlement on the same grounds. Seven claimants relodged their claims. One case was returned to the High Court for the third time and is pending. Two cases have been pending before the Constitutional Court from two to as long as four years.

### 3.4. ŠTRPCI

The proceedings for compensation of damages upon claims of relatives of the twenty kidnapped and murdered passengers from the Belgrade-Bar train at Štrpci station in 1993 were led before the courts in Montenegro and Serbia. Individual proceedings were conducted in Montenegro before the basic courts in Podgorica, Bar, Berane, Rožaje, Plav, and five before the courts in Bijelo Polje.<sup>101</sup> Lawsuits were filed against the state on the basis of the so-called objective responsibility of state authorities to protect the citizens, because the train had been accompanied by a police patrol which failed to respond to kidnappings.<sup>102</sup>

For the death of a child, mothers in Montenegro were awarded uneven amounts of compensation - in one case € 15,000 was awarded in a final decision, and € 20,000 in another. Siblings were awarded from € 12,000 to € 15,000 per claimant. These figures are within the limits of the amount of non-pecuniary damages provided for in the Legal opinions of the Civil Division of the Podgorica High Court in 2004, but they could have been higher, given the extremely difficult circumstances of this war crime.

<sup>101</sup> Information provided by attorney at law Velija Murić, legal representative of the claimants, July 2016.

<sup>102</sup> Former Art. 180 of Law on Obligations of the Federal Republic of Yugoslavia, current Art. 187, para 1 of Law on Obligations of Montenegro, *Official Gazette of Montenegro*, 48/2008.

Damages awarded by Montenegrin courts were significantly higher than those awarded by courts in Serbia<sup>103</sup>, however, according to the legal representative of the victims Velija Murić, the practice has improved after a peaceful protest held in front of the High Court in Bijelo Polje.<sup>104</sup> The protest was held as a result of extremely lengthy trials before the second instance court and its practice of upholding the judgments awarding offensively low amounts of compensation.<sup>105</sup>

Proceedings were conducted before the Basic Court in Bijelo Polje in 2006 against the Republic of Serbia for non-pecuniary damages for the kidnapping and murder of one of the passengers, Ilijaz Ličina. The claim was partly accepted and the Republic of Serbia is obligated to compensate the non-pecuniary loss to his family - an average of € 8,500 per family member.<sup>106</sup>

The respondent party, in response to the claim and motions submitted during the proceedings, challenged the merits of the claim and the jurisdiction of the Basic Court in Bijelo Polje. Also, an objection was raised with regard to standing to commence an action and standing to be sued, as well as the amount of damages, which the respondent regarded as unfounded and unsubstantiated. All objections of the respondent were dismissed as unfounded, with the rejection of the objection to standing to be sued being particularly important, on which occasion the Basic Court invoked Art. 187, para 1 of the Law on Obligations.<sup>107</sup>

The remains of Ilijaz Ličina were found in 2010 and in 2013 handed over to his family for proper burial. The Basic Court in Bijelo Polje then adopted the claim of the family for damages against the Republic of Serbia, which is also obliged to pay pecuniary damages for his funeral in the amount of € 8,073.

103 A few days before marking the anniversary of the crime in Štrpci in 2004, the Municipal Court in Prijepolje, Serbia, decided on the first claim of the family of kidnapped and murdered Džafer Topuzović for non-pecuniary damage and mental anguish. The compensation amounted to one million dinars (€ 16,300). "Eleven years since the kidnapping in Štrpci", B92, 27 February 2004.

104 "Protest of the relatives of the kidnapped", B92, 2 March 2005.

105 "Although so far certain actions for compensation of damage have been carried out in Montenegro, their slow progress and lack of care of the state for the families of victims indicate the absence of a national strategy and will for the implementation of instruments of transitional justice" (Humanitarian Law Centre, HLCIndexOut: 019-364-1, Belgrade, 24 February 2006).

106 Information obtained from the attorney at law Velija Murić in July 2016.

107 Art. 187, para 1 of the Law on Obligations, no. 01-1540/2, 2008: For the damage caused by death, bodily injury or damage to, or destruction of property of a natural person as a result of terrorist acts, as well as during public demonstrations or public events, the state shall be held liable, whose authorities were required to prevent such damage under the current regulations.

### 3.5. KALUĐERSKI LAZ

The families of victims of the crime in Kaluđerski laz filed 12 lawsuits for compensation of non-pecuniary loss before the Primary Court in Podgorica against the state of Montenegro<sup>108</sup>. In the lawsuits the Army was labelled as the perpetrator, and the Ministry of the Interior of the Republic of Montenegro as a state authority which was responsible for the protection of people and property in extraordinary circumstances.

The first verdict in the first instance was adopted in December 2009, obliging Montenegro to pay the injured Hadži Ahmeti from Novo Selo, near Peć, the amount of € 15,000 of the requested € 45,000 for non-pecuniary damage, as a victim of war crimes committed in April 1999 near Rožaje.<sup>109</sup> Subsequently, the final amount of € 12,000 was awarded and the judgment was enforced.<sup>110</sup> However, the Supreme Court overturned the verdicts of lower courts based on the review of the Protector of Property and Legal interests of Montenegro, returned the case for a retrial and ordered the first instance court to stay the civil proceedings pending the completion of criminal proceedings against five defendants in Kaluđerski laz case.<sup>111</sup> The Supreme Court held that “a decision in criminal proceedings bears significance of the preliminary issue for the dispute in question, given that upon the dispute completion it shall be determined whether the authorities of the respondent state (army and police) had caused damage to the claimant and thereby became liable for its compensation.”<sup>112</sup> However, the Supreme Court failed to provide an explanation for such position, i.e. why it denied the claimant's access to court and prohibited the civil court from deciding on the objective responsibility of the respondent state for any damage, given that in the criminal procedure only the individual, subjective criminal responsibility is determined, not the objective responsibility of state authorities, and that a civil court is bound only by a criminal conviction and not the acquittal.<sup>113</sup>

Acting upon the objection of the state representative invoking the statute of limitation, the courts also stayed proceedings on the other actions pending the completion of criminal proceedings in the Kaluđerski Laz case, given the legal position of the Civil Division of the Supreme Court in the Morinj case

108 Information provided by claimants' attorney Velija Murić in July 2016.

109 Podgorica Basic Court, P. 3739/05 of 27 November 2009.

110 Podgorica High Court, Gž. 62/10, judgment of 30 November 2010. Information on the enforcement obtained from claimants' attorney Velija Murić in July 2016.

111 The Supreme Court of Montenegro, Rev. No. 934/11, decision of 22 December 2011.

112 *Ibid.*

113 See Art. 15 of the Civil Procedure Act (CPA), *Official Gazette of Montenegro*, 22/2004, 28/2005 – Ruling of the Constitutional Court of the Republic of Montenegro, 76/2006 and *Official Gazette of Montenegro*, 47/2015 – other law and 48/2015.

that the civil court was not authorised to establish if a criminal offence had been committed in order to proceed with litigation.<sup>114</sup>

In the case of claimant Alji Bećiraj, who was not mentioned as an injured party in the indictment in the Kaluđerski laz criminal case, the lawsuit was dismissed due to exceeding of the general time-bar for filing a claim.<sup>115</sup> The Court refused to apply the privileged time-bar<sup>116</sup>, claiming that the civil court had no jurisdiction to establish the existence of a criminal offence in the absence of a final criminal conviction, in accordance with the legal position of the Supreme Court.<sup>117</sup> Also, the High Court in Podgorica, with no explanation, insisted on the position that, in a case where the damage occurred as a result of criminal offence, the privileged time-bar is applicable only in relation to a (direct) perpetrator, who in this case remained unknown, and not the state, objectively liable for damage caused by its agencies.<sup>118</sup>

114 Information on other proceedings obtained from the attorney at law Velija Muric in July 2016. The legal position reads: "III. The longer limitation period for claiming compensation for non-pecuniary damage caused by a criminal offence may be applied if the existence of a criminal offence has been established by a final judgment of a criminal court", Supreme Court of Montenegro, Bulletin 2/2011, p. 5.

115 Basic Court in Podgorica, P. 3146/13; High Court in Podgorica Gž. 1190/2015. At trial, it was undoubtedly established that on 14 May 1999 the claimant was captured and tortured by unidentified members of the Military formation of the FRY Army while he was walking through the forest together with his cousin toward Beleg mountain region. The complaint was lodged after the expiry of a regular time-bar period stipulated in Art. 376 of Law on Obligations.

116 Art. 377, para 1: When the damage is caused by a criminal offence, and criminal prosecution provides for a longer time-bar period, a claim for damages against the responsible person shall expire when the period specified for time-bar of criminal prosecution expires. Law on Obligations, *Sl. list SFRJ*, 29/78, 39/85, 45/89-USJ decision and 57/89, *Sl. list SRJ*, 31/93 and *Sl. list SCG*, 1/2003 Constitutional Charter.

117 Judgment of Podgorica High Court, Gž. 1190/2015.

118 "As found by this Court, time-bar period specified in the then applicable Art. 377 of Law on Obligations is not applicable on the claim in question, as also found by the first instance court, since there is no final criminal judgment, which established the crime, or the circumstances which exclude criminal liability or criminal prosecution of the defendant. This especially because the claimant himself does not contest that the identity of the crime perpetrator has not been determined, that the crime has not been established in the criminal proceedings and a civil court does not have jurisdiction to examine and conclude whether the actions of certain individuals contained elements of a criminal offence. It should be borne in mind that, if the damage had been caused by a criminal act, the privileged time-bar on filing a claim is applicable only in relation to the perpetrator of the crime." *Op.cit.* Gž. 1190/2015.

### 3.6. MURINO CASE

From 24 March to 10 June 1999, the NATO military alliance<sup>119</sup> conducted airstrikes against the Federal Republic of Yugoslavia due to the policy of the then government in relation to Kosovo. As a rule, military targets were under attack in the Republic of Montenegro.

However, on Friday, 30 April 1999, during the bombing of the bridge in the small town of Murino in northern Montenegro, a local store, cultural centre and other civilian structures had been hit and damaged. Six civilians lost their lives, including three children at the store, while four people were seriously injured. Miroslav Knežević (14), Olivera Maksimović (13), Julija Brudar (11), Vukić Vuletić (46), Milka Kočanović (69) and Manojlo Komatina (72) had died. Civil defence sirens were not heard that day, nor was there any other warning of incoming danger, which is a fact also established in the court decision, which had become final.<sup>120</sup>

Since May 2008, the families of the killed and one injured person have filed seven lawsuits for damages against the state of Montenegro, Ministry of Internal Affairs, and Ministry of Defence. A total of 27 claimants, close relatives of the victims and one person injured in the NATO intervention, sought a compensation for nonpecuniary losses in the amounts ranging from € 13,000 to € 20,000 respectively, due to mental anguish and physical pain, fear and costs of funerals and of medical treatment.

Based on the then applicable Art. 172 of the Law on Obligations, the state is liable for damage caused by death, bodily injury or damage due to acts of violence or terror, if under the current regulations its authorities were required to prevent such damage. Claimants argued in their lawsuits that the state authorities had in no way warned the people about the coming attack on Murino, although they had been informed by NATO of every target to be attacked, therefore, they were required to preemptively alert the population using air-raid sirens or media and prevent the suffering of

<sup>119</sup> North Atlantic Treaty Organization is an international military alliance based on the North Atlantic Treaty of 1949.

<sup>120</sup> Judgments P. 354/12 of the Basic Court in Podgorica and Gž. 4027/12 of the High Court in Podgorica.



innocent civilians.<sup>121</sup> In the case of the family of Manojlo Komatina, the first and second instance courts accepted this view and in the final decision awarded compensation of damage of € 69,000.00 and € 6,500 for the costs of the proceedings, which were paid to the family.<sup>122</sup>

The Protector of Property and Legal interests of Montenegro filed a motion for review against the final judgment, in which he reiterated the objection pertaining to the timebar. Lower instance courts rejected this motion, finding that the death of civilians had been caused by the criminal offence Grave Act against General Safety, envisaging a prison sentence of a minimum of five years, and applied the privileged time-bar period of ten years, relevant in cases where the damage occurs as a consequence of a criminal offence, according to which the claim becomes time-barred after the deadline for time-bar for the prosecution of that offence has expired (Art. 377 of Law on Obligations).

However, the Supreme Court ruled that the lower instance courts had wrongly rejected the objection of time-bar, insisting on the view - which was not substantiated - that a civil court could not establish the existence of a criminal offence:

*(L)ower instance courts erroneously concluded that in this case the existence of a criminal act could be determined in civil proceedings. The existence of criminal offence can only be established in the course of criminal proceedings in a conviction, so a civil court cannot determine the type of offence in order to apply longer time-bar deadlines as prescribed by provision of Art. 377 of Law on Obligations, as has been done in this case...*<sup>123</sup>

A constitutional appeal was filed against this judgment and the decision on it is still pending.

The claim was also partly accepted in the proceedings on the claim of members of Brudar family, in the amount of € 65,000. After the first

121 "The bombing of Murino was absolutely announced. I have a text made public, where NATO commander Wesley Clark confirmed that every flight of NATO aircraft had been announced, as well as destinations of aircrafts taking off from Aviano. They did this and announced the attacks, as they claimed, for humanitarian reasons. The fact that the local authorities, police and army in Murino had all failed to inform the people to flee, is a matter of the state of Montenegro. I can assure you with certainty that Montenegro was obliged to do so and that it is responsible for its failure, morally, humanly and traditionally. Because these victims were innocent," attorney at law Velija Murić, weekly *Monitor*, "Murino – nasilje nad porodicama zrtava NATO bombardovanja – drzava trazi da vrate pare", No. 1229 of 9 May 2014.

122 Judgment P. 354/12 of the Basic Court in Podgorica.

123 Judgment Rev. 956/13, p. 3 of 3, presiding judge Julka Badnjar, judges Natalija Filipović, Branimir Femić, Radojka Nikolić and Rada Kovačević.

instance verdict was reversed, in a retrial in mid-2013 the claim was partially adopted for the second time. In the case of the injured Slavko Mirković, who sought damages for physical pain, fear and cost of treatment, the claim was rejected in its entirety. Both cases are currently being decided on appeals before a second instance court, however, the appellate court is expected to abide by the Supreme Court's opinion pronounced in the Komatina case and thus dismiss the claim.

Following the Supreme Court's decision in the Komatina case, the court also rejected ordinary and extraordinary legal remedies submitted by the complainants in three other cases.





