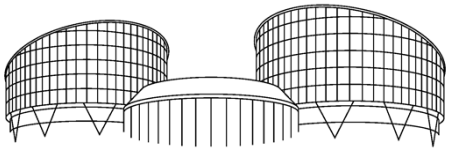

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF ORLOVIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA

*(Application no. 16332/18)*

JUDGMENT

STRASBOURG

1 October 2019

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Orlović and Others v. Bosnia and Herzegovina,**

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Paul Lemmens,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 2 July and 9 July 2019,

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

# PROCEDURE

1. The case originated in an application (no. 16332/18) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by fourteen citizens of Bosnia and Herzegovina ("the applicants"), Ms Fata Orlović, Mr Šaban Orlović, Ms Fatima Ahmetović, Mr Hasan Orlović, Ms Zlatka Bašić, Ms Senija Orlović, Mr Ejub Orlović, Mr Abdurahman Orlović, Ms Muška Mehmedović, Ms Mirsada Ehlić, Ms Melka Mehmedović, Ms Rahima Dahalić, Ms Fatima Orlović and Ms Murtija Hodžić, on 30 March 2018.

2. The applicants were represented by Mr F. Karkin, a lawyer practising in Sarajevo. The Government of Bosnia and Herzegovina ("the Government") were represented by their Agent, Ms B. Skalonjić.

3. The applicants alleged, in particular, that they were prevented from effectively enjoying their possession because an unlawfully built church has not been removed from their land. The applicants also alleged that the domestic courts' decisions concerning their civil claim had been contrary to Article 6 of the Convention.

4. On 24 May 2018 notice of the application was given to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1942, 1966, 1969, 1972, 1976, 1974, 1980, 1968, 1970, 1973, 1975, 1978, 1980 and 1982, respectively. The first applicant lives in Konjević Polje, Bosnia and Herzegovina. According to the information provided by the remaining applicants, they live in Srebrenik, Bosnia and Herzegovina.

### A. Relevant background

6. The applicants are heirs to the first applicant's husband, Š.O., and his brother M.O. The first applicant's husband and more than twenty other relatives were killed in the Srebrenica genocide in 1995.

7. The applicants Mr Šaban Orlović, Ms Fatima Ahmetović, Mr Hasan Orlović, Ms Zlatka Bašić, Ms Senija Orlović and Mr Ejub Orlović are the first applicant's and her late husband's children. Mr Abdurahman Orlović, Ms Muška Mehmedović, Ms Mirsada Ehlić, Ms Melka Mehmedović, Ms Rahima Dahalić, Ms Fatima Orlović and Ms Murtija Hodžić are M.O.'s children.

8. The applicants lived in Konjević Polje, Bratunac Municipality in what is now the Republika Srpska (one of the two constituent entities of Bosnia and Herzegovina), on a property belonging to Š.O. and M.O. The property consisted of several individual and agricultural buildings, fields and meadows.

9. During the 1992-95 war the applicants were forced to flee their home and became internally displaced persons.

### B. Building of a church on the applicants' land

10. On 11 September 1997, following a request submitted by the Drinjača Serbian Orthodox Parish ("the Parish"), Bratunac Municipality expropriated a part of the applicants' land – a field with a total area of 11,765 sq. m, designated as cadastral parcel no. 996/1 – and allocated it to the Parish for the purpose of building a church. The decision referred to the land in question as undeveloped construction land and stipulated that compensation to the previous owners would be determined in separate proceedings. The applicants were never informed of the expropriation proceedings.

11. In 1998 a church was built on plot no. 996/1, 20.5 m away from the existing house in which the first applicant had lived with her family before the war. The church was built without any relevant technical documentation.

12. On 21 October 2003 the Parish submitted a request to the Spatial Planning and Housing Unit of Bratunac Municipality ("the SPHU"), asking for planning permission for the church.

13. On 14 April 2004, in the supervision proceedings of the work of the SPHU, the Construction Inspectorate of the Ministry of Spatial Planning, Construction and Ecology of the Republika Srpska ("the Inspectorate") issued a decision by which it ordered the Construction Inspectorate of Bratunac Municipality ("the Municipal Inspectorate") to ban the use of the church in Konjević Polje within three days of the delivery of that decision, in accordance with section 138 of the Spatial Development Act 2002 (see paragraph 43 below). The Inspectorate considered that the Municipal Inspectorate had not acted in accordance with the relevant law because it had failed to stop the construction work and later prevent the use of the church, although it had been built without planning permission and other technical documentation. Moreover, the Parish had never obtained a use permit.

14. On 27 August 2004 the Municipal Inspectorate informed the Ministry of Spatial Planning, Construction and Ecology that the deputy mayor of Bratunac had "expressly demanded" that the use of the church for that function not be stopped. It was further stated that in the deputy mayor's opinion the issue should be resolved at a higher political level, for which purpose a meeting had been organised between the municipal representatives, the Ministry of Spatial Planning, Construction and Ecology and the bishop of the Zvornik-Tuzla Eparchy. After the meeting, the Serbian Orthodox Church had initiated the proceedings for the legalisation of the church. The Municipal Inspectorate concluded by stating that in view of those developments it had desisted from acting in accordance with section 138 of the Spatial Development Act 2002.

15. In December 2004 the Parish obtained planning permission for the church (see paragraph 12 above).

### C. Restitution proceedings

16. On 28 October 1999, following a request submitted by the second applicant, Mr Šaban Orlović, the Commission for Real Property Claims of Displaced Persons and Refugees ("the CRPC"), set up by Annex 7 to the Dayton Peace Agreement (see paragraph 44 below), established that the first applicant's late husband, Š.O., had been the owner of the land in Konjević Polje and annulled any involuntary transfer or restriction of ownership after 1 April 1992. The decision further established that Š.O.'s heirs were entitled to repossess the land in question sixty days after submitting a request for the enforcement of that decision.

17. On 14 November 2001, following a request submitted by the first applicant, Ms Fata Orlović, the Ministry for Refugees and Displaced

Persons of the Republika Srpska, Bratunac Unit ("the Ministry for Refugees"), also established that Š.O. was the owner of the land in question, and in particular, the co-owner of plot no. 996/1 together with his brother M.O. Immediate repossession of the land was ordered.

18. On 17 April 2002 the first applicant submitted a request for the enforcement of the CRPC decision of 28 October 1999 to the Ministry for Refugees (see paragraph 16 above).

19. On an unspecified date after that the applicants regained possession of their land, except for plot no. 996/1, on which the church remained (see paragraph 11 above). The first applicant returned to the house in which she had lived with her family before the war.

20. On 3 April 2003 the first applicant submitted a request to the Ministry for Refugees asking for the full enforcement of its decision of 14 November 2001 (see paragraph 17 above). She also asked it to order the Parish to remove the church from her property in order to enable full repossession and to return the land in its original condition.

21. On 20 April 2004 the applicants wrote to the Parish asking for an amicable solution of the dispute. The applicants proposed relocation of the church as the best solution, as they argued that it had been illegally built on their land. In that regard they referred to the Inspectorate's decision of 14 April 2004 (see paragraph 13 above).

22. On 20 January 2005 the mayor of Bratunac offered the applicants compensation, in an unspecified amount, or allocation of another property in lieu of the restitution of plot no. 966/1. The applicants refused and maintained their request for the full restitution of their property.

23. On 19 September 2005 the applicants wrote to the Ministry for Refugees, the Parish, the Ministry of Spatial Planning, Construction and Ecology and the mayor of Bratunac urging them to enable the full enforcement of the CRPC decision.

### D. Civil proceedings

24. On 29 October 2002 the first applicant brought a civil action in the Srebrenica Court of First Instance ("the Court of First Instance") against the Serbian Orthodox Church in Bosnia and Herzegovina seeking to recover possession of plot no. 996/1. She asked for the church to be removed from her land and for restitution of the land in its original condition.

25. On 4 March 2003 the Court of First Instance decided that it lacked subject-matter jurisdiction to decide the case and rejected the first applicant's civil action.

26. On 25 August 2006, following an appeal by the first applicant, the Bijeljina District Court ("the District Court") quashed the judgment of 4 March 2002 and remitted the case for re-examination.

27. In the course of the re-examination proceedings before the Court of First Instance, the other thirteen applicants joined the first applicant's civil action. At the court's request the applicants specified the respondents as follows: the Zvornik-Tuzla Eparchy of the Serbian Orthodox Church, the Bratunac Parish and the Konjević Polje Parish. The applicants specified that they sought a court order to remove the church built on the land in question and to cede possession of the land to the applicants within thirty days of the date of the judgment, in default of which the applicants would be authorised to remove the church themselves at the respondents' expense.

28. The preparatory hearings before the Court of First Instance were adjourned several times at the request of the parties. In particular, a hearing scheduled for 27 December 2007 was adjourned at the request of the applicants' representative who informed the court that he had talked to the Prime Minister of the Republika Srpska and that there was a possibility that the case could be settled in the course of 2008.

29. At a hearing of 20 April 2010 the applicants changed their claim in that they asked the court to recognise the validity of an out-of-court settlement concluded on 11 January 2008 between their representative and the respondents, who were represented by the Prime Minister of the Republika Srpska, his adviser, M.D., and the bishop of the Zvornik-Tuzla Eparchy, which was worded as follows:

> "The respondents must remove the church built on plot no. 996 ... within fifteen days of the date on which they will have provided other land for the purpose of building a church in Konjević Polje, in default of which [the settlement will be] compulsorily enforced."

30. On 21 May 2010 the Court of First Instance dismissed the applicants' claim. That judgment was upheld by the District Court on 17 September 2010 (copies of those decisions are not in the case file).

31. On 1 February 2012, following an appeal on points of law lodged by the applicants, the Supreme Court of the Republika Srpska ("the Supreme Court") quashed the District Court's judgment of 17 September 2010 and remitted the case for re-examination (a copy of the Supreme Court's decision is not in the case file).

32. Following remittal, on 24 September 2012 the District Court quashed the Court of First Instance's judgment of 21 May 2010 and remitted the case to that court for re-examination (a copy of that decision is not in the case file). The District Court instructed the Court of First Instance to examine the facts concerning the existence of the out-of-court settlement, its content and the existence of the proper authorisation to conclude the settlement.

33. On 3 June 2013 the Court of First Instance rejected the applicants' claim. On the one hand, the court held that the applicants had failed to demonstrate that the Prime Minister and his adviser had been authorised to conclude the settlement on behalf of the respondents. They had not been

authorised to do so by the law either because of the principle of the separation of church and state. On the other hand, while the bishop of the Zvornik-Tuzla Eparchy could be considered as the respondents' legal representative, it had not been proved that the settlement had indeed been concluded with him. In his witness statement M.D. had confirmed that he had contacted the bishop by phone to discuss the possibility of an amicable solution, but that no agreement had been reached. The applicants were ordered to pay 11,243.70 convertible marks (BAM – approximately 5,760 euros) in legal costs.

34. On 23 October 2013, following an appeal by the applicants, the District Court overturned the Court of First Instance's judgment in the part concerning legal costs, decreasing the award to BAM 1,029.60, and upheld the remainder of the judgment.

35. On 6 August 2014 the Supreme Court rejected the applicants' appeal on points of law. The court noted in particular that negotiations which had taken place in 2008 between the applicants' representative and the Republika Srpska's Prime Minister and his adviser had concerned the government's financial aid to the Zvornik-Tuzla Eparchy with the purpose of relocation of the church from the applicants' land. The lower courts had correctly concluded from the facts that no agreement had been concluded between the parties to the proceedings, namely the applicants and the Serbian Orthodox Church.

36. On 17 October 2014 the applicants lodged a constitutional appeal, relying on Article 6 of the Convention and Article 1 of Protocol No. 1. They reiterated, in particular, that their right to the peaceful enjoyment of possessions had been violated because the church had been illegally built on their land. They also argued that the bishop during the telephone conversation with M.D. had given his consent to the out-of-court agreement.

37. On 28 September 2017 the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") dismissed the appeal as ill-founded, by five votes to four. Under Article 6 § 1 of the Convention, it held that the lower courts had given clear and convincing reasons for their rulings, and that these reasons were not arbitrary. In examining the applicants' complaint under Article 1 of Protocol No. 1, the court essentially referred to its conclusion under Article 6 § 1 of the Convention. That decision was delivered to the applicants on 2 November 2017.

### E. Other relevant information

38. On 10 September 2008 the first applicant was physically attacked by one of the police officers who were supervising the cleaning up of the area around the church in preparation for a service which was to be held the following day.

39. On the same day the Office of the High Representative issued the following statement:

> "Agreement On Konjević Polje Church Must Be Implemented
>
> The OHR condemns the incident that took place on Fata Orlović's property in Konjević Polje this morning.
>
> Last year the Government of Republika Srpska decided to provide funding for the relocation of the illegally constructed church from the private property of Fata Orlović in Konjević-Polje.
>
> OHR welcomed the agreement as a sign that Fata Orlović's right to private property would be respected.
>
> On 30 August of last year, the Bratunac Security Forum, chaired by Bratunac Mayor Nedeljko Mlađenović, and attended by all the relevant actors, announced that the annual church feast of 11 September would be held for the last time in the existing church in Konjević Polje on 11 September 2007.
>
> OHR maintains that last year's agreement must be respected.
>
> The Office of the High Representative calls for all those involved to stick to previously agreed positions, to show restraint and to refrain from any action that might enflame the situation."

40. On 12 September 2010 the first applicant was again attacked on her property by a police officer.

## II. RELEVANT DOMESTIC LAW

### A. Restitution of Property Act 1998

41. The Restitution of Property Act 1998 (*Zakon o prestanku primjene Zakona o korištenju napuštene imovine*, Official Gazette of the Republika Srpska "OG RS", no. 16/10), which regulates the restitution of privately-owned real property abandoned after 30 April 1991, replaced the Abandoned Property Act 1996 (*Zakon o korištenju napuštene imovine*, OG RS, nos. 3/96 and 21/96) and annulled all the acts regulating the status of abandoned property issued in the period between 30 April 1991 and 19 December 1998.

42. In accordance with section 5 of this Act, an owner has the right to repossession of property and to recognition of all the rights he or she had over that property until 30 April 1991 or until the date of the loss of possession. The right to claim repossession is not subject to the statute of limitations (section 9). A request can be submitted at any time to the competent unit of the Ministry for Refugees in the municipality in which the property in question is located and/or to the CRPC (sections 10(1) and 16(1)). The decisions of the CRPC are final and immediately enforceable by the relevant authorities of the Republika Srpska

(section 16(3) and (5)). Property which has been vacated (by a temporary occupant) can be repossessed immediately (section 14(5)).

### B. Spatial Development Act 2002

43. Under section 138 of the Spatial Development Act 2002 (*Zakon o uređenju prostora*, OG RS, no. 84/02), which was in force at the material time, a building inspector was authorised, *inter alia*, to ban the use of an object or a part thereof, in the absence of a valid authorisation to use it.

## III. RELEVANT INTERNATIONAL MATERIALS

### General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Peace Agreement")

44. The Dayton Peace Agreement was initialled at a military base near Dayton, the United States, on 21 November 1995. It entered into force on 14 December 1995 when it was signed in Paris, France. It put an end to the 1992-95 war in Bosnia and Herzegovina.

The relevant part of Annex 4 (the Constitution of Bosnia and Herzegovina) reads as follows:

**Article II § 5**

"All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void."

The relevant part of Annex 7 (the Agreement on Refugees and Displaced Persons) provides:

**Article I: Rights of Refugees and Displaced Persons**

"All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.

The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures:

a. the repeal of domestic legislation and administrative practices with discriminatory intent or effect;

b. the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of ethnic or religious hostility or hatred; ...”

**Article VII: Establishment of the Commission**

“The Parties hereby establish an independent Commission for Displaced Persons and Refugees (‘the Commission’) ...”

**Article VIII: Cooperation**

“The Parties shall cooperate with the work of the Commission, and shall respect and implement its decisions expeditiously and in good faith, in cooperation with relevant international and nongovernmental organizations having responsibility for the return and reintegration of refugees and displaced persons.”

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

45. The applicants complained that they had been prevented from effectively enjoying their possession because the unlawfully built church had not yet been removed from their land. They relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### A. Admissibility

46. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

47. The applicants maintained their request for the full restitution of their property and removal of the church. They also submitted that in the decision of 11 September 1997 Bratunac Municipality (see paragraph 10 above) had wrongly categorised the land in question as undeveloped construction land fit for expropriation. In reality it was a field, as described in the land register. The applicants furthermore submitted that the expropriation decision of 11 September 1997 had never been served on them. Moreover, the church in question had been used only once per year, on the day of its patron saint, because there was no Serb[1] population in Konjević Polje.

48. The Government conceded that the decision of 11 September 1997 to expropriate the applicants' land and allocate it to the Parish for the construction of a church had constituted interference with the applicants' property rights. They further submitted that the interference in the present case had amounted to deprivation of possession, unless the Court found that the complexity of the legal and factual situation prevented its being classified in a precise category. As regards the lawfulness, the Government argued that the decision of 11 September 1997 had been given in accordance with the Development Land Act 1986. As to the proportionality of the interference the Government submitted that the Court had held before that the compulsory transfer of property from one individual to another, may, depending upon circumstances, constitute a legitimate means for promoting public interest. In the present case the applicants' property was expropriated at the request of the Parish for the purpose of building a church in which Serbs from the surrounding villages could practise their religion.

49. The Government furthermore submitted that the Republika Srpska had been aware of the obligations it undertook under Annex 7 to the Dayton Peace Agreement concerning free return of refugees to their homes of origins and restitution of their property (see paragraph 44 above). In order to implement Annex 7, the Republika Srpska had enacted the Restitution of Property Act 1998 (see paragraph 41 above). The return of displaced persons and refugees was an important objective for all the authorities in

1. Serbs are an ethnic group whose members may be natives of Serbia or of any other State of the former Yugoslavia. 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.

Bosnia and Herzegovina and the authorities had not intended for this case to be a generator of further division and conflicts.

*2. The Court's assessment*

50. The Court notes firstly that it is not disputed in the present case that the applicants are the owners of the property in question and that they were entitled to have the land restored to them.

51. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest and to secure the payment of penalties. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98, and *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

52. The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions. However, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 100, ECHR 2014; and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 219, ECHR 2015), particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII). Even in relations between private individuals or entities there may be positive obligation for the State (see *Kotov v. Russia* [GC], no. 54522/00, § 109, 3 April 2012).

53. With a view to establishing whether the respondent State has complied with its positive obligations under Article 1 of Protocol No. 1, the

Court must examine whether a fair balance has been struck between the demands of the public interest involved and the applicant's fundamental right of property (see *Broniowski*, cited above, § 144; *Kotov*, cited above, § 110; *Ališić and Others*, cited above, § 101; and *Sargsyan,* cited above, § 220).

54. Turning to the present case the Court notes that under Annex 7 to the Dayton Peace Agreement the applicants, internally displaced persons, had the right to return to their homes of origin (see paragraph 44 above). As submitted by the Government, the return of displaced persons and refugees was an important objective for all the authorities in Bosnia and Herzegovina (see paragraph 49 above).

55. The Court further notes that the applicants' right to full restitution had been established by the decisions of the CRPC and the Ministry for Refugees, of 28 October 1999 and 14 November 2001, respectively (see paragraphs 16 and 17 above). Both decision conferred the right to immediate repossession (see also section 14(5) of the 1998 Act in paragraph 42 above) and both were final and enforceable. The Court notes in particular that under the Restitution of Property Act 1998 and Article VIII of Annex 7 to the Dayton Peace Agreement, the relevant authorities of the Republika Srpska had to implement the CRPC's decisions (see paragraphs 42 and 44 above). The Court considers that the applicants' complaint is essentially one about inaction of the public authorities, contrary to the latter's positive obligation to fully restore their property rights.

56. The Court notes furthermore that land was subsequently returned to the applicants, except for plot no. 996/1, on which the church remained. The applicants had repeatedly sought full repossession to no avail (see paragraphs 18, 20 and 23 above).

57. The Court will, therefore, determine if the prejudice sustained as a result of the authorities' inaction by the applicants was justifiable in the light of the relevant principles. The assessment of proportionality requires an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". Furthermore, in each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate burden (see *Szkórits v. Hungary*, no. 58171/09, §§ 39 and 40, 16 September 2014).

58. The Court considers that the State's obligation to secure to the applicants the effective enjoyment of their right of property, as guaranteed by Article 1 of Protocol No. 1, required the national authorities to take practical steps to ensure that the decisions of 28 October 1999 and 14 November 2001 were enforced. Instead, the authorities initially even did the opposite by effectively authorising the church to remain on the applicants' land (see paragraphs 14 and 15 above).

59. The Court also observes that the applicants had initiated civil proceedings seeking to recover possession of their land in the course of which they allegedly concluded an out-of-court settlement and subsequently changed their claim (see paragraph 29 above). The applicants' claim was ultimately dismissed, which was confirmed by the Supreme Court and the Constitutional Court, respectively (see paragraphs 35 and 37 above).

60. Despite having two final decisions ordering full repossession of their land, the applicants are still prevented, seventeen years after the ratification of the Convention and its protocols by the respondent State, from the peaceful enjoyment thereof.

61. Although a delay in the execution of a judgment may be justified in particular circumstances (see *Burdov v. Russia*, no. 59498/00, § 35, ECHR 2002-III), the Court notes that the Government did not offer any justification for the authorities' inaction in the present case. The Court considers that the very long delay in the present case amounts to a clear refusal of the authorities to enforce the decisions of 28 October 1999 and 14 November 2001, leaving the applicants in a state of uncertainty with regard to the realisation of their property rights. Thus, as a result of the authorities' failure to comply with the final and binding decisions, the applicants suffered serious frustration of their property rights (see, *mutatis mutandis*, *Szkórits*, cited above, § 45).

62. Having regard to all the above, the Court concludes that the applicants had to bear a disproportionate and excessive burden. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

63. The applicants complained that the domestic courts' decisions concerning their civil claim had been contrary to Article 6 § 1 of the Convention.

64. The Government contested that argument.

65. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

66. Having regard to the finding relating to Article 1 of Protocol No. 1 to the Convention (see paragraph 62 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 6 § 1.

## III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

67. Article 46 of the Convention, in so far as relevant, provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

68. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

69. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the Convention shortcoming it has found to exist (see *Broniowski*, cited above, § 194, and *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 148, 17 September 2009).

70. The Court considers that the violation found in the instant case does not leave any real choice as to the measures required to remedy it.

71. In these conditions, having regard to the particular circumstances of the case, the Court considers that the respondent State must take all necessary measures in order to secure full enforcement of the CRPC's decision of 28 October 1999 (see paragraph 16 above) and the decision of the Ministry for Refugees of 14 November 2001 (see paragraph 17 above), including in particular the removal of the church from the applicants' land, without further delay and at the latest within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

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

### A. Damage

73. In respect of pecuniary damage the applicants claimed 10,000 euros (EUR) each in respect of the loss sustained because they had been prevented from using the land, on which the church had been built, for agricultural purposes. They made no claim in respect of non-pecuniary damage.

74. The Government submitted that the applicants might have suffered some pecuniary damage and invited the Court to make its award on equitable basis and in accordance with its established case-law.

75. The Court has been unable to make a precise calculation regarding the loss sustained owing to the inability to use the land for agricultural purpose in view of the lack of evidence of the profit the applicants could have actually made had they been able to use that land. However, it considers that the applicants must necessarily have sustained pecuniary loss as they have been prevented from using a part of their land, although its immediate restitution had been ordered already in 1999 and 2001 (see paragraphs 16 and 17 above; see also, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 200, ECHR 2004-II). The Court further considers that the pecuniary loss was most significant for the first applicant because she is the one who had returned to the property in Konjević Polje (see paragraph 19 above). Consequently, ruling on an equitable basis and in accordance with the criteria set out in its case-law, the Court awards EUR 5,000 to the first applicant and EUR 2,000 to each of the remaining applicants under this head.

### B. Costs and expenses

76. The applicants also claimed EUR 13,000 for the costs and expenses incurred before the domestic courts and before the Court.

77. The Government submitted that the domestic cost and expenses should be assessed in accordance with the applicable lawyers' tariffs. As regards the costs and expenses before the Court, the Government argued that the applicants were entitled to reimbursement of necessary and actual costs.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case, the Court notes that the applicants have not submitted any evidence (bills or invoices) about the costs and expenses incurred. Therefore, their claim is rejected for lack of substantiation.

### C. Default interest

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

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*, unanimously, that there is no need to examine the complaint under Article 6 of the Convention;

4. *Holds,*
   (a) by six votes to one, that the respondent State must take all necessary measures in order to secure full enforcement of the CRPC's decision of 28 October 1999 and the decision of the Ministry for Refugees of 14 November 2001, including in particular the removal of the church from the applicants' land, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention;
   (b) unanimously, that the respondent State is to pay, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention**,** EUR 5,000 (five thousand euros), plus any tax that may be chargeable, to the first applicant and EUR 2,000 (two thousand euros), plus any tax that may be chargeable, to each of the remaining applicants, in respect of pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (c) unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Andrea Tamietti | Jon Fridrik Kjølbro |
| Deputy Registrar | President |

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

JFK
ANT

# PARTLY DISSENTING OPINION OF JUDGE KJØLBRO

1. I am in agreement with the judgment with the exception of one point where my view differs from that of the majority. Consequently, I voted against point 4 (a) of the operative provisions that reflects the majority's reasoning in paragraph 71 of the judgment, where the Court has indicated as an individual measure that the respondent State has to ensure "the removal of the church from the applicant's land, within three months from the date on which the judgment becomes final".

2. In my view, and for the reasons explained below, I find the individual measure indicated problematic as it does not take sufficient account of the fact that the present case concerns not only a dispute between the applicants and the respondent State, but also and in particular a dispute between the applicants and a private third party, the Drinjača Serbian Orthodox Parish ("the Parish"), which is not a party to the proceedings before the Court.

3. As rightly pointed out by the majority (see paragraphs 68-69 of the judgment), it is only in exceptional situations that the Court under Article 46 will indicate individual measures to be adopted by a respondent State, and, in general, the Court will only do so when the finding of a violation "does not leave any real choice as to the measures required to remedy it" (see, for example, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

4. In the present case, the Court has, in its reasoning as well as the operative provisions, indicated that the respondent State has to ensure "the removal of the church from the applicants' land, within three months from the date on which the judgment becomes final". The present case, however, does not only concern a dispute between the applicants (seeking the return of the remaining part of the land and the removal of the church built on it) and the respondent State, but also a dispute between the applicants and the Parish (the owner of the church built on the disputed land).

5. By ordering the removal of the church, the Court is, *de facto*, ruling on and deciding a dispute between two private parties, to the detriment of one the parties, the Parish, which is not a party to the proceedings before the Court and has not had a chance to express its legal views and defend its interests, not even as an intervening third party to the proceedings before the Court.

6. By dissenting on this point, I am not expressing a view on how the dispute between the applicants and the Parish is to be decided. That is, in my view, an issue to be decided by domestic authorities in domestic proceedings, where the necessary procedural guarantees and the required balancing of interests can take place; it is not an issue to be decided by the Court.

7. In this context, I draw attention to the following facts: The land in question was expropriated in 1997 and allocated to the third party (see paragraph 10 of the judgment). In 1998, the Parish built the church in

question (see paragraph 11 of the judgment). The church has been in place and has been used by the Parish for more than 21 years now. In addition, in 2004, a planning permit was issued (see paragraph 15 of the judgment). Without expressing any view on the measures adopted by the domestic authorities when allocating the land to the Parish and issuing the planning permit, I cannot but notice that the Parish may, as a private party, rely on and invoke the rights set out in the Convention, including the right to respect for property as guaranteed by Article 1 of Protocol No. 1 to the Convention. How the dispute between the applicants and the Parish is to be decided is for the domestic courts to decide with the possibility of subsequently lodging an individual application with the Court under Article 34 of the Convention.

8. In the present case, the applicant had instituted civil proceedings against the Parish. Initially, the applicants had demanded the removal of the church and the restoration of the land in question (see paragraph 24 of the judgment). However, subsequently, and in the context of the civil proceedings, the applicants had amended their claim and asked the domestic courts to recognise the validity of an out-of-court settlement allegedly concluded between the parties (see paragraph 29 of the judgment), a claim that was ultimately dismissed since no agreement had been concluded as alleged by the applicants (see paragraph 35 of the judgment).

9. In other words, in the context of the civil proceedings the domestic courts did not have a chance to rule on the merits of the dispute between the parties, that is the question of the removal of the church and the return of the land in question, and this is a direct consequence of the applicants' choice in the context of the domestic proceedings.

10. If the present case had not involved the interests of a private third party, the Parish, I would have had no problem with the Court ordering or indicating the return of the land, but in the present case there is an underlying dispute between private parties with conflicting claims and interests, and the Court is deciding the dispute to the detriment of one of the parties, which, as mentioned, is not represented before the Court. That I do find very problematic.

11. If the domestic courts had acted in a manner similar to the approach adopted by the majority in the present case, ordering the removal of a building and the return of land in proceedings to which the owner or a person with property rights was not a party and was unable to present its view and defend its interests, the Court would have found a clear violation of Article 6 of the Convention (see, for example, *Gankin and Others v. Russia*, nos. 2430/06 and 3 others, §§ 33-39, 31 May 2016, concerning the right to be informed of proceedings and be able to attend hearings and defend rights), as well as Article 1 of Protocol No. 1 to the Convention (see, for example, *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06

and 2 others, § 303, 28 June 2018, concerning procedural rights under Article 1 of Protocol No. 1).

12. Although the Court has in many cases ordered or indicated the return of property to an applicant, it has nonetheless always borne in mind that there may be situations where the return of property is impossible *de facto* or *de jure*, *inter alia* on account of the rights and interests of third parties. That is why in such cases the Court has indicated the return of the property in question or, in the alternative, the payment of compensation equal to the actual value of the property in question (see, for example, *Zwierzyński v. Poland* (just satisfaction), no. 34049/96, §§ 13-16, 2 July 2002; *Hodoş and Others v. Romania*, no. 29968/96, §§ 72-73, 21 May 2002; *Scordino v. Italy (no. 3)* (just satisfaction), no. 43662/98, §§ 37-38, 6 March 2007; *Budescu and Petrescu v. Romania*, no. 33912/96, § 53-54, 2 July 2002; *Cretu v. Romania*, no. 32925/96, §§ 59-60, 9 July 2002; and *Bălănescu v. Romania*, no. 35831/97, §§ 36-37, 9 July 2002).

13. In my view, that is what the Court could and should have done in the present case: indicate the removal of the church and return of the property in question or, in the alternative, the payment of compensation equal to the actual value of the land in question.

14. That would have enabled the respondent State, under the supervision of the Committee of Ministers, to have the dispute decided in proceedings in which both parties would have a chance to put forward their legal arguments, the procedural rights set out in Article 6 of the Convention could have been respected and the balancing of interests required by Article 1 of Protocol No. 1 to the Convention could have taken place. The majority has, however, decided to interfere with the rights of a private third party, the Parish, which is not a party to the proceedings before the Court and has not had a chance to put forward any arguments, not even as a intervening third party before the Court.

15. That having been said, I would like to add one final observation concerning the approach adopted by the Court in the present case: I wonder whether the measure complained of should be assessed under the State's positive or negative obligations under Article 1 of Protocol No. 1 of the Convention.

16. For the reasons stated in paragraphs 54 to 57 of the judgment, the Court proceeds on the basis that the case concerns the State's positive obligations. However, the Court's case-law is not always consistent on this point. In some cases concerning a State's failure to comply with a final and binding domestic decision concerning property rights, the Court has assessed the State's inaction as an interference with the applicant's property under Article 1 of Protocol No. 1 to the Convention (see, for example, *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II; *Antonetto v. Italy*, no. 15918/89, § 34, 20 July 2000; *Frascino v. Italy*, no. 35227/97, § 32, 11 December 2003; and *Paudicio v. Italy*, no. 77606/01, § 42, 24 May

2007), *Păduraru v. Romania*, no. 63252/00, § 92, ECHR 2005-XII (extracts), *Viaşu v. Romania*, no. 75951/01, § 59, 9 December 2008. However, as the Court has stated in many cases, the principles to be applied are the same (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 144, ECHR 2004-V) and, therefore, had the Court decided to assess the case as a question of interference or negative obligations, the reasoning might have been different but the outcome of the case would have been the same.