

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(4), Article 57(2)(b), Article 59(1) and (2) and Article 62(1), (4) and (6) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the appeal of Ms. **S.A.**, in case no. **AP 1101/17**, at its session held on 22 March 2018, adopted the following

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## DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. S.A. against the judgment of the Supreme Court of Republika Srpska no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 in the part relating to the costs of proceedings is hereby granted.

A violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the Supreme Court of the Republika Srpska, no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 are hereby quashed in the part relating to the costs of proceedings.

The case shall be referred back to the County Court in Banja Luka, which is obligated to employ an expedited procedure and to take a new decision in line with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The County Court in Banja Luka is ordered to inform the Constitutional Court, within a time limit of 90 days from the date of delivery of this Decision, on the measures taken to enforce the Decision in accordance with Article 72(5) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Ms. S.A. against the judgment of the Supreme Court of the Republika Srpska, no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 and the judgement of the Basic Court in Banja Luka no. 71 0 P 025573 97 P of 10 May 2013 is hereby rejected in the part relating to compensation for non-pecuniary damages as manifestly (*prima facie*) ill-founded.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## REASONING

### I. Introduction

1. On 25 March 2017, Ms. S.A. (“the appellant”) from Živinice, represented by Ms. Nedžla Šehić, a lawyer practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the judgment of the Supreme Court of the Republika Srpska (“the Supreme Court”), no. 71 0 P 025573 16 Rev 2 of 4 January 2017, the judgment of the County Court in Banja Luka (“the County Court”) no. 71 0 P 025573 14 Gž of 29 May 2014, and the judgment of the Basic Court in Banja Luka (“the Basic Court”) no. 71 0 P 025573 97 P of 10 May 2013. The appellant also requested that the Constitutional Court issue an

interim measure, whereby the Constitutional Court would suspend the procedure of compulsory collection of costs in favour of the Republika Srpska Attorney's Office ("the RS Attorney's Office") and decide that such measure "would be applied in all other proceedings initiated for the collection of costs of representation of the Attorney's Offices in Bosnia and Herzegovina (Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in the cases related to compensation of damages caused by war crimes". On 11 July 2017, the appellant submitted a supplement to the appeal.

## **II. Procedure before the Constitutional Court**

2. Pursuant to Article 23(2) and (3) of the Rules of the Constitutional Court, on 4 September 2017 the Supreme Court, the County Court and the Basic Court and the RS Attorney's Office were requested to submit their respective replies to the appeal.

3. The Supreme Court submitted its reply to the appeal on 6 September, the County Court did so on 12 September, and the RS Attorney's Office submitted its response to the appeal on 7 September 2017. The Basic Court failed to submit its reply to the appeal.

## **III. Facts of the Case**

4. The facts of the case, as they appear from the appellant's assertions and the documents submitted to the Constitutional Court, may be summarized as follows:

5. On 23 May 2007, the appellant filed a complaint before the Basic Court against the Republika Srpska ("the respondent") whereby she requested compensation for non-pecuniary damages in the total amount of BAM 50,000, as between 11 July 1992 and 21 May 1993 she had been detained in the camps and prisons, where she had been exposed to torture and inhuman treatment. Deciding on this statement of claim, the courts in all three instances dismissed the appellants claim as being statute barred. Namely, the courts concluded in all three of the challenged judgements that the time-limit for compensation of damages under Article 377(1) of the Law on Obligations, to which the appellant referred, is applied only in case where the request for compensation of damage relates to an identified perpetrator of criminal offence that caused the relevant damage and when the existence of criminal offence and criminal liability is established by the binding convicting judgement in respect of that person. However, in the present case, the appellant directed her statement of claim against the respondent as a legal entity whose liability is based "on the liability of another, and not on its direct liability as a perpetrator of the criminal

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offence in terms of Article 154(1) of the Law on Obligations”. Therefore, according to the position of courts in the challenged judgements, Article 376 of the Law on Obligations is to be applied in the particular case under which the claim for compensation of caused damage expires in three years after the injured party found out about the damage and about the person who caused the damage, and in any case, this claim expires in five years from the date when the damage was inflicted. The courts took into account that the state of war was terminated by the decision of the National Assembly of the Republika Srpska on 19 June 1996, thus concluding that as of that date the statute of limitation period, which was suspended during the war, started to run again. Given that the lawsuit was lodged on 23 May 2007, thus, after the expiry of time limits set forth in Article 376 of the Law on Obligations, the courts concluded that the claim became time-barred.

6. In addition, by the judgement of the Basic Court under no. 71 0 P 025573 97 P of 10 May 2013 the appellant is obliged to compensate the respondent for the costs of proceedings in the amount of BAM 3,000.00 with the statutory default interest as of the date of judgement to the date of settlement in full, while the respondent’s request for compensation of the costs of proceedings “in a remaining part relating to the difference between the requested and the awarded amount” is dismissed. In the reasoning of the judgement the Basic Court stated that the respondent has the right to compensation of the costs of proceedings in accordance with Article 386(1) of the Civil Procedure Code (“the CPC”) since the appellant did not succeed with her claim against the respondent. Furthermore, the court stated that it exempted the appellant from paying a court fee, upon her request, given that it established that she was unemployed, that she was in a “difficult financial situation, and it especially took into account the subject-matter of the particular dispute as well as the value appropriate for the collection of court fee”. The Basic Court concluded that “it is beyond dispute that the funds the plaintiff has for her sustenance would be reduced by the payment of court fees to such an extent that it would endanger her social security”. However, the Basic Court obliged the appellant to compensate the respondent for the costs of proceedings in the total amount of BAM 3,000.00 which was assessed on the basis of the Tariff for Lawyers’ Fees and Costs (*Official Gazette of the Republika Srpska*, 68/05) (“the Tariff”), including the preparation of the complaint and the participation of the respondent’s legal representative in three hearings with a lump-sum fee”.

7. Deciding on the appeal, in the judgement no. 71 0 P 025573 14 Gž of 29 May 2014, the County Court concluded, *inter alia*, that the costs of proceedings were correctly determined and that the RS Attorney’s Office, pursuant to Article 395 of the RS CPC, was entitled to the costs in accordance with the Tariff and “the specified request of the respondent”.

8. By the challenged judgement no. 71 0 P 025573 16 Rev 2 of 4 January 2017, the Supreme Court dismissed the appellant's revision-appeal without offering specific reasons for dismissing the allegations in the revision-appeal with regard to the costs of proceedings.

#### **IV. Appeal**

##### **a) Allegations in the appeal**

9. The appellant holds that the challenged judgements are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as well as the right to effective legal remedy under Article 13 of the European Convention.

10. Firstly, the appellant presents at length the reasons to hold that the courts erroneously evaluated that her claim was time-barred and that the challenged decisions were therefore unlawful because the "party to the hostilities (Republika Srpska) is liable for all the acts committed by persons who were members of its armed forces or persons who, although not being an immediate perpetrator, were responsible for the actions of armed forces". In addition, the appellant points out that in this manner she was "deprived of the access to court to obtain just compensation from the liable person (State-Entity), which she is entitled to in accordance with law and the positions previously taken by the Constitutional Court of Bosnia and Herzegovina".

11. Moreover, the appellant challenges the decisions on the costs of proceedings and makes reference to the judgement of the European Court of Human Rights ("the European Court") in *Cindrić and Bešlić v. Croatia*. The appellant especially points out that in the relevant decision the European Court established that the order imposed on the applicants by the domestic courts to pay the costs of the State's representation in the civil proceedings in which they sought damages in connection with the killing of their parents, according to the tariff applicable to attorneys, had violated their right to property and had infringed their right of access to a court under Article 6(1) of the European Convention. Consequently, the appellant proposes the Constitutional Court to grant the appeal, establish a violation of the aforementioned rights, and refer the case back for retrial with an instruction for taking a new decision in an expedited procedure.

12. In her motion for an interim measure, the appellant points out that the interim measure would be necessary as in Bosnia and Herzegovina numerous enforcement procedures have been

pending for the enforced collection of awarded litigation costs relating to the RS Attorney's Office representation in judicial disputes for compensation of damages caused by war crimes and that the RS Attorney's Office "has already sent a letter to the appellant requesting her to settle those costs". In addition to the supplement to the appeal, the appellant enclosed the ruling of the Municipal Court in Živinice no. 33 0 P 0783088 17 I of 19 June 2017, dismissing her objection lodged against the ruling allowing the enforcement of 7 March 2017. In her appeal, the appellant did not challenge this ruling allowing the appeal but she indicated that, in the objection filed against that ruling, she referred to the above mentioned judgement of the European Court and that the Municipal Court in Živinice stated that the relevant judgement of the European Court could not be directly applied in the enforcement procedure and that the procedure cannot be terminated based on that judgment, "as in that way the enforceable document is actually contested and the relevant judgement can be applied only in civil proceedings". For that reason, the appellant maintained her request for the expedited issuance of the interim measure, stating that without it the enforcement would be carried out "irrespective of the fact that it is obviously contrary to [the European Convention], and the mere subsistence of the appellant, whose standard of living is already on the edge of subsistence, would be additionally threatened.

#### **a) Responses to the Appeal**

13. In their responses to the appeal, the Supreme Court and the County Court state that they maintain their factual and legal conclusions referred to in the reasoning of their judgements and that they hold that there is no violation of the rights referred to by the appellant.

14. The respondent, through the RS Attorney's Office, disputed the allegations presented in the appeal and pointed out that there is no violation of the rights referred to by the appellant. In the remaining part of the reply, the RS Attorney's Office underlines that "the appellant's right to a hearing within a reasonable time have not been violated" and that the "County Court in Banja Luka undertook all necessary measures to secure that the cases are decided within a reasonable time".

#### **V. Relevant Law**

15. The **Law on Obligations** (*Official Gazette of SFRY, 29/78, 39/85, 45/89 and 57/89, Official Gazette of Republika Srpska, 17/93, 3/96, 39/03 and 74/04*), as relevant, reads:

*Claim for compensation of damage*

*Article 376(1) and (2)*

*(1) Claim for compensation of caused damage expires in three years after the injured party found out about the damage and about the person who caused the damage.*

*(2) In any case, this claim expires in five years from the date when the damage was inflicted.*

*Claim for compensation of damage caused in a criminal offence*

*Article 377*

*(1) When the damage is caused in a criminal offence, and a longer limitation period is anticipated for prosecution for criminal offence, the request for compensation of damage addressed to the competent person expires with the end of time period determined for limitation period of prosecution for criminal offence.*

*(2) The interruption of prosecution for criminal offence also implies the suspension of prescription relating to the request for compensation of damage.*

*(3) The same rule applies to the suspension of prescription.*

16. **The Civil Procedure Code of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), in the relevant part, reads:

*Article 386(1)*

*The party that has lost the litigation entirely shall be obliged to compensate the costs to the adverse party.*

*[...]*

*Article 387(1) and (2)*

*When deciding on the costs which shall be to the party, the court shall take into account only the costs necessary for conducting the litigation. When deciding which costs have been necessary and the amount thereof, the court shall thoroughly evaluate all circumstances.*

*If there is a prescribed tariff for remuneration for the work of attorneys or for other costs, the costs shall be measured up according to the tariff.*



[...]

*Article 395*

*Provisions on expenses shall be applied to the parties represented by the Attorney's Office and the Free Legal Aid Centre.*

*The costs of the litigation under paragraph 1 of this Article shall include the costs in accordance with the Tariff for remuneration for the work of attorneys in the Republika Srpska.*

*Article 396(1)*

*At the specific request of the party, the court shall decide on the compensation of costs, without holding the hearing.*

[...]

*Article 400*

*The court shall exempt a party from paying the costs of proceedings if, according to his/her general financial situation, the party cannot compensate the costs without jeopardizing the necessary support of him/herself and his/her family.*

*Exemption from paying the costs of proceedings shall include exemption from paying court taxes and depositing advance payment for the costs of witnesses, experts, on-the-spot investigation, translation and interpretation and court advertisements. The court may exempt a party from paying all or a part of costs of the proceedings.*

*Article 401*

*When making ruling on exemption from paying the costs of proceedings, the court shall carefully consider all circumstances, especially the value of the dispute, number of persons supported by the party and income of the party and the family members.*

*Article 402*

*The ruling on exemption from paying the costs of proceedings shall be rendered by first instance court at the party's motion.*

*The party shall be obliged to submit proof of financial situation, including means, with the motion.*

*When necessary, the court may ex officio obtain and provide the necessary information about the financial situation of a party requesting exemption and also it may hear the adverse party thereof. (...)*

## **VI. Admissibility**

### **Formal Requirements for Admissibility**

17. In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

18. In accordance with Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

19. In the present case, the subject-matter of the appeal is the judgment of the Supreme Court no. 71 0 P 025573 16 Rev 2 of 4 January 2017, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgement on 24 January 2017, and the appeal was filed on 25 March 2017, *i.e.* within a time limit of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) of the Rules of the Constitutional Court, for there is no formal reason rendering the appeal inadmissible.

20. However, considering the issue of whether the appeal is manifestly (*prima facie*) ill-founded, which is the admissibility requirement under Article 18(4) of the Rules of the Constitutional Court, the Constitutional Court considers that, given its jurisprudence in the same or similar cases, *prima facie* admissibility of the appellate allegations on the compensation of non-pecuniary damage should be assessed separately from those related to the awarded costs of proceedings.

### ***Prima Facie* Admissibility**

21. When deciding on *prima facie* admissibility regarding part of the challenged judgements related to the decision on compensation of damages, the Constitutional Court invoked the provisions of Article 18(4) of the Rules of the Constitutional Court.

22. Article 18(4) of the Rules of the Constitutional Court reads:

*The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that there is no justified request of the party to the proceedings, or that the presented facts cannot justify the allegation of the existence of a violation of the rights safeguarded by the Constitution and/or when the Constitutional Court establishes that the party to the proceedings has not suffered the consequences of a violation of the rights safeguarded by the Constitution, so that the examination of the merits of the appeal is superfluous.*

23. In examining the admissibility of the appeal, the Constitutional Court must establish, *inter alia*, whether the requirements for consideration of the merits listed in Article 18(4) of the Rules of the Constitutional Court have been satisfied. In that regard, the Constitutional Court indicates that, according to its own jurisprudence and the case-law of the European Court of Human Rights, the appellant must specify violations of his/her rights safeguarded by the Constitution of Bosnia and Herzegovina and these violations must be deemed probable. An appeal is manifestly ill-founded if it lacks *prima facie* evidence, indicating with sufficient clarity that the alleged violation of human rights and freedoms is possible (see ECHR, *Vanek vs. Slovakia*, Judgment of 31 May 2005, Application no. 53363/99, and Constitutional Court, Decision no. *AP-156/05* of 18 May 2005), or if the facts in respect of which the appeal is filed manifestly do not constitute a violation of rights referred to by the appellant, *i.e.* the appellant does not have an “arguable claim” (see, ECHR, *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat v. Hungary*, Judgment of 26 July 2005, Application no. 5503/02), or if it is established that the appellant is not a “victim” of violations of the rights safeguarded by the Constitution of Bosnia and Herzegovina.

24. The Constitutional Court notes that the appellant holds that a violation the rights referred to by the appellant in this part of challenged judgements is a result of an arbitrary application of the substantive law, *i.e.* of the provisions of Article 376 of the Law on Obligations, which stipulates the general limitation periods for bringing claims for compensation for damages. Namely, the appellant holds that the provisions of Article 377 of the Law on Obligations, which stipulates the particular limitation periods where damages are caused by a criminal offence,

should have been applied, regardless of the fact that the defendant is the Republika Srpska and not an immediate perpetrator.

25. However, the Constitutional Court points out that it has considered a number of cases carrying the similar factual and legal issues, *inter alia*, in case no. AP 4288/11 (see, Constitutional Court, Decision on Admissibility and Merits no. *AP-4288/11* of 9 December 2014, available at [www.ustanisud.ba](http://www.ustanisud.ba)), where the Constitutional Court referred to its jurisprudence established in the Decision no. *AP-4128/10* (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP-4128/10* of 28 March 2014, available at [www.ccbh.ba](http://www.ccbh.ba)). In the aforementioned decision *AP-4288/11*, the Constitutional Court recalled that according to the opinion of the European Court, the existence of the statute of limitations is not, *per se*, incompatible with the European Convention. What is important to establish is whether the nature of the time-limit concerned and/or the manner in which it had been applied were compatible with the European Convention, *i.e.* that the application of the statutory limitation periods may be regarded as foreseeable for the applicants, having regard to the relevant legislation and the particular circumstances of the case. The Constitutional Court also took into account that in the case *Baničević v. Croatia* the European Court observed that Article 377 of the Law on Obligations provides for a longer statutory limitation period for claims for damages if the damage was caused by a criminal offence. This longer statutory limitation period, as reasoned by the European Courts of human Rights, thus operates in favour of the victims of crime, allowing them to claim compensation within the longer statutory time-limit prescribed for the criminal offence at issue. However, according to the established case-law of domestic courts, this statutory limitation period is applicable only where it has been established by a final judgment of the criminal court that the damage was caused by a criminal offence (*idem*, *AP- 4288/11*, paragraphs 25-26). In addition, as to the appellant's reference to the Decision of the Constitutional Court no. *AP-289/03* of 19 November 2004, the Constitutional Court emphasizes that this court decides on the circumstances on a case-by-case basis, and by considering the circumstances of the case at hand, it has established that there was no arbitrary application of the substantive law, as was already reasoned (*idem*, *AP-4128/10*, paragraph 45).

26. In view of the above, the Constitutional Court indicates in the aforementioned decisions that the ordinary courts established that the lawsuit for compensation for damages caused by an unlawful deprivation of liberty was filed by the appellant outside the statutory time limits set forth in Article 376 of the Law on Obligations and that it could not be said that the courts' stance was arbitrary that the provision of Article 377 of the Law on Obligations may be applied solely

to the perpetrator of a criminal offense and not to a third person who is generally held responsible for the damage rather than the factual perpetrator of a criminal offense and, therefore, only the provision of Article 376 of the Law on Obligations may be applied to the third person. Therefore, the time limits referred to in Article 377 of the Law on Obligations are solely applicable to the perpetrator of a criminal offense, who is responsible for the damage under the principle of subjective liability (culpability), and not to third persons who may be liable for the damage instead of the factual perpetrator of the criminal offense under the principle of assumed responsibility (more details *ibid*, AP-4288/11, paragraphs 29-34).

27. Following the above case-law, in a number of subsequent decisions the Constitutional Court concluded that the allegations on a violation of the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention and the right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, in the situations identical or similar to the one in the present appeal, are manifestly (*prima facie*) inadmissible (see, the Constitutional Court, Decision on Admissibility and Merits in the case no. AP-3250/12 of 16 September 2015, AP-1137/14 of 10 November 2015, AP-1023/13 of 16 March 2016, AP-5460/14 of 11 January 2017, and others, all available at [www.ustavisud.ba](http://www.ustavisud.ba)).

28. In the particular case, the Constitutional Court holds that a different conclusion cannot be reached and, as an alternative to the repetition of the same detailed arguments already presented in its prior decisions, refers the appellant to the aforementioned case-law. In view of the above and the consistent case-law of the European Court of Human Rights and the Constitutional Court, and the positions stated in the present decision, the Constitutional Court considers that there is nothing to indicate that the appellant's allegations relating to the dismissal of her claim for compensation of non-pecuniary damage in the case at hand would raise the constitutional issues to which she referred, *i.e.* there is nothing that suggests that the appellant has an "arguable claim" in terms of Article 18(4) of the Rules of the Constitutional Court. The Constitutional Court, therefore, concludes that the allegations on the violation of the right to a fair trial and the right to property with regard to the compensation of non-pecuniary damage are manifestly (*prima facie*) ill-founded.

29. Furthermore, as regards the appellant's allegations on the violation of the right to an effective remedy referred to in Article 13 of the European Convention, the Constitutional Court points out that the appellant failed to explicitly indicate the rights in connection with which the right under Article 13 of the European Convention was violated. However, it may be concluded on

the basis of her appeal that the allegations on the violation of this right are brought into connection with the right to a fair trial and the right to property. In this respect, the Constitutional Court notes that the appellant had and used the possibility to lodge legally prescribed remedies in civil proceedings. The fact that those remedies have not resulted in the appellant's success in the civil proceedings cannot lead to the conclusion on absence of or ineffectiveness of such legal remedies and the Constitutional Court, therefore, concludes that the allegations on the violation of the right to an effective remedy are manifestly (*prima facie*) ill-founded as well.

30. On the other hand, in assessing *prima facie* admissibility of the allegations in the appeal related to the award of costs in the proceedings, the Constitutional Court observes that the appellant based her allegations on the violation of the right to a fair trial (access to a court) and the right to property on the relevant case-law of the European Court of Human Rights and that she presented arguments which cannot be considered manifestly unfounded. Taking into account all circumstances of the present case, the Constitutional Court holds that it cannot be said that the appeal in this part is manifestly (*prima facie*) ill-founded, and it will examine the merits thereof.

## VII. Merits

31. The appellant challenges the aforementioned judgments in the part relating to the awarded costs of the proceedings, claiming that the obligation imposed on her to compensate the respondent for the costs of the proceedings calculated according to the Attorneys' Tariff have violated her right of access to a court as part of the right to a fair trial and the right to property referred to in Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and Article 1 of Protocol No. 1 to the European Convention as well as the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

### Right to property

32. Article II(3)(k) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

[...]

1 (k) *The right to property.*

33. Article 1 of Protocol No. 1 to the European Convention, in the relevant part, reads:

*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.*

[...]

34. The appellant's allegations refer to the order obliging her to pay the costs of the RS Attorney's Office in accordance with the Attorneys' Tariff. It is, therefore, beyond dispute that this concerns the appellant's "property" in terms of Article 1 of Protocol No. 1 to the European Convention and the interference with her right to peaceful enjoyment of property.

35. Further, the Constitutional Court reiterates that Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph of the same Article, recognizes that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected. The second and third 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, the European Court, *Sporrong and Lönnorth v Sweden*, Judgment of 23 September 1982, Series A, no. 52, paragraph 61). In the particular case, the Constitutional Court will examine the case in the light of the general rule under the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the European Convention (see, the European Court, *Cindrić and Bešlić v. Croatia*, Judgement of 6 September 2016, paragraph 92).

36. In addition, in order for an interference with the peaceful enjoyment of property to be justified, it must be not only lawful as prescribed by the European Convention but it must serve a legitimate aim in the public interest and must, also, maintain a reasonable proportionality between the means employed and the aim pursued. The interference with the right to property must not go

beyond that which is necessary to achieve a legitimate aim and the holders of the right should not be subjected to an arbitrary treatment or required to bear an excessive burden in the realization of legitimate aim (see, the European Court, *Sunday Times v. The United Kingdom*, Judgement of 26 April 1979, Series A, no. 30, paragraph 49 and *Malone v. The United Kingdom*, Judgement of 2 August 1984, Series A, no. 82, paragraphs 67 and 68).

*Lawfulness of interference*

37. In the present case, the Constitutional Court observes that the interference with the appellant's property is prescribed by the Civil Procedure Code of the Republika Srpska, which satisfies all requirements of "lawfulness" in terms of Article 1 of Protocol No. 1 to the European Convention: the law was published and available and the provision applied is clear and precise. Furthermore, the appellant did not dispute the lawfulness of the provision on the basis of which she was obliged to reimburse the costs of proceedings, but the application of the relevant provision in her particular case. The Constitutional Court, therefore, has no reason to conclude that the interference with the appellant's property was not lawful, as required under Article 1 of Protocol No. 1 to the European Convention (*op. cit. Cindrić and Others*, paragraph 93).

*Existence of legitimate aim*

38. The next issue to address is whether the interference with the appellant's peaceful enjoyment of property had a legitimate aim. In this connection, the Constitutional Court notes that the provision of Article 386(1) of the RS CPC comprises a general rule that party that has lost a litigation shall be obliged to reimburse the costs of proceedings, *i.e.* the unsuccessful party has to pay the successful party's costs. In addition, under Article 395(1) and (2) the same rule is also applied in the case where the party is represented by the Attorney's Office, and the costs are calculated in accordance with the lawyers tariff where the fees are in principle calculated in relation to the value of the subject-matter of the dispute, and the value of the dispute generally corresponds to the amount the plaintiff requests by his/her statement of claims.

39. The Constitutional Court points out that the European Court of Human Rights in above cited case *Cindrić and Others* noted that the rationale behind the "loser pays" rule is to avoid unwarranted litigation and unreasonably high litigation costs by dissuading potential plaintiffs from bringing unfounded actions without bearing the consequences. The European Court of Human Rights considers that, by discouraging ill-founded litigation and excessive costs, those rules generally pursue the legitimate aim of ensuring the proper administration of justice and protecting



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the rights of others and that, therefore, the “loser pays” rule cannot in itself be regarded as contrary to Article 1 of Protocol No. 1 to the European Convention (*op. cit. Cindrić and Others*, paragraph 96 with further references). In addition, the European Court also points out that this view is not altered by the fact “that those rules also apply to civil proceedings to which the State is a party, thus entitling it to recover from an unsuccessful party the costs of its representation. The State should not be considered to have limitless resources and should, like private parties, also enjoy protection from ill-founded litigation” (*idem.*).

40. In view of the above positions of the European Court of Human Rights, the Constitutional Court holds that the order to the appellant to reimburse the costs of the proceedings in the particular case pursued a legitimate aim. The Constitutional Court will continue with the consideration of the crucial issue – whether a fair balance was struck between the general interest and the appellant’s right under Article 1 of Protocol No. 1 to the European Convention.

*Proportionality between the interference with the right to property and a legitimate aim*

41. As already stated above, any interference must achieve a “fair balance” between the demands of the general interest of the community (legitimate aim) and the requirement of protecting the individual’s fundamental rights and that is not possible to achieve if the person concerned had to bear a “disproportionate and excessive burden” (see, the European Court, *James and Others v. the United Kingdom*, Judgement of 21 February 1986, Series A, no. 98, paragraphs 46 and 50). In assessing compliance with Article 1 of Protocol No. 1 to the European Convention, the European Court underlined that it must make an overall examination of the various interests in issue, bearing in mind that the European Convention is intended to safeguard rights that are “practical and effective”. That further means that the Court “must look behind appearances and investigate the realities of the situation complained of” (*op. cit. Cindrić and Others*, paragraph 98 with further references).

42. The Constitutional Court recalls that the European Court of Human Rights in the case *Cindrić and Others v. Croatia* (paragraph 99) stated that the central issue in that case concerns the fact that the applicants were ordered to reimburse the costs of the State’s representation by the State Attorney’s Office in an amount equal to an attorneys’ fee, because their claim for damages in connection with the killing of their parents had been dismissed in its entirety on the grounds that the State was not liable for damage resulting from the killings committed on the territory of the Krajina, which at the material time had been outside the control of the Croatian authorities. Further, the Court emphasized that the applicants did not challenge the rule contained in the Civil Procedure Act

but they rather claimed that the manner in which the rule was applied in the particular circumstances of their case had placed an excessive individual burden on them (paragraph 100).

43. The Constitutional Court observes that the crucial issue indicated by the appellant in the present case is that she was ordered to compensate the costs of the proceedings in respect of the representation of public authority by the RS Attorney's Office in the full amount equal to the attorney's fee. Similar to the conclusions made by the European Court in the case *Cindrić and Others*, the Constitutional Court also notes that under Article 386(1) of the RS CPC there is no flexibility whatsoever in relation to the obligation of the party that lost the litigation to compensate the costs to the adverse party. Namely, that provision prescribes that "the party that has lost the litigation entirely shall be obliged to compensate the costs to the adverse party". In addition, as already stated, under Article 395(1) and (2), the provisions regulating the costs are also applied "to the parties represented by the Attorney's Office", and those costs include "all costs and fees in accordance with [the lawyers tariff]".

44. Turning back to the case *Cindrić and Others v. Croatia*, the Constitutional Court recalls that the European Court (paragraph 103), *inter alia*, underlined that the applicants brought their claim for non-pecuniary damage under the Liability Act. That Act provides that the State is liable for damage resulting from death caused by "acts of terrorism or other acts of violence committed with the aim of seriously disturbing public order by provoking fear or stirring up feelings of insecurity in citizens". After listing the jurisprudence of the Supreme Court which, during the same period when the applicants lodged their lawsuits, granted a number of identical claims, the European Court concluded (paragraph 107) that it cannot therefore be said that the applicants' civil action against the State was devoid of any substance or manifestly unreasonable. The applicants' view that the damage caused to them by the killing of their parents was covered by the Liability Act was not unreasonable, since at that time it was not possible for the applicants to know whether the killing of their parents would be regarded as a terrorist act or as war-related damage.

45. In the case at hand, the Constitutional Court reemphasize that the appellant lodged the lawsuit in which she presented the claim for compensation of non-pecuniary damage that she suffered as a victim of war crime. In the conducted proceedings it is established beyond reasonable doubt that the appellant has a status of camp inmate in Bosnia and Herzegovina because she was detained in the camp in the period between 11 July 1992 and 21 May 1993, but her claim is statute barred given that she filed her lawsuit on 23 May 2007 and the time limit for the statute of limitations started to run as of 19 June 1996. Furthermore, the courts concluded that the longer statute of limitations period under Article 377 of the Law on Obligations cannot be applied in the

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appellant's case but only in the case of immediate perpetrator of the criminal offence sentenced by a legally binding judgement. In this connection, the Constitutional Court has already indicated in this decision that it consistently takes the same position on a compensation claim for non-pecuniary damage that is statute-barred in such or similar cases is concerned. Furthermore, the Constitutional Court points out that the appellant's allegations are correct that courts in the Federation of Bosnia and Herzegovina, at the time when she filed her lawsuit, were granting such requests, while courts in the Republika Srpska were dismissing such claims. However, the case-law of the courts in the Federation of Bosnia and Herzegovina was subsequently modified and the new stances of the Constitutional Court followed, as reasoned above (see paragraphs 25-27 of the present Decision).

46. In view of the above and given the similar conclusions by the European Court of Human Rights in the case of *Cindrić and Others v. Croatia*, the Constitutional Court considers that it cannot be said that the appellant's lawsuit at the time of filing the claim against the respondent "was devoid of any substance or manifestly unreasonable", as the courts in Bosnia and Herzegovina took different positions as to the application of Article 377 of the Law on Obligations to the public authorities (*mutatis mutandis, op. cit., Cindrić and Others*, paragraph 107). In addition, the Constitutional Court also notes that the first instance court exempted the appellant from payment of court fees with the reasoning that she "is in a difficult financial situation, and especially evaluated the subject matter of the dispute as well as the value adequate for the collection of fee", and "it is beyond dispute that the funds the appellant has for her sustenance would be reduced by the payment of court fees to such an extent that it would endanger her social security". However, at the same time, the first instance court obliged the appellant to pay the Republika Srpska, represented by the RS Attorney's Office, the full amount of the costs of the other party to the proceedings, *i.e.* BAM 3,000.00, assessed on the basis of the Attorneys' Tariff. In this respect, the Constitutional Court especially points out that the RS Attorney's Office is financed from the Republika Srpska budget and, therefore, is not in the same position as an attorney, as well as that the full amount of the costs awarded is not trivial, especially given the appellant's financial situation on the basis of which the first instance court exempted the appellant from payment of court fees. Taking into account the aforementioned as well as the specific circumstances of the particular case, and especially the fact that, at the time the appellant lodged her lawsuit, the jurisprudence of the courts in Bosnia and Herzegovina was different with regard to the application of Article 377 of the Law on Obligations, related to a longer limitation period and, therefore, the appellant could expect to succeed in the proceedings on her claim, the Constitutional Court holds that the payment of the costs of proceedings in full, as ordered by the courts in the present case, amounts to an excessive burden on the appellant, which is disproportionate to a legitimate aim sought to be achieved.

47. The Constitutional Court, therefore, establishes that the appellant's right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated.

### **Right to a fair trial**

48. The appellant considers that ordering her to bear the full costs of the proceedings, as determined by the challenged judgements, amounts to a violation of her right of access to a court, as part of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

49. Article II(3) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

*(...)*

*e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

Article 6(1) of the European Convention, in the relevant part, reads:

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

50. The Constitutional Court points out that Article 6(1) of the European Convention secures to everyone the right to have any claim relating to his/her civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the "right to a court", of which the right of access to a court, that is, the right to institute proceedings before a court in civil matters, is one aspect. The right of access to a court is not absolute but may be subject to limitations. As the European Court indicated in its case-law, these limitations are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals". In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) of the European Convention if it does not pursue a legitimate aim

and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*op. cit.*, *Cindrić and Others*, paragraphs 116-117 with further references; also *mutatis mutandis*, the Constitutional Court, Decision on Admissibility and Merits no. AP-774/04 of 20 December 2005, paragraphs 417-418, published in the *Official Gazette of Bosnia and Herzegovina* no. 39/06).

51. In the present case, the Constitutional Court accepts that ordering the appellant to pay the costs of the Republika Srpska representation under the Lawyers' Tariff may be interpreted as a restriction hindering the right of access to a court (see, *op. cit.*, *Cindrić and Others*, paragraph 119 with further references). In this connection, the Constitutional Court points out that in the examination of the right to property it has already established that the "loser pays" rule, *i.e.* the one who lost the litigation is obliged to reimburse the costs of proceedings to the adverse party, pursues the legitimate aim of ensuring the proper administration of justice and protecting the rights of others by discouraging ill-founded litigation and excessive costs of proceedings (see paragraph 39 above). Furthermore, as to the question whether such a limitation is proportionate to the legitimate aim pursued, the Constitutional Court refers to its findings in respect of Article 1 of Protocol no. 1 to the European Convention. On the same grounds on which it established the violation of Article 1 of Protocol No. 1 to the European Convention in the particular case, the Constitutional Court reiterates that the order to the appellant to pay the full amount of costs of proceedings to the RS Attorney's Office, as the representative of the respondent Republika Srpska in the instant case, evaluated on the basis of Lawyers' Tariff, amounts to the disproportionate limitation of the appellant's right of access to a court.

52. The Constitutional Court, therefore, holds that the appellant's right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention has been violated.

### **VIII. Conclusion**

53. The Constitutional Court concludes that the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and the right of access to a court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention have been violated where the appellant is obliged to pay the full amount of costs of proceedings to the RS Attorney's Office, which represented the Republika Srpska as respondent party in the

proceedings for compensation of non-pecuniary damages suffered by the appellant as a victim of war crime, where the costs are evaluated in the full amount on the basis of Attorney's Tariff, as such a decision of the court places a disproportionate burden on the appellant in the circumstances of the particular case.

54. Having regard to Article 18(4), Article 59(1) and (2) and Article 62(1), (4) and (6) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the Decision.

55. Given the decision of the Constitutional Court in this case, it is not necessary to consider separately the appellant's request for interim measures.

56. Having regard to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions