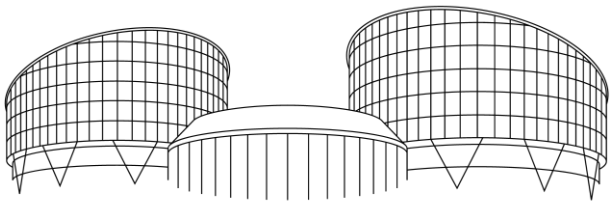

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BAJIĆ v. CROATIA

(Application no. 41108/10)

JUDGMENT

STRASBOURG

13 November 2012

FINAL

13/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bajić v. Croatia,

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

Anatoly Kovler, *President,*
Nina Vajić,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 23 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 41108/10) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr Pero Bajić ("the applicant"), on 2 July 2010.

2. The applicant was represented by Ms R. Plešnar, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 8 June 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. On 15 June 2011 the Government of the Netherlands was informed of the case and invited to exercise their right to intervene if they wished to do so. On 15 July 2011 the Government of the Netherlands informed the Court that they did not wish to exercise their right to intervene in the present case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and lives in Garevac.

A. Background to the case

6. On 23 August 1994 the applicant's sister, F.Č. was admitted to the Rebro Hospital in Zagreb (*Klinički bolnički centar Zagreb – Rebro*) as an emergency case. She required surgery for an abdominal tumour. Dr V.B. assumed charge of her treatment.

7. Dr. V.B. was a surgery professor at the University of Zagreb Medical Faculty (*Medicinski fakultet Sveučilišta u Zagrebu*). At the time of the events he worked as a surgeon in the Rebro Hospital where he had been for more than thirty years, and around the period at issue he ran for a managerial position in that hospital.

8. On 26 August 1994 the applicant paid Dr V.B. 5,000 German marks (DEM) in order to perform the surgery and on 30 August 1994 Dr V.B. operated on the applicant's sister.

9. A day after surgery the applicant's sister was transferred from the intensive-care unit to a regular ward. In the early morning of 1 September 1994 she died. Dr V.B. established massive pulmonary embolism as the cause of death.

B. Disciplinary proceedings against V.B.

10. On 17 May 1995 the applicant complained to the Ministry of Health (*Ministarstvo zdravstva Republike Hrvatske*) about the circumstances of the medical treatment of his sister in the Rebro Hospital.

11. The Ministry of Health forwarded the applicant's complaint to the director of the Rebro Hospital on 8 June 1995 and ordered an inquiry.

12. On 28 June 1995 disciplinary proceedings were opened against the doctor before the Disciplinary Commission of the Rebro Hospital (*Disciplinska komisija Kliničkog bolničkog centra Zagreb*) on charges of having committed a disciplinary offence of receiving payment for performing surgery.

13. On 19 July 1995 Dr V.B. was found to have committed the disciplinary offence as charged and dismissed from the Rebro Hospital. As to the allegations of medical negligence the Disciplinary Commission noted:

> "The medical records concerning F.Č. are incomplete; there is no information concerning her treatment (her previous and present condition, her personal medical history is missing, as well as information on her general status, local status, pre-surgery treatment, indication, the surgery itself, post-surgery treatment, histological record and the cause of death), there is no record concerning her release from hospital or information concerning her reanimation in the intensive care unit. The Commission finds that, by failing to [ensure the] proper administration of the medical records, Prof Dr V.B. has failed to perform his duties diligently, but it does not wish to make any conclusions concerning his professional conduct in treating F.Č."

14. Dr V.B. lodged an appeal against that decision before the Administrative Panel of the Rebro Hospital (*Upravno vijeće Kliničkog bolničkog centra Zagreb*) and on 22 August 1995 the Administrative Panel

overturned the first-instance decision and ordered his suspension from work for one year. The enforcement of this measure was suspended.

C. Criminal proceedings against V.B.

15. On 20 October 1994 the applicant and two other relatives of the deceased lodged a criminal complaint against Dr V.B. with the Zagreb Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Zagrebu*), accusing him of the criminal offences of accepting bribes and medical malpractice. The Zagreb Municipal State Attorney's Office asked the investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) to hear Dr V.B. and potential witnesses and to commission a medical report. Responsibility for producing the medical report was given to doctors J.Š. and B.C., both employed at the University of Zagreb Medical Faculty.

16. On 24 October 1997 they produced their report. They found that there had been no failures in the treatment of the applicant's sister that could have resulted in her death.

17. Based on their findings, on 19 February 1998 the Zagreb Municipal State Attorney's Office rejected the criminal complaint in respect of the alleged medical malpractice. The applicant and other relatives of the deceased were instructed that they could take over the prosecution of Dr V.B. by lodging an indictment as subsidiary prosecutors in the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*).

18. On 9 March 1998 the applicant and two other relatives of the deceased lodged an indictment in the Zagreb Municipal Criminal Court against Dr V.B. on charges of medical malpractice. They challenged the medical report made by J.Š. and B.C. and asked that a new medical report be commissioned. The relevant part of their submissions reads:

> "As a result of such [a cursory approach] when assessing the responsibility of the accused, the injured parties propose that another medical report be commissioned [from] a medical institution outside the University of Zagreb Medical Faculty, so that a more objective opinion can be produced."

19. On 17 March 1998 the Zagreb Municipal State Attorney's Office indicted Dr V.B. in the Zagreb Municipal Criminal Court on charges of taking bribes, but these proceedings were discontinued on 31 August 2000 on the ground that the prosecution had become time-barred.

20. At a hearing on 21 November 2000 Dr V.B. pleaded not guilty to the charges of medical malpractice. The applicant asked that a number of persons be called as witnesses for the prosecution and reiterated the request for a new medical report to be commissioned from experts who did not have any connection with the University of Zagreb Medical Faculty. In support of the request the applicant argued that Dr V.B., in addition to acting as a medical doctor at the Rebro Hospital, was also attached to the University of Zagreb Medical Faculty in a capacity of professor. The applicant pointed

out that J.Š., one of the experts to whom responsibility for producing the medical report of 24 October 1997 had been given during the investigation, was a professor at the same University.

21. At a hearing on 23 February 2001 the applicant again asked that a new medical report be commissioned from an institution outside Zagreb and reiterated his previous arguments of the incompatible professional relationship between the experts and the accused. On the same day, and having regard to the arguments submitted, the Municipal Criminal Court decided that a new medical report would be commissioned from the Rijeka University Medical Faculty (*Medicinski fakultet Sveučilišta u Rijeci*). The court relied on Article 250 § 2 of the Code of Criminal Procedure (*Zakon o kaznenom postupku*).

22. On 31 May 2001 M.U., a doctor from the Rijeka University Medical Faculty, submitted a report to the Zagreb Municipal Criminal Court. He found that there had been no indication of any failures in the course of the medical treatment of the applicant's sister.

23. On 5 July 2001 the applicant's lawyer submitted a written objection to M.U.'s findings to the Zagreb Municipal Criminal Court.

24. At a hearing on 6 July 2001 M.U. gave oral evidence. In addition to explaining the content of his report he stated that he was not a permanently appointed medical expert but rather an ad hoc medical expert. He also confirmed that he was not employed in the same institution as Dr V.B., nor did he have any other connection with him.

25. On 13 November 2001 the applicant submitted a privately commissioned medical report by D.M., a medical specialist in urology and surgery from Wiesbaden, Germany. In his report D.M. excluded the massive pulmonary embolism as the cause of death and found that the applicant's sister had died from pulmonary edema which had been caused by an acute cardiac arrest. D.M. also noted that in order to exclude any failures in the postoperative course of treatment, it would be necessary to consult other documentation and make further examinations.

26. At the final hearing held on 9 June 2003 the applicant asked that D.M. be called as a witness for the prosecution. He further requested that another medical report be commissioned from an institution outside Croatia. On the same day the Zagreb Municipal Criminal Court pronounced judgment in the case whereby it acquitted Dr V.B. of the charges of medical malpractice. The Zagreb Municipal Criminal Court relied in its findings on the submissions of M.U. including his expert report which had concluded that there been no flaws in the medical treatment of the applicant's sister. The court further held that this finding had been corroborated by other witnesses and relevant documents. In respect of the applicant's request for the commission of another medical report, the court noted:

> "It has to be noted that the court commissioned the decisive medical report from a surgeon who was not a permanently appointed medical expert. This is because the

> accused himself has stated in his defence that he had been a recognised doctor and also a medical expert for a number of years. Therefore, in order to prevent any possible doubt as to the truthfulness and objectivity of experts from a relatively small professional environment such as Zagreb, the report was commissioned from an expert from another city, namely, Rijeka.
>
> The Court also dismissed the request by the prosecution that a report be commissioned from a medical institution outside Croatia, as there was no doubt as to the expertise and objectivity of [M.U.] ..."

27. On 17 September 2004 the applicant lodged an appeal with the Zagreb County Court, complaining that the first-instance court had erred in its factual findings and in the application of substantive and procedural law.

28. On 22 February 2005 the Zagreb County Court quashed the first-instance judgment and ordered a retrial, on the grounds that the medical report had been drawn up by a doctor who had not been a sworn medical expert. It also instructed the Zagreb Municipal Criminal Court to hear again J.Š. and B.C., the experts who had previously drawn up a report during the investigation. The relevant part of the decision reads:

> "Since in the case at issue the medical report was not drawn up by a permanently appointed expert or a specialised institution, and the judgment is based on such evidence, the appellants correctly pointed out that there had been a miscarriage of justice ...
>
> In the retrial the first-instance court shall again take all the evidence and question the permanently appointed experts who drew up the medical report during the investigation, Prof Dr J.Š. and Prof Dr B.C. They must give their evidence at the trial and only then, if the parties make any objection which could raise doubts as to the accuracy and relevancy of their opinion, may the court commission a new report from a specialised institution in or experts from Croatia ..."

29. On 4 October 2005 the Zagreb Municipal Criminal Court commissioned a new medical report from J.Š. and B.C., but on 6 October 2005 J.Š. informed the court that B.C. had died. At a hearing on 1 December 2005 the court assigned the report only to J.Š.

30. At a hearing on 10 February 2006 J.Š. asked the Zagreb Municipal Criminal Court to reassign responsibility for producing the medical report to two other experts. On the same day responsibility for producing the report was reassigned to doctors J.Š., M.D. and S.J., who were all professors at the Zagreb Medical Faculty. S.J. was also the Head of the Department for Pathology of the Rebro Hospital.

31. On 14 November 2006 the applicant lodged with the Zagreb Municipal Criminal Court a motion to disqualify the medical expert witnesses, claiming that they did not have necessary expertise and that they were close associates and friends of the accused. He pointed out that S.J. was employed at the Rebro Hospital.

32. On 3 January 2007 J.Š., M.D. and S.J. issued their medical report. They found that there had been no failures in the medical treatment of the

applicant's sister by the accused or by other medical staff at the Rebro Hospital.

33. On 25 April 2007 the Zagreb Municipal Criminal Court denied the applicant's motion to disqualify the expert witnesses on the grounds that there had been nothing in their report to suggest any bias or unlawfulness on their part. The relevant part of the decision reads:

> "Following the decision of the appellate court, a first hearing in this case was held on 4 October 2005 ... at which a medical report was commissioned from experts Dr [J.]Š. and Dr [B.]C. Since the court was informed that Dr [B.]C. had died in the meantime, another expert report was commissioned from Dr [J.]Š. at the hearing held on 1 December 2005 ... As the case in issue essentially required a combined medical report, it was decided at a hearing on 10 February 2006 that a report would be commissioned from Dr [J.]Š., Dr [M.]D. and Dr [S.]J., a forensic expert, a pathologist and a surgeon respectively. The records of the hearings show that the subsidiary prosecutor, who was legally represented, made no objection when the report was commissioned from these experts.
>
> In view of the fact that the victim was hospitalised with a diagnosis of an abdominal tumour, it was necessary to commission a report from a forensic expert, a pathologist and a surgeon. Moreover, as regards the objection that [S.J.] was not a consultant cardiologist or endocrinologist, [that] is not a ground for his disqualification, as an expert's knowledge and specialisation can only be grounds for an objection concerning [his or her] findings ...
>
> There are no reasons to doubt the impartiality of Prof Dr S.J., since he is a permanently appointed expert and, moreover, Head of the Pathology Department at the University of Zagreb's Medical Faculty. The fact that he is also Head of the Pathology Department at the Rebro Hospital does not call into doubt his impartiality as the said institution employs hundreds of individuals and the accused has retired in the meantime. This is also the case because [S.J.] is obliged to draft his report conscientiously and to his best knowledge, as well as to present his findings accurately, comprehensively and objectively, and with due regard to the relevant rules. The arguments of the subsidiary prosecutor that the said experts are close associates and friends of the accused are unsubstantiated and there was nothing else to suggest a lack of impartiality on their part."

34. On 22 October 2007 the applicant again asked for another medical report to be commissioned from an institution outside Croatia. He pointed out that the accused had been a professor for many doctors over the years in Croatia and, as an example, referred to a statement by a witness, doctor M., who had testified before the Zagreb Municipal Criminal Court that he had a good, friendly relationship with the accused.

35. At a hearing on 22 November and again during the final hearing on 19 December 2007 the applicant reiterated in vain his request that another medical report be commissioned from an institution outside Croatia, but the judge conducting the proceedings dismissed it and concluded the trial. On the latter date the Zagreb Municipal Criminal Court acquitted Dr V.B. of the charges of medical malpractice, on the grounds that the medical report had excluded any failures in the medical treatment of the applicant's sister, which was corroborated by the statements of witnesses and other medical

documentation. As to the applicant's claim of bias on the part of the medical experts, the relevant part of the judgment reads:

> "Disregarding the fact that these experts are colleagues and [that] they perhaps know the accused, their report did not disclose any appearance of their bias in favour of the accused. Moreover, on 25 April 2007 this court had already dismissed the prosecutor's motion to disqualify the experts as ill-founded ..."

36. On 29 January 2008 the applicant lodged an appeal with the Zagreb County Court, complaining that the first-instance court had erred in its factual findings and in the application of procedural law.

37. On 24 February 2009 the Zagreb County Court dismissed the applicant's appeal and upheld the first-instance judgment. The County Court found that there had been no need to commission a medical report from outside Croatia because the applicant's complaints that Croatia was a relatively small professional environment and that the case concerned a well known doctor had merely been his subjective impression and were without any justification. The relevant part of the decision reads:

> "The report – drafted by three well known experts – was not called into doubt. Since the proceedings were conducted in Croatia, where Croatian law applied, there was no reason to commission a medical report from experts from another country. The medical report privately commissioned by the subsidiary prosecutor could have served [as a basis] for formulating questions. But, since they have not called into doubt the expert knowledge of the experts who drafted the medical report in the present case, and the report is not self-contradictory or dubious, there was no reason to commission a medical report from a medical institution abroad, particularly since that was neither expedient nor necessary. The mere assertion by the prosecutors that Croatia was a "relatively small professional environment" where the accused was a well known doctor, and that there was solidarity among doctors, which was only the [subsidiary] prosecutor's subjective opinion, without having called into doubt the accuracy of the report's findings, did not mandate the commission of another report. The fact that the said objection was not addressed by the first-instance court can only be considered as an insignificant breach of procedural rules which did not call into doubt its findings as to whether the accused had committed the offence or not."

38. On 21 May 2009 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), complaining that there had been flaws in the proceedings concerning the death of his sister and Dr V.B.'s alleged medical malpractice. He submitted that the medical experts who had drawn up the medical report had not been impartial.

39. On 26 November 2009 the Constitutional Court declared the applicant's constitutional complaint inadmissible on the grounds that the proceedings in issue had not concerned any of his civil rights or obligations or any criminal charge against him. This decision was served on the applicant on 4 January 2010.

D. Civil proceedings instituted by the applicant

40. On 23 March 2001 the applicant brought a civil action in the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*) against Dr V.B., seeking repayment of the DEM 5,000 that he had paid for his sister's surgery.

41. On 10 January 2006 the Zagreb Municipal Civil Court found in the applicant's favour and ordered Dr V.B. to pay the applicant the requested amount.

42. On 27 February 2006 Dr V.B. lodged an appeal with the Zagreb County Court.

43. On 6 November 2007 the Zagreb County Court quashed the first-instance judgment and ordered a retrial, on the grounds that the Zagreb Municipal Civil Court had failed to establish all the facts relevant in respect of the statute of limitations applicable to the applicant's civil action and in the light of the fact that the criminal proceedings against Dr V.B. on charges of taking bribes had been discontinued as time-barred (see paragraph 19 above).

44. Following new proceedings before the first-instance court, on 10 September 2009 the Zagreb Municipal Civil Court again found in the applicant's favour. As to the statute of limitations, the court held that the applicant had not caused the criminal proceedings against Dr V.B. to become time-barred and therefore found that his civil action had not become time-barred.

45. On 10 November 2009 Dr V.B. lodged an appeal with the Zagreb County Court.

46. On 11 May 2010 the Zagreb County Court overturned the first-instance judgment and dismissed the applicant's civil action on the grounds that it had become time-barred.

47. The applicant lodged a constitutional complaint with the Constitutional Court against the judgment of the Zagreb County Court and these proceedings appear to be still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution of the Republic of Croatia

48. The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010) in Article 21, under Head III – Protection of Human Rights and Fundamental Freedoms, Part 2 – Personal and Political Rights and Freedoms, provides:

"Every human being has the right to life.

..."

2. Constitutional Court Act

49. The relevant part of section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette nos. 99/1999, 29/2002, 49/2002) reads:

"1. Everyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a decision of a state body, a body of local and regional self-government, or a legal person with public authority concerning his or her rights and obligations, or about a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: a constitutional right) ...

2. If another legal remedy exists against the violation of the constitutional right [complained of], the constitutional complaint may be lodged only after that remedy has been exhausted.

3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law is allowed, remedies shall be considered to have been exhausted only after a decision on these legal remedies has been given."

3. Criminal Code

50. The relevant parts of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 27/1998, 50/2000, 129/2000, 51/2001, 111/2003, 190/2003, 105/2004, 84/2005, 71/2006, 110/2007, 152/2008, 57/2011) provide:

Article 8

"(1) Criminal proceedings in respect of criminal offences shall be instituted by the State Attorney's Office in the interests of the Republic of Croatia and its citizens.

(2) In exceptional circumstances, the law may provide for criminal proceedings in respect of certain criminal offences to be instituted on the basis of a private prosecution or for the State Attorney's Office to institute criminal proceedings following [a private] application."

MEDICAL MALPRACTICE

Article 240

"(1) A physician or a dentist who, in rendering medical services, does not apply measures for the protection of patients in accordance with professional standards, or applies an obviously inadequate remedy or method of treatment, or in general acts carelessly, thus causing the deterioration of an illness or the impairment of a person's health, shall be punished by a fine or by imprisonment not exceeding two years."

SERIOUS DAMAGE TO HEALTH

Article 249

"(1) If, by the criminal offence referred to in ... Article 240 paragraphs 1 and 2 ... of this Code, serious bodily injury to a person is caused, or his health is severely impaired, or an existing illness considerably deteriorates, the perpetrator shall be punished by imprisonment for one to eight years.

(2) If the death of one or more persons is caused by a criminal offence referred to in paragraph 1 of this Article, the perpetrator shall be punished by imprisonment for three to ten years."

4. Code of Criminal Procedure

51. At the time, the relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002 and 62/2003) provided:

Article 2

"(1) Criminal proceedings shall be instituted and conducted at the request of a qualified prosecutor only. ...

(2) In respect of criminal offences subject to public prosecution the qualified prosecutor shall be the State Attorney and in respect of criminal offences to be prosecuted privately the qualified prosecutor shall be a private prosecutor.

(3) Unless otherwise provided by law, the State Attorney shall undertake a criminal prosecution where there is a reasonable suspicion that an identified person has committed a criminal offence subject to public prosecution and where there are no legal impediments to the prosecution of that person.

(4) Where the State Attorney finds that there are no grounds to institute or conduct criminal proceedings, the injured party may take his place as a subsidiary prosecutor under the conditions prescribed by this Act."

Article 248

"(1) An expert report shall be commissioned by a written order of the authority conducting the proceedings. The order shall state the facts relevant for the report and the name of the expert witness. The order shall be served on the parties."

Article 250

"(1) A person who may not testify as a witness or who is exempted from testifying shall not be appointed as an expert witness, and neither shall a person against whom the offence was committed, and if such a person is appointed, the court's decision may not be based on his findings or opinion.

(2) A reason for the disqualification of an expert witness applies also to a person who is employed by the same State authority or by the same employer as the accused or the injured person."

5. Civil Obligations Act

52. The relevant provisions of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, nos. 53/1991, 73/1991 and 3/1994) provided:

DAMAGES

Section 200

"(1) For any physical or mental pain concerning the ... death of a close person ... the court shall, if appropriate under the circumstances of a given case, and particular if the intensity of the pain or fear and their duration so require, award non-pecuniary damages ... "

PERSON WHO CAN CLAIM DAMAGES

Section 201

"(1) In the event of the death of a person the court can award an appropriate non-pecuniary damage to the members of his or her immediate family (spouse, child, a parent).

(2) The same damages can be awarded also to the brothers and sisters if sufficient family ties existed between them.

... "

6. Health Care Act

53. The relevant provisions of the Health Care Act (*Zakon o zdravstvenoj zaštiti*, Official Gazette, nos. 75/1993, 11/1994, 55/1996, and 1/1997 – consolidated text) provided:

"Anyone has a right to direct a verbal or written complaint to the director of a health care institution ... concerning the quality, substance and the type of health care provided.

The director ... shall immediately take [the] necessary measures and he shall inform the complainant about the measures that were taken by letter and within a period of three days.

If the complainant is not satisfied with the measures that were taken, he can seek [to assert] his rights before the competent bar association, the Ministry of Health or the competent court."

B. Constitutional Court's practice

54. On 14 May 2001 in case no. U-III-791/1997 the Constitutional Court accepted an injured party's constitutional complaint concerning a violation of the right to life. The relevant part of the decision reads:

"Under the [Code of Criminal Procedure], in a situation where the State Attorney is the prosecutor, the injured party has only very limited rights in the proceedings.

> However, as soon as the State Attorney is no longer a party (if he drops the charges) the injured party can act as a subsidiary prosecutor in the proceedings. In other words, when the State Attorney does not appear [as a prosecutor] in the proceedings, the [injured] party is (or can be) the subsidiary prosecutor. This should be, *mutatis mutandis*, applied in respect of a constitutional complaint. Since the State Attorney cannot lodge a constitutional complaint ... the injured party can represent himself. In this case [the injured party] can lodge a constitutional complaint."

55. In its decision of 13 February 2004 in case no. U-IIIA-232/2003 the Constitutional Court declared a subsidiary prosecutor's constitutional complaint concerning the length of criminal proceedings inadmissible on the grounds that the proceedings in issue had not concerned his civil rights or obligations or any criminal charge against him. The relevant part of the decision reads:

> "It is clear from the constitutional complaint that the criminal proceedings ... did not concern the applicant's civil rights or obligations or any criminal charge against him. In the criminal proceedings the applicant was not the defendant and he failed to lodge a civil claim, which he had notably pursued in separate civil proceedings.
>
> Therefore ... the applicant does not have the necessary *locus standi* before the Constitutional Court ..."

56. The Constitutional Court followed the same approach in its decision of 23 December 2004 in case no. U-III-2729/2004 in which it declared a subsidiary prosecutor's constitutional complaint concerning the outcome of criminal proceedings inadmissible on the same basis as noted above.

57. In its decision of 22 October 2008 in case no. U-IIIVs-3511/2006, the Constitutional Court accepted a constitutional complaint concerning the length of criminal proceedings lodged by a subsidiary prosecutor who had not lodged a civil claim in those criminal proceedings. The relevant part of the decision reads:

> "The approach taken by the lower courts, by which the applicant did not have the right to lodge a length-of-proceedings complaint because she, as a subsidiary prosecutor in criminal proceedings, ... had failed to lodge a civil claim ... reflects the approach previously taken by this court.
>
> ... [T]he Constitutional Court considers that that approach should be revisited on the grounds of the public interest and the protection of victims' rights.
>
> ...
>
> Therefore, the Constitutional Court considers that the question of whether a subsidiary prosecutor in criminal proceedings has a right to have the competent court decide within a reasonable time [whether] the defendant be found guilty and punished according to law, cannot be considered only from the perspective of the civil claim which the injured party may have against the defendant. Such a restrictive approach would deprive the subsidiary prosecutor [of the ability] to exercise his right to bring a subsidiary prosecution and it would run contrary to the principle that rights should be effective ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

58. The applicant complained that all the relevant facts concerning the death of his sister had not been properly established in the unreasonably long criminal proceedings against Dr V.B. The Court, being master of the characterisation to be given in law to the facts of the case, will consider this complaint under Article 2 of the Convention, the relevant part of 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."

A. Admissibility

1. Applicability ratione temporis

(a) The parties' arguments

59. The Government argued that all complaints in respect of the death and medical treatment of the applicant's sister were outside of the Court's temporal jurisdiction. They pointed out that the Convention had entered into force in respect of Croatia on 5 November 1997 and that the applicant's sister had died in 1994. Therefore, the Government concluded that any substantive complaint under Article 2 of the Convention was incompatible *ratione temporis*.

60. The applicant pointed out that the proceedings in respect of the death of his sister had commenced in 1998, which was after the Convention had entered into force in respect of Croatia. He also pointed out that the present case concerned the procedural protection of the right to life under Article 2 of the Convention.

(b) The Court's assessment

61. The Court reiterates that the procedural obligation to carry out an effective investigation under Article 2 of the Convention constituted a separate and autonomous obligation on the domestic authorities, which was binding on them even though the death of the applicant's sister took place before the date the Convention entered into force in respect of Croatia. The Court's temporal jurisdiction, as regards compliance with the procedural obligation of Article 2 in respect of deaths occurring before the entry into force of the Convention, exists if there is a genuine connection between the death and the entry into force of the Convention and if a significant proportion of the procedural steps were or ought to have been carried out

after the critical date (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 159, 161-163, 9 April 2009).

62. The Court notes that in the present case proceedings concerning the death of the applicant's sister were instituted before the domestic courts on 9 March 1998 when the applicant lodged an indictment with the Zagreb Municipal Criminal Court and ended on 26 November 2009 when the Constitutional Court adopted its decision. Therefore, the Court notes that all relevant procedural steps in connection with the death of the applicant's sister were carried out after the Convention entered into force in respect of Croatia on 5 November 1997. It follows that the applicant's complaint falls within the Court's jurisdiction *ratione temporis*.

2. Compliance with the six-month time-limit

(a) The parties' arguments

63. The Government argued that the applicant had failed to bring his complaint before the Court within the six-month time-limit. In the Government's view, the final domestic decision had been the judgment of the Zagreb County Court of 24 February 2009 and not the decision of the Constitutional Court of 26 November 2009 on which the applicant had relied when he had lodged his application with the Court. In the Government's view, the applicant should have been aware of the case-law of the Constitutional Court to the effect that constitutional complaints brought by subsidiary prosecutors in criminal proceedings were inadmissible.

64. The applicant argued that he had brought his complaint before the Constitutional Court because he had been obliged to exhaust all domestic remedies.

(b) The Court's assessment

65. The Court reiterates that the object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continuously open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

66. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. In this respect the Court has already held that before bringing complaints against Croatia to the

Court, in order to comply with the principle of subsidiarity, applicants are in principle required to afford the Croatian Constitutional Court the opportunity to remedy their situation (see *Orlić v. Croatia*, no. 48833/07, § 46, 21 June 2011).

67. The Court also reiterates that the requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation (see *Hatjianastasiou v. Greece*, no. 12945/87, Commission decision of 4 April 1990, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts)).

68. The Court notes at the outset that the Croatian Constitution in Article 21 recognises and guarantees the right to life as a fundamental human right. Furthermore, the Court notes that, contrary to the Government's arguments, the practice of the Constitutional Court as regards the admissibility of complaints submitted by subsidiary prosecutors in criminal proceedings, is inconclusive (see §§ 54-57 above). In this respect the Court reiterates its findings in the *Dolenec* case that under section 62 of the Constitutional Court Act, anyone who deems that a decision of a State body concerning his or her rights and obligations, or a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms may lodge a constitutional complaint against that decision and that, from the wording of section 62 of the Constitutional Court Act, the applicant had reason to believe that his constitutional complaint was a remedy that required to be exhausted (see *Dolenec v. Croatia*, no. 25282/06, § 200, 26 November 2009).

69. In view of these findings and importance of the protection afforded to the right to life, the Court considers that it cannot be held against the applicant if he afforded the Constitutional Court, as the highest Court in Croatia, the opportunity to take appropriate steps to remedy the alleged failures in the proceedings which had been instituted before the lower courts in respect of the infringement of his sister's right to life. This conclusion is supported by the fact that only by using this remedy did the applicant comply with the principle of exhaustion of domestic remedies in line with the principle of subsidiarity. Therefore, the Government's argument must be rejected.

3. Exhaustion of domestic remedies

(a) The parties' arguments

70. The Government argued that the applicant had failed to exhaust all domestic remedies. The Government considered that the applicant had failed to bring a civil action against Rebro Hospital under the Civil Obligations Act where he could have claimed damages for the alleged

medical malpractice and the death of his sister. That could have also allowed him to lodge a constitutional complaint if he had not succeeded with his civil action.

71. The applicant argued that he had exhausted all domestic remedies. He pointed out that he had had two sets of proceedings at his disposal – civil and criminal – and that he had opted for criminal proceedings. He noted that after the death of his sister he had suffered profound grief that could only have been alleviated by establishing all the circumstances of the case and not by compensation of damages. He also argued that, even if he had not expressly cited Article 2 of the Convention, his complaints both before the Court and before the Constitutional Court had in substance concerned the procedural aspect of Article 2 of the Convention.

(b) The Court's assessment

72. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of resolving directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

73. The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time it requires in principle that the complaints intended to be made subsequently at international level should have been aired before domestic authorities, at least in substance and in compliance with the formal requirements laid down in domestic law (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III; *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006; *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 91, 29 November 2007; and *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 54, 28 July 2009).

74. However, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; and *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005; and *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010).

75. The Court has held, as regards cases of alleged medical negligence, that the positive obligations under Article 2 of the Convention require States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (see *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999; *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; and *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006).

76. In this respect, the Court has held that if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 of the Convention to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may, for instance, also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Šilih*, cited above, § 194).

77. However, even if the procedural obligation under Article 2 of the Convention does not necessarily require the State to provide for criminal proceedings in medical negligence cases, such proceedings could by themselves have fulfilled the requirements of Article 2 of the Convention (*Šilih*, cited above, § 202).

78. This accordingly means that applicants alleging a violation of the positive obligation of Article 2 of the Convention in cases of alleged medical negligence, before bringing their complaints to the Court, must avail themselves of the best means available in the domestic system with which to identify the extent of the doctor's liability for the death of their relative (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 55, ECHR 2002-I).

79. Consequently, if the domestic system allows for more remedies which could in principle, if pursued successfully, be considered as the best way in which to determine the extent of the doctor's liability for the death of their relative, the applicants are obliged to exhaust a remedy which addresses their essential grievance. Use of another remedy which has essentially the same objective and which would not necessarily result in a more effective examination of the case is not required (see *Jasinskis*, cited above, §§ 52-53).

80. The Court notes that in the present case the applicant instituted criminal proceedings in which he, acting as a subsidiary prosecutor after his criminal complaint was rejected by the Zagreb Municipal State Attorney's Office, pursued his claim of medical malpractice resulting in the death of his sister through the courts (see *Šilih*, cited above, §§ 169, 197-199). In

addition, he instituted disciplinary proceedings against the doctor involved in the treatment of his sister by complaining to the Ministry of Health about the circumstances of her medical treatment in the Rebro Hospital.

81. It appears to be common ground that both avenues – the criminal prosecution and the administrative disciplinary proceedings – could in principle, if pursued successfully, have led to the extent of the doctor's liability being established and eventually to the award of appropriate redress and/or publication of the decision (see *Jasinskis*, cited above, § 52, and *Šilih*, cited above, § 194). The Government have failed to demonstrate that the remedy offered by civil proceedings would have enabled the applicant to pursue objectives that are any different from the ones pursued through the use of the aforementioned remedies (see *Jasinskis*, cited above, § 53).

82. The Court therefore considers that in the light of the circumstances of the present case there was no reason for the applicant to institute another set of civil proceedings in addition to the criminal prosecution and the administrative disciplinary proceedings instituted by him.

83. Accordingly, the applicant has exhausted domestic remedies and the Government's objection has to be dismissed.

4. Conclusion

84. The Court notes that this part of the application 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' arguments

85. The applicant argued that during the criminal proceedings before the domestic courts in respect of the alleged medical malpractice and the death of his sister, the domestic courts had failed to commission an independent medical report. In the applicant's view, there had been doubt as to the objectivity and independence of the medical experts who had drawn up the medical report, since both the accused and the experts had been professors of medicine at the same faculty. Moreover, the accused had been a mentor to many physicians over the years and a prominent figure in the Croatian health system. According to the applicant this had resulted in serious flaws in the findings of the experts. However, his objections in that respect had not been thoroughly examined by the domestic courts. The applicant also complained that the requirement of promptness had not been met in the criminal proceedings at issue.

86. The Government argued that the investigation and the proceedings before the domestic authorities in respect of the alleged medical malpractice

and the death of the applicant's sister had been prompt and effective. During the criminal proceedings three separate medical reports had been commissioned by the domestic courts and none of them had suggested any failures in the medical treatment of the applicant's sister. On the contrary, the medical report that had been privately commissioned by the applicant had been drawn up by a doctor who had not been an expert and had been based on incomplete medical documentation. Dr V.B. had been acquitted by the domestic courts on the basis of the reports submitted by sworn court experts, which could not be considered arbitrary action.

2. The Court's assessment

(a) General principles

87. The Court reiterates that the acts and omissions of the authorities in the field of health care may in certain circumstances engage their responsibility under the positive limb of Article 2 of the Convention. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (*Byrzykowski v. Poland*, cited above, § 104).

88. The positive obligations require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (see, among other authorities, *Calvelli and Ciglio*, cited above, § 49).

89. In order to satisfy its positive obligation under Article 2 of the Convention, the State has a duty to ensure, by all means at its disposal, that the legislative and administrative framework set up to protect patients' rights is properly implemented and any breaches of these rights are put right and punished. Therefore, the Court's task is to examine whether there was an adequate procedural response on the part of the State to the infringement of the right to life (see *Konczelska v. Poland* (dec.), no. 27294/08, § 35, 20 September 2011). Moreover, the requirements of Article 2 go beyond the stage of the official investigation, where it has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law and the prohibition of ill-treatment (see *Beganović v. Croatia*, no. 46423/06, § 77, 25 June 2009).

90. A requirement of independence of the effective domestic system set up to determine the cause of death of patients in the care of the medical profession is implicit in this context (see *Byrzykowski*, cited above, § 104). This above all means not only a lack of hierarchical or institutional connection, but also the formal and *de facto* independence of all parties tasked with conducting an assessment as part of proceedings set up to determine the cause of death of patients from those implicated in the events (see, *mutatis mutandis*, *Denis Vasilyev v. Russia*, no. 32704/04, § 148, 17 December 2009).

(b) Application of these principles to the present case

91. The Court notes that the present case concerns the death of a patient receiving health care and which was allegedly caused by medical negligence. In addition, the circumstances of the case were complicated by an allegation that the doctor allegedly responsible for the malpractice and death of the patient had taken bribes and the findings of the disciplinary bodies in that respect (see paragraphs 10-14 above).

92. In such circumstances, and having in mind the fundamental importance of the right to life guaranteed under Article 2 of the Convention, the Court considers that when scrutinising the effectiveness of the domestic system as a whole, and in particular independence of the proceedings set in motion to determine the cause of death of the patient, it must be strict in order to determine whether the system as a whole and the particular proceedings satisfied all of the guarantees required by the Convention (see the approach taken in *Dodov v. Bulgaria*, no. 59548/00, §§ 87-98, 17 January 2008).

93. In the present case the Court has to examine whether the criminal proceedings, which the applicant instituted by lodging a criminal complaint with the Zagreb Municipal State Attorney's Office, and the administrative disciplinary proceedings, instituted by the applicant by complaining to the Ministry of Health, satisfied all the guarantees required by the Convention.

94. As to the criminal proceedings, the Court notes that based on the findings of medical experts J.Š. and B.C. the Zagreb Municipal State Attorney's Office dismissed the applicant's criminal complaint concerning the alleged medical malpractice of Dr V.B. (see paragraph 17 above). The applicant, however, pursued his complaints by lodging an indictment in the Zagreb Municipal Criminal Court against Dr V.B. on charges of medical malpractice. Upon doing so, he challenged the medical report made by J.Š. and B.C. on the grounds of their personal relationship with Dr V.B.

95. In this respect the Court would reiterate that one of the fundamental aspects of the procedural guarantees enjoyed by Article 2 of the Convention is that proceedings capable of determining the cause of death of patients in the care of medical professionals must be conducted with sufficient care so as to ensure the independence of the findings of the experts involved. The

requirement of independence is particularly important when obtaining medical reports from expert witnesses, who must have formal and *de facto* independence from those implicated in the events (see *Barabanshchikov v. Russia*, no. 36220/02, § 59, 8 January 2009, and *Denis Vasilyev*, cited above, § 148). The medical reports of expert witnesses are very likely to carry crucial weight in a court's assessment of the highly complex issues of medical negligence, which gives them a particularly special role in the proceedings (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007).

96. In the present case the Zagreb Municipal Criminal Court commissioned three medical reports. The first medical report was commissioned during the investigation from doctors J.Š. and B.C. of the Zagreb University Medical Faculty; the second medical report was commissioned during the criminal proceedings from M.U., a professor at the Rijeka University Medical Faculty; and the third medical report was commissioned first from J.Š. and B.C., then from two other experts, M.D. and S.J., who were supposed to replace B.C., who had died in the meantime. The medical reports were commissioned with an instruction to the medical experts to examine the circumstances of the treatment and death of the applicant's sister and the actions of the accused, Dr V.B.

97. The Court further notes that in their findings the national authorites relied exclusively on the reports drawn up by doctors J.Š., B.C., M.D. and S.J. Their reports thus played a crucial role in the proceedings because all of the domestic authorities relied on their findings to a decisive degree. The State Attorney's Office, relying exclusively on the findings of J.Š. and B.C., rejected the applicant's criminal complaint against Dr V.B., and the domestic courts, also relying on the reports drawn up by J.Š., M.D. and S.J., acquitted Dr V.B. of the charges of medical malpractice.

98. It is not disputed between the parties that all these medical experts, on whose reports the domestic authorities based their decisions, were professors at the Zagreb University Medical Faculty and that the accused, Dr V.B., was also a professor at the same faculty and a well known medical expert from Zagreb. Furthermore, doctor S.J. worked as the Head of the Pathology Department of the Rebro Hospital. In this respect the Court notes, however, that Article 250 paragraph 2 of the Croatian Code of Criminal Procedure expressly provides that an expert who is employed by the same State authority or by the same employer as the accused or the injured person has to be disqualified.

99. Moreover, the Court notes that the Zagreb Municipal Criminal Court initially refused to accept the medical report by J.Š. and B.C. which was produced during the investigation and commissioned another medical report from the Rijeka University Medical Faculty, relying on Article 250 paragraph 2 of the Code of Criminal Procedure. That court explained that this was necessary in order to "prevent any possible doubt as to the

truthfulness and objectivity of experts from a relatively small professional environment such as Zagreb" (see paragraphs 21 and 26 above).

100. However, the Zagreb County Court, when quashing the first-instance judgment on the grounds that the expert from the Rijeka University Medical Faculty who was intended to replace the experts from the Zagreb University Medical Faculty was not a sworn court expert, ordered that the medical report be commissioned again from the experts at the Zagreb University Medical Faculty, the colleagues of the accused.

101. It is also to be noted that the applicant requested on numerous occasions throughout the proceedings that the medical experts from Zagreb University Medical Faculty be disqualified from the criminal case against their colleague, Dr V.B. However, the domestic courts, without ever asking directly these expert witnesses as to their connection with Dr V.B., dismissed the applicant's motions to disqualify them, saying nothing more than that there was nothing to suggest bias on their part.

102. The Court stresses that what is at stake here is not the content of the medical reports or the question of whether the applicant's sister truly died owing to medical negligence, but the fact that the medical experts in the judicial proceedings were professors at the same Medical Faculty as the accused and as such could not be seen as objectively impartial according to Croatian law. What is at stake is the trust of the public in the criminal justice system, where appearances have a high importance.

103. Furthermore, the Court reiterates that in Article 2 cases concerning medical negligence a requirement of promptness and reasonable expedition is implicit in determining the effectiveness of the domestic proceedings set up to elucidate the circumstances of the patient's death. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays (see *Šilih*, cited above, § 195).

104. In this connection the Court notes that the applicant lodged his criminal complaint with the Zagreb Municipal State Attorney's Office in October 1994, only to have his complaint rejected in February 1998, after more than three years. He then lodged an indictment against Dr V.B. in the Zagreb Municipal Criminal Court on 9 March 1998 and the final judgment in those proceedings was adopted on 24 February 2009 when the Zagreb County Court dismissed the applicant's appeal. The proceedings further continued before the Constitutional Court upon the applicant's

constitutional complaint and ended on 26 November 2009 when that court adopted its decision.

105. The Court is not called upon to determine or to identify what sort of steps the domestic authorities should have taken in the case at hand. Therefore, it confines itself to noting that the criminal proceedings, in view of the fact that they lasted for more than fifteen years, were excessively long and that neither the conduct of the applicant nor the complexity of the case can suffice to explain such length.

106. As to the administrative disciplinary proceedings which the applicant instituted by complaining to the Ministry of Health, the Court notes that the applicant complained about the circumstances of the medical treatment of his sister in the Rebro Hospital. However, the Ministry of Health only opened disciplinary proceedings against Dr V.B. in respect of the allegation that he had taken bribes, without giving any answer about the complaint of medical malpractice.

107. Against the above background, the Court finds that the domestic system as a whole, faced with a case of an allegation of medical negligence resulting in death of the applicant's sister, failed to provide an adequate and timely response consonant with the State's procedural obligations under Article 2 of the Convention.

108. There has accordingly been a violation of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

109. The applicant complained that he had not had an effective domestic remedy in respect of the alleged medical malpractice and the death of his sister. He relied on Article 13 of the Convention, which reads as follows:

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

A. Admissibility

110. The Court considers that this complaint is closely linked to the one concerning the procedural aspect of Article 2 of the Convention and must also therefore be declared admissible.

B. Merits

111. The Court notes that the applicant was able to pursue a criminal prosecution of the doctor allegedly responsible for the death of his sister. The issue of effectiveness of the remedies used has already been addressed in the context of Article 2 of the Convention. In view of its findings under

Article 2 of the Convention, the Court considers that there is no need to examine further the complaint under Article 13 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

112. The applicant also complained under Article 6 of the Convention about the lack of fairness of the criminal proceedings.

113. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. 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

115. The applicant claimed 44,072,32 euros (EUR) in respect of pecuniary damage on the grounds that he had travelled from Rotterdam to Zagreb because of the domestic proceedings, and he had raised his sister's children who had come to live with him in the Netherlands, although their father had stayed in Croatia. The applicant also claimed EUR 30,000 in respect of non-pecuniary damage.

116. The Government considered the applicant's claim excessive, unfounded and unsubstantiated, because there was no causal link between the violations complained of and the applicant's pecuniary claims.

117. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

118. As regards pecuniary damage, the Court notes that the applicant was represented by a lawyer throughout the domestic proceedings and that it was not therefore necessary for the applicant to travel to Croatia because of the proceedings. The Court also considers that he failed to demonstrate any direct causal link between his sister's death and the fact that her children

had come to live with him in the Netherlands. Therefore, as the Court does not see any causal link between the claimed amount and the finding of a violation, the applicant's claim for pecuniary damage is dismissed.

B. Costs and expenses

119. The applicant also claimed EUR 19,024 for costs and expenses incurred before the domestic courts and in the proceedings before the Court.

120. The Government considered that the applicant had failed to substantiate his claim for costs and expenses in any way.

121. 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. As to the criminal proceedings instituted by the applicant before the national authorities, the Court agrees that, as they were essentially aimed at remedying the violation of the Convention alleged before the Court, the domestic legal costs may be taken into account in assessing the claim for costs (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 284, ECHR 2006-V). In the present case, regard being had to the information in its possession and the above criteria, the Court awards the applicant the sum of EUR 6,300 for costs and expenses in the proceedings before the national authorities. As to the Convention proceedings, making its assessment on an equitable basis and in the light of its practice in comparable cases, the Court considers it reasonable to award the applicant, who was legally represented, the sum of EUR 1,600, plus any tax that may be chargeable to the applicant on these amounts.

C. Default interest

122. 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 UNANIMOUSLY

1. *Declares* the complaint concerning Articles 2 and 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of the procedural aspect of Article 2 of the Convention;

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

4. *Holds*

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

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 7,900 (seven thousand nine hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President

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

A.K.
S.N.

CONCURRING OPINION OF JUDGE SICILIANOS

I have voted in favour of finding a violation of the procedural aspect of Article 2 of the Convention in the present case. As the judgment rightly underlines, "in Article 2 cases concerning medical negligence a requirement of promptness and reasonable expedition is implicit in determining the effectiveness of the domestic proceedings set up to elucidate the circumstances of the patient's death" (paragraph 103 of the judgment). In this connection the Court noted that the applicant lodged his criminal complaint with the Zagreb Municipal State Attorney's Office in October 1994 and that the proceedings ended on 26 November 2009, when the Constitutional Court adopted its decision. In other words, the domestic proceedings lasted for more than fifteen years. Neither the conduct of the applicant nor the complexity of the case could explain such length (paragraph 105).

With all due respect to my colleagues, I believe that this finding would have been sufficient and that it was unnecessary to go into the somewhat controversial issue of whether the findings of the experts involved were impartial. In fact the domestic courts commissioned three medical reports (paragraphs 15, 21, 29-30). Five experts and University Professors from both the Zagreb and the Rijeka University Medical Faculties found that there had been no medical malpractice. Furthermore, the expert report submitted by the applicant himself (by a professor in another discipline, namely urology) did not find that there had been malpractice by doctor V.B. It simply stated that "in order to exclude any failures in the postoperative course of treatment, it would be necessary to consult other documentation and make further examinations" (paragraph 25). Moreover, the Zagreb Municipal Criminal Court acquitted doctor V.B. of the charges of medical malpractice not merely on the basis of the impugned medical report, but also by taking into account the witness statements and other relevant medical documentation (paragraph 35). In those circumstances, the impugned judgments of the domestic courts do not disclose any arbitrariness or lack of impartiality. Consequently, the corresponding complaint by the applicant was of a 'fourth-instance' nature and should have been dismissed as manifestly ill-founded.