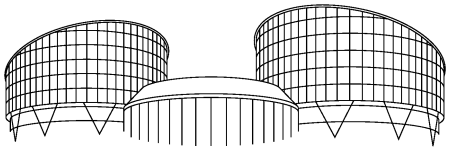

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 4078/15
Rabija FEJZIĆ and others
against Serbia

The European Court of Human Rights (Third Section), sitting on 26 September 2017 as a Chamber composed of:

Luis López Guerra, *President,*
Branko Lubarda,
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Jolien Schukking, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 24 December 2014,

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

Having regard to the comments submitted by the Government of Bosnia and Herzegovina,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix. All the applicants are nationals of Bosnia and Herzegovina and are represented by Ms T. Drobnjak, a lawyer practicing in Belgrade.

2. The Serbian Government ("the Government") are represented by their Agent, Ms N. Plavšić.

A. Relevant background to the present case

3. Following its declaration of independence from the former Socialist Federal Republic of Yugoslavia (SFRY) in March 1992, a brutal war broke out in Bosnia and Herzegovina. More than 100,000 people were killed and more than 2,000,000 others were displaced as a result of "ethnic cleansing" or generalised violence. The following local forces were the main parties to the conflict: the Army of the Republic of Bosnia and Herzegovina (*Armija Republike Bosne i Hercegovine*, hereinafter ARBH), which was mostly made up of Bosniacs[1] and loyal to the central authorities in Sarajevo, the Croatian Defence Council (*Hrvatsko vijeće odbrane*, hereinafter HVO), which was mostly made up of Croats[2], and the Army of the Republika Srpska (*Vojska Republike Srpske*, hereinafter VRS) which was mostly made up of Serbs[3]. The conflict ended in December 1995 when the General Framework Agreement for Peace ("the Dayton Agreement") entered into force between Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (succeeded by Serbia by 2006).

4. Žepa, a town in eastern Bosnia and Herzegovina, is situated some twelve kilometres from the border with Serbia. Before the war it had a population of less than 3,000, of whom the majority were Bosniacs. During the war, Žepa was one of three Bosniac enclaves in eastern Bosnia surrounded by the VRS[4]. In 1993 it was declared a "safe area" by the United Nations Security Council[5].

5. In 1995, there were between 6,500 and 8,000 people living in Žepa, of whom some two-thirds were displaced persons from other parts of Bosnia and Herzegovina[6].

6. On 12 July 1995 the VRS attacked the Žepa "safe area", capturing it on 25 July. In the days that followed, several hundred Bosniacs –

[1] Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is used to denote citizens of Bosnia and Herzegovina, irrespective of their ethnic origin.

[2] Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The term "Croat" is normally used to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with the term "Croatian", which normally refers to nationals of Croatia.

[3] Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The term "Serb" is normally used to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with the term "Serbian", which normally refers to nationals of Serbia.

[4] Srebrenica and Goražde being the other two.

[5] In 1993 the United Nations Security Council, acting under Chapter VII of the Charter, demanded that all the parties concerned treat Srebrenica, Sarajevo, Tuzla, Žepa, Goražde and Bihać, as well as their surroundings, as "safe areas" which should be free from armed attacks and any other hostile act (resolutions 819 of 16 April 1993 and 824 of 6 May 1993).

[6] See ICTY (International Criminal Tribunal for the Former Yugoslavia) judgment *Popović et al.*, IT-05-88, §§ 667-670, 10 June 2010.

predominantly able-bodied men who refused to surrender to VRS forces – managed to cross the border and flee to Serbia[1]. The present applicants' relatives were among them.

B. The circumstances of the present case

1. General

7. When Žepa was captured by the VRS, the applicants' relatives (Mr Abid Agić, the brother of the first applicant; Mr Šećan Dizdarević, the son of the second applicant and brother of the third and the fourth applicant; Mr Edem Torlak, the father of the fifth applicant and the husband of the sixth applicant; and Mr Meho Jahić, the husband of the seventh applicant) crossed into Serbia from Bosnia and Herzegovina, hoping that they would be able to find refuge in a third country. They were discovered by a border guard patrol of the Yugoslav Army (*Vojska Jugoslavije*, hereinafter VJ) and taken to two detention camps. It would appear that more than 800 exiled individuals were brought to the camps between 29 July and 3 August 1995. The applicants claim that the men received notification that they had prisoner-of-war status; it is not clear whether all of them were indeed members of ARBH or some of them were civilians. The first camp, Šljivovica, was situated in the municipality of Čajetina and the second, Mitrovo Polje, in the municipality of Aleksandrovac, both in Serbia. The Šljivovica detention camp was located in an abandoned workers' barracks and Mitrovo Polje in a former children's recreational facility.

8. Both camps were guarded by the Serbian police force and none of the applicants was allowed to leave them. According to the applicants, during their transportation to the camps or while interned in them, their relatives were either murdered or died as a result of torture and lack of medical assistance.

9. During their existence the camps were visited by representatives of the International Committee of the Red Cross and the State Commission for Missing Persons of Bosnia and Herzegovina. The latter compiled a report in which it found that the conditions of detention were disturbing.

10. Following the entry into force of the Dayton Agreement, the UNHCR facilitated the transfer of the camp survivors into third countries and the camps were closed in February/April 1996.

2. Circumstances of Mr Abid Agić's death

11. The applicants maintained that Mr Agić, along with the other men, was captured by a border guard stationed at the Jagoštica watch-tower on 31 July or 1 August 1995. Upon capture and before being handed over to

[1] *Popović et al.,* cited above, §§ 731-738.

the competent police authorities, he was severely beaten by the soldiers and died there from the injuries sustained.

12. The Government maintained that nobody by the name of Abid Agić is mentioned in the relevant police or military records.

3. Circumstances of Mr Šećan Dizdarević's death

13. The applicants maintained that Mr Dizdarević, who was seventeen years old at the time, was captured along with the other men by a border guard stationed at the Jagoštica watch-tower on 31 July or 1 August 1995. Upon capture and before being handed to the competent police authorities, he was repeatedly kicked in the abdomen by the soldiers, sustaining internal injuries as a result. He was then transferred to an internment camp where, despite the deterioration of his health, he was not provided with medical care. He died of the inflicted injuries on the way to hospital on 9 September 1995.

14. The Government maintained that the autopsy report shows that Mr Dizdarević died of natural causes due to "heart failure and stay of breathing resulting from self-poisoning caused by deterioration of part of the small intestine, aggravated by breathing of stomach contents as a result of vomiting and acute inflammation of the stomach."

15. The applicants made no comment on the Government's submission.

4. Circumstances of Mr Edem Torlak's death

16. Mr Torlak was detained at the Jagoštica watch-tower and transported to the Šljivovica camp on 1 August 1995. He was transported with another sixty detainees in a closed curtainside truck designed to transport a maximum of twenty people. He died apparently of suffocation during transportation. His body was taken out of the truck and buried on 11 August 1995 by the Muslim religious community in the Priboj cemetery. There is apparently a pathologist's report of 10 August 1995, without post mortem examination, stating that he had died from heart attack.

In June 2007 the Serbian Commission for missing persons ordered the exhumation of his corps, identified him and transported him to Bosnia and Herzegovina. The Commission stated in its request to a competent court that it did not have any information that the persons may have died by the cause of a crime. The autopsy could not determine the cause of death due to the corps' state.

5. Circumstances of Mr Meho Jahić's death

17. The applicants maintain that Mr Jahić was severely beaten by guards at the Šljivovica camp and that he died of the injuries inflicted in October 1995.

18. The Government maintained that the only person registered as a detainee under the name of Meho Jahić at the Šljivovica camp was transferred to the Office of the UN High Commissioner for Refugees in Belgrade on 7 December 1995 and had been scheduled for emigration to Ireland. They further claim that this person died on 25 January 2005 in Hrasnica, Ilidža, Bosnia and Herzegovina and was buried in Vlakovo, Ilidža, Bosnia and Herzegovina.

6. Criminal proceedings

19. On 6 September 2011 the Humanitarian Law Centre (*Fond za humanitarno pravo,* hereinafter FHP), a Belgrade-based NGO, lodged a criminal complaint on behalf of the applicants and other individuals as victims with the Office of the War Crimes Prosecutor of Serbia (*Tužilaštvo za ratne zločine*, hereinafter OWCP) against more than fifty individuals for alleged war crimes (see paragraph 32 below). In its criminal complaint the FHP submitted statements from the camps' detainees, medical documentation, documentation from the International Committee of the Red Cross and the State Commission for Missing Persons of Bosnia and Herzegovina, and other evidence. They submitted an extensive list of potential witnesses and proposed other investigative steps. Among those alleged to have taken part in the killings, the Centre identified members of the State Security Agency of Serbia, police officers, and military servicemen of various ranks. It would appear that on 8 September 2011 the OWCP requested the FHP to provide evidence it referred to in the criminal complaint, but the FHP apparently failed to do so.

20. On 23 September 2011 the OWCP undertook a preliminary verification of the information submitted by the applicants and requested the Ministry of the Interior and the Ministry of Defence to submit information regarding the criminal complaint.

21. On 17 November 2011 and 2 December 2011 the Ministry of the Interior submitted two reports to the OWCP. In their reports it was stated that the situation in the camps had been generally good, that the camps had not been enclosed behind a fence, and that residents who were given refugee status had had access to health services, a canteen, a post office, a phone, a bank, and both private visits and visits by officials from international organisations. While one of the reports describes the conditions in Šljivovica camp as unsatisfactory, the conditions in Mitrovo Polje were described as lodgings with the quality of "hotel accommodation". This preliminary examination also revealed some inconsistencies and irregularities in the criminal complaint regarding the identity of the alleged victims and the circumstances of their death and burial.

22. On 1 March 2013 the OWCP notified the FHP that it decided, having regard to the FHP's allegations and evidence collected by the OWCP, not to prosecute (*da nema mesta krivičnom gonjenju,* Ktrr. 134/11)

on the ground that there had not been elements of the alleged war crime or any other crime within the OWCP's jurisdiction in the acting of the suspects. A reasoned decision (*rešenje o odbačaju*), if it had been made in writing, has neither been sent to the applicants, nor to the FHP.

7. Proceedings before the Constitutional Court

23. On 8 April 2013 the applicants lodged a constitutional appeal before the Constitutional Court of Serbia, claiming violations of Articles 2, 3 and 6 of the Convention. On 4 February 2014 the Constitutional Court rejected the applicants' constitutional appeal, finding that, given the legal nature and content of the OWCP's decision, it could not be considered as an individual act which was decisive with respect to the applicants' human rights, as required by Article 170 of the Constitution (*da se ne radi o pojedinačnom aktu iz člana 170. Ustava;* see paragraph 25 below).

24. The decision of the Constitutional Court was delivered to the applicants' representative on 2 July 2014.

C. Relevant domestic law and practice

1. The Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in OG RS no. 98/06)

25. The relevant provisions of the Constitution read as follows:

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

2. Provisions concerning the statutory limitation of criminal liability

(a) Criminal Code of the Federal Republic of Yugoslavia

26. The Criminal Code of the Socialist Federal Republic of Yugoslavia 1976 (Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, in the Official Gazette of the Federal Republic of Yugoslavia nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, and in OG RS no. 39/03) was in force until 1 January 2006. The relevant provisions thereof are set out hereunder.

27. Article 95 governs the statutory limitation periods in respect of criminal liability. The relevant parts are worded as follows:

"(1) If not prescribed differently by this Code, criminal liability shall be statute-barred:

1) twenty-five years from the date on which the offence was committed in instances where the law provides for the death penalty or twenty years' imprisonment;

2) fifteen years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding ten years;

3) ten years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding five years;

4) five years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding three years;

5) three years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding one year;

..."

28. Article 100 of the same Code is worded as follows:

"The statutory limitation of criminal liability does not apply to the crimes covered by Articles 141-145 of this Code [genocide and war crimes] or to crimes for which statutory limitation is proscribed by international treaties."

(b) Criminal Code of the Republic of Serbia

29. The Criminal code of the Republic of Serbia (Official Gazette of the Republic of Serbia, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012 and 104/2013) entered into force on 1 January 2006.

Article 103 governs the statutory limitation periods in respect of criminal liability. The relevant parts are worded as follows:

"(1) If not prescribed differently by this Code, criminal liability shall be statute-barred:

1) twenty-five years from the date on which the offence was committed where the law provides for thirty to forty years' imprisonment;

2) twenty years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding fifteen years;

3) fifteen years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding ten years;

4) ten years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding five years;

5) five years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding three years;

6) three years from the date on which the criminal act was committed where the law provides for a maximum sentence exceeding one year;

..."

30. Article 100 of the same Code is worded as follows:

"The statutory limitation of criminal liability does not apply to crimes covered by Articles 370-375 of this Code [genocide and war crimes] or to crimes for which statutory limitation is proscribed by ratified international treaties."

3. Provisions concerning war crimes, crimes against humanity and killings

(a) Criminal Code of the Federal Republic of Yugoslavia (in force until 1 January 2006)

31. Article 142 - War crime against the civilian population

"Whoever, acting in violation of the rules of international law applicable in time of war, armed conflict or occupation, orders that a civilian population be subject to killing, torture, inhumane treatment, biological experiments, immense suffering or violation of their bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, hostage-taking, imposition of collective punishment, unlawful transfer to concentration camps or other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of the enemy's army or in its intelligence service or administration; forced labour, starvation of the population, property confiscation, pillaging, illegal and intentional destruction or large-scale stealing of property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency; or personally commits one of the aforementioned actions, shall be punished by not less than five years' imprisonment or the death penalty."

32. Article 144 - War crime against prisoners of war

"Whoever, acting in violation of the rules of international law, orders the murder, torture or inhumane treatment of prisoners of war, including biological experiments, extreme suffering or serious injury to their bodily integrity or health, compulsory enlistment in the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or personally commits any of the aforementioned acts, shall be punished by not less than five years' imprisonment or by the death penalty."

(b) Criminal Code of the Socialist Republic of Serbia

33. The Criminal Code of the Socialist Republic of Serbia (Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77 and 20/79) was in force in until 1 January 2006. Its relevant provisions read as follows:

34. Article 47 – Murder

"(1) Whoever causes the death of another shall be punished by not less than five years' imprisonment.

(2) No less than twelve years' imprisonment or the death penalty shall be imposed on whoever:

1) causes the death of another in a cruel or insidious manner;

2) causes the death of another by callous, violent behaviour;

3) causes the death of a person and with premeditation endangers the life of (an)other person(s);

4) causes the death of another for the purpose of gain, or to commit or conceal another offence, or for callous revenge or other base motives;

5) causes the death of an official or serviceman during the discharge or related to the discharge of duties concerning the state or public security...;

6) with premeditation causes the death of several persons, where this is not a case of manslaughter committed in the heat of passion, or infanticide, or mercy killing.

35. Article 53 – Serious bodily harm

"(1) Whoever causes serious injury to another, or serious impairment of another's health, shall be punished by imprisonment of between six months and five years.

(2) Whoever causes serious injury to another or impairment of another's health resulting in the endangering of the life of that person or the destruction or permanent significant damage to or weakening of a vital function of his body or an organ thereof, or permanent serious health impairment or disfigurement, shall be punished by one to ten years' imprisonment.

(3) If the injured party dies as a consequence of sustained injuries according to paragraphs 1 and 2 of this Article, the perpetrator shall be punished by one to twelve years' imprisonment."

(c) Criminal Code of the Republic of Serbia (in force as of 1 January 2006)

36. Article 113 - Murder

Whoever causes the death of another shall be punished by imprisonment of between five and fifteen years.

37. Article 114 - Aggravated Murder

Whoever:

1) causes the death of another in a cruel or insidious manner;

2) causes the death of another by callous violent behaviour;

3) causes the death of another and with premeditation endangers the life of another person;

...

5) causes the death of another for the purpose of gain, or to commit or conceal another offence, or for callous revenge or other base motives;

...

9) with premeditation causes the death of several people, where this is not a case of manslaughter committed in the heat of passion, or infanticide, or mercy killing;

shall be punished by thirty to forty years' imprisonment .

38. Article 121 – Serious bodily harm

"(1) Whoever causes serious injury to another, or serious impairment of another's health, shall be punished by imprisonment of between six months and five years.

(2) Whoever causes serious injury to another or impairment of another's health resulting in the endangering of the life of that person or the destruction or permanent significant damage to or weakening of a vital function of his body or an organ thereof,

or permanent serious health impairment or disfigurement, shall be punished by one to eight years' imprisonment.

(3) If the actions specified in paragraphs 1 and 2 of this Article result in the death of the injured party, the offender shall be punished by two to twelve years' imprisonment.

..."

39. Article 371 – Crime against humanity

"Whoever, acting in violation of the rules of international law, orders as part of a wider and systematic attack against a civilian population: murder; placement of the group in living conditions calculated to bring about its complete or partial extermination, enslavement, deportation, torture, or rape; enforced prostitution; forcible pregnancy or sterilisation aimed at changing the ethnic balance of the population; persecution on political, racial, national, ethical, sexual or other grounds, detention or abduction of persons without disclosing information about such acts in order to deny such person legal protection; oppression of a racial group or establishing domination of one such group over another; or other similar inhumane acts that intentionally cause serious suffering or serious impairment of health, or personally commits any of the aforementioned offences, shall be punished by imprisonment of at least five years or imprisonment of between thirty and forty years. "

40. Article 372 – War crime against civilian population

(1) Whoever, acting in violation of international law in time of war, armed conflict or occupation orders: an attack on the civilian population, a settlement, particular civilians, persons incapable of combat or members or facilities of humanitarian organisations or peacekeeping missions; wanton attack without target selection that harms the civilian population or civilian buildings under the special protection of international law; an attack against military targets knowing that such an attack would cause collateral damage among civilians or damage to civilian buildings that is evidently disproportionate to the military effect; the infliction on the civilian population of bodily injury, torture, inhumane treatment, biological, medical or other research experiments, or the taking of tissue or organs for transplantation or the performing of other acts that impair health or inflict great suffering or the deportation or relocation or forced change of nationality or religion; forcible prostitution or rape; applying intimidation and terror measures, taking hostages, collective punishment, unlawful deprivation of freedom and detention; deprivation of the rights to a fair and impartial trial; declaration of the prohibition, suspension or non-admissibility in court proceedings of the rights and acts of enemy nationals; the coercion into service of a hostile power or its intelligence or administration services; the coercion into military service of persons under seventeen years of age; forced labour; starvation of the population; unlawful seizure, appropriation or destruction of property not justified by military needs; taking unlawful and disproportionate contributions and requisitions; devaluation of local currency or unlawful issuing of currency, or personally commits any of the above offences, shall be punished by at least five years' imprisonment.

..."

41. Article 374 – War crimes against prisoners of war

"(1) Whoever, acting in violation of international law, orders the injury, torture, or inhumane treatment of prisoners of war, or biological, medical or other research experiments on them, or the taking of their tissues or body organs for transplantation

or the commission of other acts harmful to health and causing them serious suffering, or compels prisoners of war to serve in the forces of a hostile power or deprives them of the rights to fair and regular trial; or personally commits any such offences, shall be punished by at least five years' imprisonment.

(2) Whoever orders the murder of prisoners of war or personally commits such an offence, shall be punished by at least ten years' imprisonment or imprisonment of between thirty and forty years."

4. The War Crimes Act 2003

42. This Act (published in Official Gazette of the Republic of Serbia no. 67/03, amendments published in Official Gazette nos. 135/04, 61/05, 101/07 and 104/09) entered into force on 9 July 2003. The War Crimes Prosecutor, the War Crimes Police Unit and the War Crimes Sections within the Belgrade Higher Court and the Belgrade Court of Appeal were set up pursuant to this Act. They have jurisdiction over serious violations of international humanitarian law committed anywhere in the former Yugoslavia (see section 3 of this Act).

5. Practice of the OWCP

43. In a number of previous cases concerning war crimes, the OWCP has treated the war in Bosnia and Herzegovina between June 1992 and 1995 as an internal armed conflict (see the judgments in cases *Škorpioni, Zvornik I, Bijeljina, Prijedor, Zvornik II and Stari Majdan*). The majority of the indictments in these cases came into being before 2006. The final judgments in most of these cases had been adopted by the domestic courts by 2010.

COMPLAINTS

44. The applicants complain under Articles 2, 6 and 13 of the Convention about the lack of an effective investigation into the deaths of their relatives.

THE LAW

45. The applicants complained that the respondent State had failed in its obligations under the procedural aspect of Article 2, and Articles 6 and 13 of the Convention to conduct an effective, impartial and thorough investigation capable of leading to the identification and punishment of those responsible for the deaths of their relatives. Given the nature of their complaints, the Court considers that they fall to be examined from the standpoint of Article 2 of the Convention, which reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. As regards the sixth applicant: whether the complaint concerning the investigation into the death of Meho Jahić is sufficiently well-founded

46. The applicants maintained that Mr Jahić died in 1995 as a consequence of torture.

47. The Government contested this argument. They provided documentary evidence showing that the only person registered at the Šljivovica camp under that name was transferred to the Office of the UN High Commissioner for Refugees in Belgrade on 7 December 1995 and had been scheduled for emigration to Ireland. The evidence provided by the Government further shows that this person died on 25 January 2005 in Hrasnica, Ilidža, Bosnia and Herzegovina and was buried in Vlakovo, Ilidža, Bosnia and Herzegovina.

48. The applicants made no comments in response to this Government's observation.

49. In view of the evidence provided by the Government and the lack of any explanation on the part of the applicants to refute it, the Court finds that the complaint of the sixth applicant regarding the investigation into the death of Mr Jahić is unsubstantiated and should therefore be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. As regards the remaining applicants

1. The Government's submissions

50. The Government disputed the admissibility of the complaints on several grounds.

51. The Government submitted that the applicants had failed to comply with the six-month rule laid down in Article 35 § 1 of the Convention. At the time when the criminal complaint had been lodged, prosecution of the alleged crimes had already become statute-barred. As Serbia was not a party

to an armed conflict, Articles 142 and 144 of the Criminal Code – which are triggered in time of armed conflict – did not apply to them (see paragraphs 31-32 above). As a result, the OWCP did not have grounds for initiating criminal proceedings for war crimes, while the statute of limitations prevented the prosecution of the alleged killings as ordinary crimes. Therefore, the applicants ought to have displayed due diligence, firstly in lodging a criminal complaint with the domestic authorities concerning the events at the origin of this application, and secondly in introducing their application before the Court. The application was therefore submitted outside the six-month time limit, as at the time when they submitted their application before the Court, the applicants ought to have been aware for longer than six months that no steps would be taken with regard to investigating their allegations.

52. The Government further argued that the criminal complaint had not been lodged by the applicants but by the FHP. As a consequence, the constitutional appeal lodged by the applicants could not be regarded as an effective legal remedy since the applicants were not, in any event, parties to the criminal proceedings. The applicants therefore failed to properly exhaust the available domestic remedies.

53. The Government also submitted that the applicants' complaints were incompatible *ratione temporis* with the provisions of the Convention (a) since the alleged deaths had taken place prior to 3 March 2004, the date on which the Convention had come into force in respect of the respondent State; (b) a "genuine connection" between the alleged deaths and the entry into force of the Convention in respect of Serbia could not be established as none of the procedural steps required by Article 2 had been, or should have been, carried out after ratification, and (c) the applicants' criminal complaint had not provided any relevant new evidence or information capable of triggering new investigative measures.

54. If the above submissions were not accepted, the Government argued in the alternative, that the complaints were manifestly ill-founded given that (a) there were no records in the police and military files showing that Mr Abid Agić was ever in the hands of the Serbian authorities and that the evidence supporting the applicants' claim with regard to his death was purely circumstantial; (b) the autopsy report showed that Mr Dizdarević died of natural causes (see paragraph 16); and (c) it was obvious from the available evidence that Ms Torlak's body was not destroyed but had been appropriately buried in 1996, which cast further doubt on the credibility of the applicants' allegations.

2. The applicants' submissions

55. The applicants contested the Government's arguments. They argued that their application referred to a continuing situation and a continuing violation of the Convention. They submitted that their criminal complaint

had been based on credible new evidence capable of triggering new investigative measures, as well as that certain investigative measures had indeed taken place after the entry into force of the Convention. The applicants further submitted that, given the scale of the human rights violations they complained of, it would have been unreasonable to have expected the victims to react promptly and initiate investigative measures in the immediate aftermath of the events in question. In this connection, the applicants asserted that before 2003, the Serbian authorities had largely failed to investigate crimes that had taken place during the conflict in the former Yugoslavia. The Office of the War Crimes Prosecutor of Serbia had been established in 2003 and since then some significant progress had been made in the prosecution of war crimes, albeit at a slow pace. Finally, the applicants argued that the crimes complained of constituted war crimes under domestic and international law and were therefore not subject to the statute of limitations.

56. They further contested the Government's objection on *ratione temporis*. They maintained that the triggering events had taken place less than ten years before the Convention came into force in respect of Serbia. Moreover, an effective investigation ought to have taken place after the plausible, credible allegations and pieces of evidence had emerged. The applicants maintained that the new material had emerged after the Convention had come into force in respect of Serbia and that it satisfied the requirements of credibility and seriousness, as is evident from the content of their criminal complaint. An investigation should therefore have been carried out after the Convention came into force in respect of Serbia. Notably, even if the Court was unable to find that the present case satisfied the requirements of the genuine connection test, it certainly satisfied the requirements of the "Convention values" test from the Court's case law (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 128-151, 21 October 2013) as the alleged crimes constituted serious violations of international law, that is to say, the most severe violation of human rights that undermines the very foundations and underlying basic values of the Convention.

3. The third-party's submissions

57. In their third-party submissions the Government of Bosnia and Herzegovina agreed with the applicants' submissions and argued in particular that – due to Serbia's involvement in the conflict in Bosnia and Herzegovina – the applicants had the status of either war prisoners or civilians protected under international humanitarian law.

4. The Court's assessment

58. The Court observes that the Government's objection that the application was out of time was twofold: firstly, that the applicants' criminal complaint was submitted to the domestic authorities too late, and, secondly, that they had failed to address the Court diligently in accordance with the six-month rule.

59. The relevant principles relating to the extent of the a duty of diligence on applicants who wish to complain about the lack of any or an effective investigation into deaths or ill-treatment were recently stated in *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 258-269, ECHR 2014 (extracts):

> 258. The Court reiterates that the six-month time-limit provided for by Article 35 § 1 of the Convention has a number of aims. Its primary purpose is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012; *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 135, ECHR 2012; and *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III). That rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000‑I; *Sabri Güneş*, cited above, § 40; and *El Masri*, cited above, § 135).
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> 259. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see, among other authorities, *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002; *Sabri Güneş*, cited above, § 54; and *El Masri*, cited above, § 136).
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> 260. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001, and *El Masri*, cited above, § 136).
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> 261. In cases of a continuing situation, the period starts to run afresh each day and it is in general only when that situation ends that the six-month period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 159, ECHR-2009, and *Sabri Güneş*, cited above, § 54).
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> 262. However, not all continuing situations are the same. Where time is of the essence in resolving the issues in a case, there is a burden on the applicant to ensure

that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved (see *Varnava and Others*, cited above, § 160). This is particularly true with respect to complaints relating to any obligation under the Convention to investigate certain events. As the passage of time leads to the deterioration of evidence, time has an effect not only on the fulfilment of the State's obligation to investigate but also on the meaningfulness and effectiveness of the Court's own examination of the case. An applicant has to become active once it is clear that no effective investigation will be provided, in other words once it becomes apparent that the respondent State will not fulfil its obligation under the Convention (see *Chiragov and Others v. Armenia* (dec.) [GC], no. 13216/05, § 136, 14 December 2011, and *Sargsyan v. Azerbaijan* (dec.) [GC], no. 40167/06, § 135, 14 December 2011, both referring to *Varnava and Others*, cited above, § 161).

263. The Court has already held that, in cases concerning an investigation into ill-treatment, as in those concerning an investigation into the suspicious death of a relative, applicants are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see the decisions in *Bulut and Yavuz*, cited above; *Bayram and Yıldırım,* cited above; *Frandes*, cited above, §§ 18-23; and *Atallah v. France* (dec.), no. 51987/07, 30 August 2011).

264. It follows that the obligation of diligence incumbent on applicants contains two distinct but closely linked aspects: on the one hand, the applicants must contact the domestic authorities promptly concerning progress in the investigation – which implies the need to apply to them with diligence, since any delay risks compromising the effectiveness of the investigation – and, on the other, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective (see *Nasirkhayeva v. Russia* (dec.), no. 1721/07, 31 May 2011; *Akhvlediani and Others v. Georgia* (dec.), no. 22026/10, §§ 23-29, 9 April 2013; and *Gusar v. Moldova* (dec.), no. 37204/02, §§ 14-17, 30 April 2013).

265. That being so, the Court reiterates that the first aspect of the duty of diligence – that is, the obligation to apply promptly to the domestic authorities – must be assessed in the light of the circumstances of the case. In this regard, it has held that applicants' delay in lodging a complaint is not decisive where the authorities ought to have been aware that an individual could have been subjected to ill-treatment – particularly in the case of assault which occurs in the presence of police officers – as the authorities' duty to investigate arises even in the absence of an express complaint (see *Velev v. Bulgaria*, no. 43531/08, §§ 59-60, 16 April 2013). Nor does such a delay affect the admissibility of the application where the applicant was in a particularly vulnerable situation, having regard to the complexity of the case and the nature of the alleged human rights violations at stake, and where it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues (see *El Masri*, cited above, § 142).

266. With regard to the second aspect of this duty of diligence – that is, the duty on the applicant to lodge an application with the Court as soon as he realises, or ought to have realised, that the investigation is not effective –, the Court has stated that the issue of identifying the exact point in time that this stage occurs necessarily depends on the circumstances of the case and that it is difficult to determine it with precision (see the decision in *Nasirkhayeva*, cited above).

267. In establishing the extent of this duty of diligence on applicants who wish to complain about the lack of an effective investigation into deaths or ill-treatment, the Court has been largely guided in recent years by the case-law on the duty of diligence imposed on applicants who complain about the disappearance of individuals in a context of international conflict or state of emergency within a country (see *Varnava and Others*, cited above, § 165, ECHR 2009; *Yetişen and Others v. Turkey,* no. 21099/06, §§ 72-85, 10 July 2012; and *Er and Others*, cited above, § 52), despite the differences between those two types of situation.

268. Thus, the Court has rejected as out of time applications where there had been excessive or unexplained delay on the part of applicants once they had, or ought to have, become aware that no investigation had been instigated or that the investigation had lapsed into inaction or become ineffective and, in any of those eventualities, there was no immediate, realistic prospect of an effective investigation being provided in the future (see, *inter alia*, *Narin v. Turkey*, cited above, § 51; *Aydinlar and Others v. Turkey* (dec.), no. 3575/05, 9 March 2010; and the decision in *Frandes*, cited above, §§ 18-23).

In other words, the Court has considered it indispensable that persons who wish to bring a complaint about the ineffectiveness or lack of such investigation before the Court do not delay unduly in lodging their application. Where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a time when the relatives must realise that no effective investigation has been, or will be, provided.

269. The Court has held, however, that so long as there is some meaningful contact between relatives and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay by the applicants will not generally arise (see *Varnava and Others*, cited above, § 165).

60. The Court has already found, in the Serbian context, that the OWCP consistently refuses to classify events which are alleged to have taken place on Serbian territory during the war in Bosnia and Herzegovina as perpetrated in the context of and associated with an international armed conflict. Leaving aside the question of whether or not its interpretation of international law is correct, the consistent practice of this Office is to treat the war in Bosnia and Herzegovina as an internal armed conflict to which Serbia was not a party (see paragraph 43 above). This is confirmed by the fact that in not a single case has there been an indictment for war crimes by the Office of the War Crimes Prosecutor arising from similar circumstances. The OWCP's practice has been apparent since as early as 2006 when the majority of indictments related to the war crimes committed in the context of the conflict in Bosnia and Herzegovina came into force, and was confirmed at the very latest by 2010 when the domestic courts delivered the first final judgments in these cases, thus accepting such practice as legally valid (see *Kamenica and others v. Serbia (dec.)*, no. 4159/15, 27 October 2016, § 51, and the authorities cited therein*).*

61. The Court further reiterates that applicants whose close relatives have been killed should be expected to display due diligence and take the requisite initiative in informing themselves about the progress made in the

investigation, irrespective of the legal qualification of the offence as a murder or as a war crime (see *Orić v. Croatia* (dec.), no. 50203/12, § 37, 13 May 2014 and the authorities cited therein).

62. The question for the Court is whether the applicants can be said to have lodged their application with undue delay, given that the only action undertaken by them from the deaths of their relatives in 1995 until the introduction of their application was the criminal complaint lodged with the OWCP in September 2011 and the subsequent challenges to the refusal to bring criminal proceedings. The application to the Court was lodged on 24 December 2014, within six months from the final challenge to the OWCP's refusal to bring criminal proceedings.

63. The Court first considers that the fact that no official investigation took place in Serbia in the aftermath of the events, following the ratification date or the OWCP's creation, while the deaths in question occurred in the presence of State authorities, should have made clear to the applicants long before they petitioned the OWCP in 2011 that the domestic authorities had no intention of investigating the events. Further, as in the case of *Kamenica*, the applicants should have been aware of the practice of the OWCP not to classify the events which are alleged to have taken place on Serbian territory during the war in Bosnia and Herzegovina as perpetrated in the context of and associated with an international armed conflict (see *Kamenica and others*, cited above, §§ 51).

64. The Court notes that the applicants have not explained why they never applied to a regular prosecutor office with the authority to investigate suspicious deaths classified as ordinary crimes. It concludes that in 2011, at the time when they submitted their criminal complaint, the applicants ought to have been aware that it would be ineffective given that there was no immediate, realistic prospect of an effective investigation being provided in the future by the OWCR regardless of how comprehensive or not their criminal complaint would be.

65. Accordingly, in the circumstances of the present case – where the only action undertaken by the applicants was not capable of having any bearing on their complaints before the Court – the Court finds that in introducing their application only on 24 December 2014, the applicants have failed to introduce their complaints before the Court with the due diligence required of them.

66. It follows that the applicants' complaint concerning the lack of investigation into their relatives' deaths must be dismissed as falling outside of the six-month limit provided for by Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 19 October 2017.

Stephen Phillips
Registrar

Luis López Guerra
President

APPENDIX

Nº.	First name/ last name	Birth date	Birth year	Place of residence
1.	Rabija FEJZIĆ	02/03/1961	1961	Sarajevo
2.	Esma COGO	05/05/1978	1978	Zenica
3.	Bejda DIZDAREVIĆ	10/08/1955	1955	Zenica
4.	Nedžib DIZDAREVIĆ	18/02/1984	1984	Travnik
5.	Omer DIZDAREVIĆ	03/01/1979	1979	Zenica
6.	Azra JAHIĆ	07/02/1972	1972	Ilidža
7.	Muniba TORLAK	03/05/1945	1945	Zenica