

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević,

Having deliberated on the appeal of **Mr. Mustafa Karahasanović et al.** in case no. **AP 4128-10**, at its session held on 28 March 2013, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **Messrs. Mustafa Karahasanović, Alija Karahasanović, Hasan Karahasanović and Ibro Karahasanović** against the Judgment of the Supreme Court of the Republika Srpska, no. 118 0 P 000039 09 Rev of 19 August 2010, is dismissed as 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 21 September 2010, Messrs. Mustafa Karahasanović, Alija Karahasanović, Hasan Karahasanović and Ibro Karahasanović ("the appellants"), represented by Mr. Idriz Kamenica, a lawyer practicing in Sarajevo, lodged 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. 118 0 P 000039 09 Rev of 19 August 2010.

### II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court, the County Court in Trebinje ("the County Court"), the Basic Court in Foča ("the Basic Court") and the Public Attorney's Office of the Republika Srpska, which represented Republika Srpska and the Municipality of Foča in the proceeding ("the defendants"), were requested on 18 October 2013 to submit their respective replies to the appeal.

3. The Basic Court and the Supreme Court submitted their respective replies to the appeal on 28 and 30 October 2013 respectively. The defendants submitted their reply to the appeal on 30 October 2013.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal of the Basic Court, the Supreme Court and the defendants were submitted to the counsel for the appellants on 4 November 2013.

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

5. 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.

6. The Judgment of the Basic Court in Foča no. 094-0-P-07-000 147 of 31 January 2008 obligated the defendants to pay jointly to the appellants the compensation for non-pecuniary damage, as follows: the amount of BAM 5,000.00 to each of the appellants in respect of the mental pain resulting from the death of father Nurko Karahasanović, the amount of BAM 5,000.00 to each of the appellants in respect of the mental pain resulting from the death of mother Sabiha Karahasanović, the amount of BAM 2,000.00 to each of the appellants in respect of the mental pain resulting from the death of brother Juso Karahasanović, the amount of BAM 2,000.00 to each of the appellants in respect of the mental pain resulting from the death of sister Sajma Karahasanović, the amount of BAM 2,000.00 to each of the appellants in respect of the mental pain resulting from the death of brother Halil Karahasanović, which amounts to BAM 64,000.00 in total, along with the statutory default interest applicable from 5 September 2007, as the day the lawsuit was filed with the court, up until the final payment has been made (paragraph 1 of the judgment). The defendants are obligated to reimburse to the appellants the costs of the proceedings in the amount of BAM 1,283.25 within 30 days from the day the judgment became legally binding (paragraph 2 of the judgment). The appellants' claim relating to the reimbursement of non-pecuniary damage in respect of the mental pain resulting from the death of a close relative, nephew Šefko Kukavica, is dismissed (paragraph 4 of the judgment). Also, the appellants' claim relating to the reimbursement of pecuniary damage in the amount of BAM 150,000.00 is dismissed (paragraph 5 of the judgment).

7. The reasons adduced for the first-instance judgment read that on the basis of the presented evidence it was established that the appellants' relatives had been killed in such a way that some of them had been found with perforating gunshot wounds which is indicative of a violent death, whereas bodily remains of some of the relatives have not been found to this day in the area of Kozja

Luka, the Municipality of Foča. It was noted that the appellants' entire property, where they had previously lived in a shared household, had been destroyed on that occasion. Considering the established facts, the Basic Court found that the defendants had the standing to be sued in the present litigation and that they were responsible for the damage that the appellants had suffered. The court based its decision on the provisions of Articles 173 and 174 of the Law on Obligations in conjunction with Article 154 of the Law on Obligations, according to the principle of objective responsibility, under the presumption of causality, as serious indications existed that the damage for the appellants had occurred as a result of the perpetration of a criminal offence, and that the appellants' relatives had perished at the hands of the armed forces of the defendants.

8. In the opinion of the Basic Court, the circumstances and facts in the conducted evidentiary proceeding indicate that the damage for the appellants had occurred as a result of the perpetration of a criminal offense from among the group of criminal offenses against humanity and international law. It was indicated that since the statute of limitations on the criminal prosecution for the mentioned criminal offenses cannot expire under Article 100 of the Criminal Code, accordingly the claim for damages cannot be barred by the statute of limitations either. It was noted that in such a legal situation the Constitutional Court took a position in the case no. AP 289-03 that the non-existence of a legally binding judgment of conviction adopted in a criminal procedure does not mean that the damage did not occur as a result of the perpetration of a criminal offense.

9. The Basic Court established that the defendant's objection as to the respective claim being barred by the statute of limitations is ill-founded. In that respect it was stated that it was correct that at the time when the damage-causing event had occurred and when the appellants had learnt of it the immediate threat of war had been declared since 15 April 1992, and the state of war had been declared in the meantime, which was lifted along with the state of immediate threat of war, by the Decision of the Republika Srpska National Assembly no. 02-732/06 of 19 June 1996. According to the Basic Court, the time limit for filing a lawsuit in the respective legal matter could start running from 19 June 1996, when the state of war and of immediate threat of war had been lifted. Up until that date, taking into account the Law on Time Limits in Judicial and Administrative Proceedings during the State of War and of Immediate Threat of War, one can consider that justified reasons had existed that prevented the appellants from exercising their respective rights. It was indicated that the appellants' relatives had been declared dead on 2 and 29 September 2005 respectively by the rulings issued by the Basic Court. The mentioned rulings became legally binding on 25 September and 21 October 2005 respectively. Therefore, in the opinion of the Basic Court, "the appellants had

learnt back then of the damage and the persons who had inflicted that damage”. Therefore, it was concluded that, within the meaning of the provision of Article 376(1) of the Law on Obligations, the statute of limitations did not expire, as the lawsuit was filed on 5 September 2007. The Basic Court dismissed the objection as to the statute of limitations barring the claims of the defendants, bearing in mind that it had applied the Decision of the Constitutional Court no. AP-289/03, and considering that the time limits of the statute of limitations started to run from the day on which the court’s rulings, which declared the appellants’ relatives dead, became legally binding.

10. The Basic Court dismissed the appellants’ claim for the compensation for non-pecuniary damage in respect of the mental pain resulting from the death of the nephew Šefko Kukavica, pursuant to the provision of Article 201(1) of the Law on Obligations. Also, the remainder of their claim relating to the compensation for non-pecuniary damage, exceeding the awarded amount, was dismissed as well, as it was set too high, according to the case-law of the courts in Republika Srpska.

11. Furthermore, the Basic Court dismissed the appellants’ claim relating to the compensation for pecuniary damage. The reason being that ever since the state of war and the state of immediate war threat had been lifted on 19 June 1996, there were no more obstacles for the appellants to inquire about their property and to seek compensation for the damage caused. It was pointed out that “the plaintiff”, during the hearing, admitted that their property had been reinstated on 4 March 1999, that he had come to Foča for the first time in 1998, and that his two brothers had been coming earlier. That was when their property had been repossessed and that was when they had learnt that their property had been destroyed during the war. Therefore, according to the opinion of the Basic Court, the appellants had learnt of the caused damage in 1998, and the deadlines referred to in Article 376(1) and (2) were calculated starting from 19 June 1996. Therefore, the appellants filed a lawsuit after the expiry of the subjective and objective deadline as from the date on which the damage had occurred, while, calculating it from the date of the lifting of the state of war, the court granted the objection of the defendants as to the statute of limitations barring the compensation for the caused pecuniary damage, thus it dismissed the appellants’ claim within the meaning of the provisions of Article 376(1) and (2) and Article 360 of the Law on Obligations.

12. The appellants and the defendants lodged appeals against the first-instance judgment. By the judgment no. 015-0-Gž-08-000 116 of 11 February 2009, the County Court granted the appeal of the defendants and modified the first-instance judgment in the part granting the claim for the compensation for non-pecuniary damage, so that that part of the claim was dismissed (the first

paragraph of the enacting clause of the judgment). The appellants' appeal was dismissed in relation to the dismissing part of the first-instance judgment (paragraphs three, four and five of the enacting clause of the judgment) and the first-instance judgment was upheld in that part. The appellants were obligated to reimburse to the defendants the costs of the proceedings in the amount of BAM 10,275.00 within 30 days from the day of the delivery of the judgment.

13. On the basis of the reasoning of the second-instance judgment, it follows that the decision of the first-instance court in the part dismissing the claim for the compensation for pecuniary damage is correct and legal. As to the objection raised in the appeal of the appellants that the pecuniary damage resulted from the perpetration of the criminal offense, falling in the group of criminal offenses which are not subject to the statute of limitations and that, therefore, the statute of limitations on the claim for the compensation for damage did not expire, is ill-founded, according to the opinion of the County Court, because there is no room for the application of the provision of Article 377(1) of the Law on Obligations in the case at hand, since the mentioned legal provision may be applied only to the perpetrator of the criminal offense who had caused the damage, and not to the state body, the state or a legal person that is held responsible for the damage instead of the person causing damage who is held responsible on the basis of culpability. Besides, the statute of limitations on the claim for the compensation for damage prescribed by the mentioned provision may be applied solely if the existence of the criminal offense is established in a criminal proceeding, and exceptionally so in a civil proceeding, if the criminal proceedings were suspended or could not be instituted on the grounds that the accused passed away, is mentally ill or if there are other circumstances ruling out criminal prosecution and the liability of the accused. These conditions have not been met, thus the provision of Article 377(1) of the Law on Obligations cannot be applied. As to the expiry of the statute of limitations on the claim for the compensation for pecuniary damage, the County Court referred to the Decision of the Constitutional Court no. AP 562-05.

14. The County Court stated that the decision of the first-instance court is not correct and legal in relation to the claim whereby the appellants sought the compensation for non-pecuniary damage over the deaths of close relatives. In the opinion of the County Court, the claim for the compensation for non-pecuniary damage over the death of a close relative is comprised by the Law on Exercising the Right to a Compensation for Pecuniary and Non-Pecuniary Damage, caused by the War Activities in the Period from 20 May 1992 to 19 June 1996 (*Official Gazette of RS*, no. 103/05; the Law on Exercising the Right). It was noted that, by enacting the mentioned law,

Republika Srpska accepted the responsibility for the compensation for non-pecuniary and, in certain cases, for pecuniary damage, caused by war operations in the period from 20 May 1992 to 19 June 1996, under the conditions referred to in the mentioned law, and that it has a standing to be sued in this litigation in relation to the claim for the compensation for non-pecuniary damage. It was noted that Republika Srpska bears the sole responsibility under the mentioned law, so that solely Republika Srpska has the standing to be sued, and not the Municipality of Foča.

15. However, as the appellants filed the lawsuit on 5 September 2007, it follows that it was filed beyond the deadline referred to in Article 8 of the Law on Exercising the Right. It was indicated that the killed relatives of the appellants were declared dead by the ruling of the Basic Court dated 29 September 2005, thus, in the opinion of the County Court, the appellants were able to file a lawsuit before 28 February 2007, in which case the deadline referred to in Article 8(2) of the Law on Exercising the Right would have been applied, as that would be fair, despite the fact that the case in this litigation cannot be subsumed under the provision of paragraph 2 Article 8 of the mentioned law, rather under the provision of paragraph 1 of the same article.

16. Also, the County Court stated that the provision of Article 337 of the Law on Obligations cannot be applied in the case at hand, as the existence of a criminal offense was not established in the criminal proceeding, and there were no conditions for this to be established in a civil proceeding. Therefore, according to the opinion of the County Court, the statute of limitations referred to in the provision of Article 376(2) of the Law on Obligations had expired, as calculated from 19 June 1997, which is the date from which the appellants could have submitted successfully a proposal for the declaration of the missing relatives dead.

17. Further, the County Court referred to the Decision of the Constitutional Court no. AP-289/03 of 19 November 2004, and noted that the present case carries no evidence that the perished relatives of the appellants had been killed in the camp and that they had been killed by the armed forces of the defendant. It was outlined that the first-instance court alleged that by inspecting an excerpt of a news article in the daily "San" it was established that the killings of the Bosniacs of Kozja Luka had taken place as a result of the crimes committed by the Crisis Staff from Miljevina, on which occasion they had massacred nine members of the family of Nurko Karahasanović. However, in the opinion of the County Court, an excerpt from a daily newspaper cannot serve as a proof that certain persons had committed a criminal offense. Instead, only a legally binding judgment adopted in a criminal proceeding can serve as a piece of evidence.

18. The appellants lodged a revision-appeal against the second-instance judgment, which the Supreme Court dismissed by the Judgment no. 118 0 P 000039 09 Rev of 19 August 2010.

19. The reasoning of the judgment on the revision-appeal reads that the time limits for the statutes of limitations on the claims for non-pecuniary damage must be linked to the conditions for declaring a missing person dead as prescribed by the Law on Non-Contentious Proceedings (Article 61(1)(4) and Article 67(2)), irrespective of the fact as to which date of the death of the missing person was established in the non-contentious proceedings. Therefore, in the opinion of the Supreme Court, the time limits of statutes of limitations, within the meaning of Article 376(1) and (2) of the Law on Obligations, are not calculated from the day when the legally binding ruling was rendered in a non-contentious proceeding declaring the missing person dead, or from the day established as the day of the death of the missing person.

20. The mentioned time limits for the statutes of limitations on non-pecuniary damage are to be calculated from the day when conditions for declaring the missing person dead have been met, and, in the case at hand, that is upon the lapse of one year from the day the hostilities had ceased, namely on 19 June 1997. Therefore, as the lawsuit in this legal matter was filed on 5 September 2007, by which time, both the subjective and objective statutes of limitations had elapsed on the claims for the compensation for non-pecuniary damage, hence the claim was correctly dismissed. As to the statute of limitations on the claim for pecuniary damage, the Supreme Court stated that it accepted as legally valid the legal positions offered by the lower-instance courts. It was noted that the statute of limitations time limit for filing a lawsuit for the compensation for pecuniary damage started running from 19 June 1996, or, in any case, from 4 March 1999, when the plaintiffs' destroyed property was reinstated, hence the objective time limit of five years had certainly elapsed before the date on which the lawsuit was filed.

21. In the opinion of the Supreme Court, the objection raised by the appellant that the second-instance court violated the proceedings under Article 231 of the Law on Civil Procedure is ill-founded, as the second-instance court, sitting as a panel in a session, did not assess differently from the first-instance court the evidence directly presented during the first-instance proceeding, rather it only offered a different legal assessment of the established facts regarding the statutes of limitations on the claim.

22. Further, in the opinion of the Supreme Court, the application of the time limit for the statute of limitations under Article 377 of the Law on Obligations is out of the question in the case at hand,

because this time limit is applied solely if the legally binding judgment of a criminal court established the existence of a criminal offense and criminal responsibility of a perpetrator (person inflicting damage). It was noted that in exceptional cases, the court conducting civil procedure is called upon to examine and establish whether the damage was caused by such actions, which contain elements of a criminal offense, only if certain procedural impediments existed (the death of the perpetrator, his/her incapacity to use judgment and such like) due to which it was impossible to institute proceedings against the perpetrator of the criminal offense and to finalize it by rendering a legally binding criminal judgment finding him/her guilty.

23. In addition, the Supreme Court found that the provision of Article 377(1) of the Law on Obligations may be applied solely to the person inflicting damage who is held responsible on the basis of his/her culpability, and not to the state, as a legal person. It was outlined that in the case at hand there is no legally binding judgment of a criminal court, either domestic or international, establishing that the members of the armed forces of Republika Srpska had committed a criminal offense against humanity or international law (an offense of a war crime), which perpetration resulted in the loss of life of the appellants' close relatives regarding whom the damages have been claimed, and their property destroyed, which would bind a court in a civil procedure within the meaning of the provision of Article 12(3) of the Law on Civil Procedure. It was indicated that during the procedure, apart from the presented assertions that the members of the Republika Srpska Army had deprived of life the close relatives of the appellants and had burnt down their property, not a single relevant fact had been established nor a single piece of evidence presented that may have rendered such assertions well-founded. In such circumstances, in the opinion of the Supreme Court, it is not possible to conclude that this concerns a criminal offense of a war crime committed by the members of the armed forces of Republika Srpska, and, therefore, it is not possible to speak about objective responsibility of the defendants (Articles 173 and 174 of the Law on Obligations).

## **IV. Appeal**

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

24. The appellants hold that the challenged decision of the Supreme Court is in violation of their 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 family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and 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. They referred to the arbitrary application of the substantive law. They held that the conclusion of the ordinary courts cannot be accepted where they stated that the statute of limitations had expired on the inflicted pecuniary and non-pecuniary damage. They held that based on evidence presented in the respective proceeding, it follows that the damage had occurred as a result of the perpetration of a criminal offense and that the time limits for the statutes of limitations on the damage incurred were to be calculated as from the day when the perpetrator of the criminal offense was sentenced by a legally binding judgment. In the appellants' opinion, it is apparent that the present case obviously concerns a criminal offense against the international law of war for which the statute of limitations may not expire, thus there is a question then if the statute of limitations may expire on the damage arising from such criminal offenses. They indicated that the perpetrators of the present criminal offense giving rise to the damage have not been prosecuted yet and punished for the criminal offenses they had committed, which the defendants are precisely responsible for, thus the position of the courts of Republika Srpska that the statute of limitations had expired on the compensation for damage in the present case cannot be accepted. They hold that such a position is discriminatory, unjust, unfair and in contravention of the international legal norms. In that respect they referred to the Decision of the Constitutional Court no. AP-289/03.

#### **b) Reply to the appeal**

25. In its reply to the appeal the Supreme Court stated that there was no arbitrary application of the substantive law in the respective proceedings. It was indicated that viewpoints relating to the provisions of Articles 376 and 377 of the Law on Obligations and Article 12 of the Law on Civil Procedure represent continued viewpoints of this court, which were also applied in the challenged decision.

26. In its reply to the appeal the Basic Court outlined the chronology of the case noting that the judge who had rendered the first-instance judgment was appointed to the Commercial County Court in Istočno Sarajevo.

27. In its reply to the appeal, the defendants outlined arguments in relation to the application of the provision of Article 376(1) and (2) and Article 377 of the Law on Obligations in the case at hand, and held that the challenged judgment of the Supreme Court did not violate the appellants' constitutional rights.

## V. Relevant Law

28. The **Law on Obligations** (*Official Gazette of the SFRY*, nos. 29/78, 39/85, 45/89 and 57/89 and *Official Gazette of the RS*, nos. 17/93, 3/96, 39/03 and 74/04), so far as relevant, reads as follows:

### ***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 of the request for compensation of damage.*

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

The **Law on Non-Contentious Procedure** (*Official Gazette of SRBiH*, no. 10/89), in its relevant part, reads as follows:

#### *Article 61(1)(4)*

*The following persons may be declared dead:*

*4) a person who disappeared during a war in relation to war events, and who has not been heard of for one year from the date the hostilities ended.*

*Article 67(2)*

*The day when the missing person died, or the day that the missing person probably did not survive, shall be deemed the date of death. If such a date cannot be determined, death shall be deemed to have occurred on the first day after the time limits referred to in Article 61 of the present Law elapsed.*

**VI. Admissibility**

29. According to 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 other court in Bosnia and Herzegovina.

30. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him.

31. The subject contested by the appeal in the case at hand is the Judgment of the Supreme Court, no. 118 0 P 000039 09 Rev of 19 August 2010, against which there are no other effective remedies available under the law. Furthermore, the appellants received the challenged decision on 7 September 2010, and the appeal was filed on 21 September 2010, i.e. within a time-limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

32. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the respective appeal meets the admissibility requirements.

**VII. Merits**

33. The appellants hold that the challenged judgment violated their 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, the right to family life under Article II(3)(f) of the Constitution of Bosnia and

Herzegovina and Article 8 of the European Convention and 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.

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

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

*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 its relevant part, reads as follows:

*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 [...].*

34. The present proceeding relates to the proceedings following the appellants' lawsuit for damages, making this the civil law case, therefore, Article 6(1) of the European Convention is applicable to the present case.

35. In essence, the appellants hold that they did not have a fair trial because of arbitrary application of the substantive law, since their claim for the compensation for non-pecuniary and pecuniary damage, following the objection raised by the defendants as to the expiry of the statute of limitations on the respective claim, was dismissed within the meaning of the provision of Article 376(1) and (2) of the Law on Obligations.

36. The Constitutional Court indicates that according to the case-law of the European Court of Human Rights ("the European Court") and of the Constitutional Court, these courts are not called upon to review the conclusions as to the facts of the case and the application of the substantive law by the ordinary courts (see, the ECHR, *Pronina V. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court has no competence to substitute

its own appraisal of the facts and evidence for that of the ordinary courts, but it is the ordinary courts' task to appraise the presented facts and evidence (see ECHR, *Thomas v. The United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective remedy, *etc.*) have been violated or disregarded, and whether the application of a law was obviously arbitrary or discriminatory. Therefore, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of the constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts. Thus in the case at hand, the Constitutional Court will examine whether the proceedings as a whole have been fair within the meaning of Article 6(1) of the European Convention (see Constitutional Court, Decision no. *AP-20/05* of 18 May 2005, published in the *Official Gazette of BiH*, no. 58/05).

37. In the present case, the Constitutional Court finds that the appellants had filed a lawsuit for the compensation for non-pecuniary damage resulting from the death of their close relatives as well as for the compensation for pecuniary damage resulting from the destruction of property. The Basic Court partly granted the appellants' claim for the compensation for non-pecuniary damage and dismissed their claim for the compensation for pecuniary damage. However, the County Court modified the first-instance judgment and dismissed the appellants' claim in full. The Supreme Court, in essence, upheld the mentioned decision of the County Court, as a result of which the appellants' claim for the compensation for non-pecuniary and pecuniary damage was dismissed pursuant to the provision of Article 376(1) and (2) of the Law on Obligations, since both the subjective and objective time limits for the statute of limitations on the claims for the compensation for non-pecuniary and pecuniary damage had elapsed.

38. The Constitutional Court recalls that the statute of limitations, as a result of a failure to exercise one's right within a time period determined by law, may have varying effects. Although the theory carries different legal positions regarding the consequences of the statute of limitations on a claim, two standpoints are fundamental. According to the first standpoint, a creditor retains a subjective right in substantive sense and loses "only" the right to judicial protection or the right to file a claim. So, a creditor loses only a part of his/her right, actually the part comprising a legal and judicial possibility to exercise it. The mentioned standpoint applies to the private law branches, primarily to the obligations law. According to the second standpoint, a creditor's subjective right ceases to exist after the statute of limitations has expired. The mentioned standpoint is connected to the public law, such as taxation law. Under the private law the expiry of the statute of limitations

results in the cessation of a legal obligation on the part of a debtor since it became unactionable and it becomes, i.e. it turns into a natural obligation. Since subjective right comprises a creditor's authorization to exercise it or not, as well as the right to judicial protection, it is possible to reach a conclusion that the expiry of the statute of limitations did not result in the creditor's loss of authorization, which makes up the substance of his/her subjective right. Therefore, a debtor may fulfill his/her obligation and a creditor may accept the fulfillment. If a debtor fulfills an obligation that was barred by the statute of limitations he/she shall not be entitled to restitution, however his/her authorization is to raise an objection as to the expiry of the statute of limitations thereby freeing oneself of the legal obligation. The objection as to the statute of limitations may be raised by a debtor in a judicial proceeding, which a creditor has instituted for the purpose of the execution of a legal obligation. If a debtor fails to use that authorization of his/hers, a court will adjudicate in favor of a creditor, because in the private law field the statute of limitations is not something that courts are mindful of *ex officio*.

39. The Constitutional Court observes that precisely in the case at hand the ordinary courts had rendered a decision on the objection raised by the defendants that the appellants' claim was barred by the statute of limitations. In that context the Constitutional Court observes that the European Court indicated in its decision rendered in the case of *Baničević v. Croatia* of 21 October 2012 that the statutory time limits for statute of limitations have several important purposes, such as the provision of legal certainty and legal validity and the protection of possible defendants against claims barred by the statute of limitations, which would be difficult to stand up against and to stop injustice that might occur if judges are requested to decide on the events that had happened in the distant past, on the basis of evidence that might become unreliable or incomplete due to the lapse of time (see the case cited above of *Stubbings et al.*, paragraph 51; see also, *mutatis mutandis*, *Vo. V. France* [VV], no. 53924/00, paragraph 92, ECHR 2004-VIII, and *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom* [VV], no. 44302/02, paragraphs 68-69, ECHR 2007-X). Therefore, litigants ought to expect the application of those rules (see, *mutatis mutandis*, *Miragall Escolano et al. v. Spain*, no. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, paragraph 33, ECHR 2000-I).

40. Therefore, according to the opinion of the European Court, the existence of the statute of limitations is not, *per se*, incompatible with the Convention. Thus, it was emphasized that the task of the European Court in the present case was to establish whether the nature of the time limit concerned and/or the manner in which it had been applied were compatible with the Convention

(see *Vrbica v. Croatia*, no. 32540/05, paragraph 66, 1 April 2010). In the opinion of the European Court that means in particular that the European Court must see for itself how the application of statutory time limits may be considered foreseeable for the applicants, given the relevant legislation and specific circumstances of the case (see *Osu v. Italy*, no. 36534/97, paragraph 35, 11 July 2002; the case cited above of *Vrbica*, paragraph 72 and *Majski v. Croatia* (no. 2), no. 16924/08, paragraph 69, 19 July 2011). The European Court also observed that Article 377 of the Law on Obligations stipulates longer statutory time limits for the statute of limitations on the compensation for damage when damage is caused by a criminal offense. A longer statutory time limit for the statute of limitations in that way functions to the benefit of the victims of crimes, allowing them to claim damages within a longer statutory time limit, prescribed for a criminal offense concerned. However, according to the established case-law of domestic courts, that statutory time limit for the statute of limitations is applicable only when a legally binding judgment established in a criminal proceeding that the damage was caused by a criminal offense.

41. Considering the circumstances of the present case the European Court highlighted that there was nothing that could prevent the applicants (nor did they state otherwise) from filing their civil suit for damages within the general statutory time limit for the statute of limitations pursuant to Article 376 of the Law on Obligations. In the opinion of the European Court that would make it possible for the civil courts to examine the well-foundedness of an applicant's request, irrespective of the lapse of the statutory time limit for the statute of limitations in a criminal proceeding or any other outcome of a criminal proceeding. Instead, the applicants waited for four years, thus creating a situation where the outcome of a criminal proceeding had a decisive effect on their civil suit. In the opinion of the European Court, by failing to file their civil suit within a general time limit for the statute of limitations, the applicants, although having a lawyer, had put themselves in a situation facing a risk of the expiry of the statute of limitations on their civil suit. Therefore, the European Court noted that it cannot be said that the very statutory time limits for the statute of limitations, or the manner in which they had been applied in this case, violated the very essence of the applicants' right of access to court (see, ECHR, *Baničević v. Croatia*, decision of 2 October 2012, Application no. 44252/10, paragraphs 31-37).

42. In view of the aforementioned, the Constitutional Court finds that the Supreme Court, by finding that the appellants' revision-appeal was ill-founded and the decision of the second-instance court correct, found that the time limits for the statute of limitations on the claim for the compensation for non-pecuniary damage must be linked to the conditions for declaring a missing

person dead as prescribed by the Law on Non-Contentious Procedure (provisions of Articles 61 and 67(2)). The aforesaid notwithstanding the fact as to which date of death of a missing person was established in a non-contentious procedure. So, in the opinion of the Supreme Court, the time limits for the statute of limitations on the compensation for non-pecuniary damage must be calculated from the day on which conditions were met for a missing person to be declared dead, in the specific case that is after the lapse of one year as from the day the hostilities had ceased, namely from 19 June 1997 (the state of war and the state of immediate threat of war had been lifted on 19 June 1996). Therefore, since the respective lawsuit was filed on 5 September 2007, both the subjective and objective time limits for the statutes of limitations had elapsed on the claims for the compensation for non-pecuniary damage within the meaning of the provision of Article 376(1) and (2) of the Law on Obligations. Further, as to the compensation for pecuniary damage, the ordinary courts took a stance that it had started running from 19 June 1996, or, in any case, from 4 March 1999, when the appellants' destroyed property had been reinstated. Thus, bearing in mind that the appellants had filed the lawsuit on 5 September 2007, the statute of limitations had expired on the claim within the meaning of the provision of Article 376(1) and (2) of the Law on Obligations. The Constitutional Court does not see any arbitrariness whatsoever in the mentioned reasoning as to the application of the substantive law by the Supreme Court. The Constitutional Court observes that the Supreme Court had adopted a lawful and correct decision, and provided clear and precise reasons for its respective conclusions regarding the application of the substantive law.

43. Further, in the opinion of the Constitutional Court, the reasoning offered by the Supreme Court regarding the application of the provision of Article 377 of the Law on Obligations is not indicative of any arbitrariness whatsoever, since 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 held responsible for the damage instead of the factual perpetrator of a criminal offense. As a result, only the provision of Article 376 of the Law on Obligations may be applied to the third person. Also, the Constitutional Court observes that the Supreme Court took a stance that conditions have not been met in the present case to establish in the respective civil procedure whether the damage was caused by actions containing elements of a criminal offense, for which, in the opinion of the Constitutional Court, the Supreme Court provided clear and precise reasons which are not indicative of arbitrariness in the application of the substantive law. In addition, the Constitutional Court observes that the appellants in the respective proceedings failed to prove that there existed a legally binding judgment of a criminal court establishing that the members of the armed forces of Republika Srpska had committed a criminal offense against humanity or international law, during

perpetration of which the appellants' close relatives had been deprived of life, which judgment would have been binding on a civil court within the meaning of the provision of Article 12 of the Law on Civil Procedure.

44. Therefore, taking into account the circumstances of the present case as well as the case-law of the European Court in the case of *Baničević*, the Constitutional Court finds that there was nothing in the present case preventing the appellants from filing their civil suit for damages within the time limit referred to in the provision of Article 376(1) and (2) of the Law on Obligations. As a result, the appellants, despite having a lawyer, had put themselves in a situation facing a risk of the expiry of the statute of limitations on their civil suit. The Constitutional Court took into account that it was not possible to apply the provision of Article 377 of the Law on Obligations in the present case, since the time limits referred to in the mentioned provision apply to the perpetrator of a criminal offense and not to third persons who may be possibly responsible for his/her actions. Further, there was no basis to establish in a civil proceeding the damage caused to the appellants through the perpetration of a criminal offense. Therefore, in the opinion of the Constitutional Court, concerning the present case and applying the statutory time limits for the statute of limitations, it cannot be said that the very statutory time limits for the statute of limitations, or the manner in which they had been applied in this case, violated the very essence of the appellants' right of access to court.

45. As to the references made by the appellants 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, which was reasoned in the foregoing paragraphs of this decision.

46. In view of the aforementioned, the Constitutional Court concludes that the appellants' allegations as to the arbitrary application of the substantive law in the present case are ill-founded, and that the appellants' 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 was not violated.

47. The Constitutional Court recalls that, during the course of the decision-making in the case at hand, it considered the more recent case-law of the Constitutional Court in the cases carrying the same or similar factual and legal issues (see, the Constitutional Court, e.g. Decision on Admissibility nos. *AP 2678/09* of 18 April 2012, *AP 3188/09* of 30 October 2012, *AP 1758/09* of

18 September 2012, as well as the Decision on Admissibility and Merits no. *AP 2763/09* of 22 March 2013 (*Bejtulah and Jakup Ilijazi*), available on the website of the Constitutional Court [www.ustavisud.ba](http://www.ustavisud.ba)), and that the present case carries nothing whatsoever suggesting that the substantive regulations had been arbitrarily or unfairly applied to the detriment of the appellants.

### **Other allegations**

48. The appellants hold that the challenged judgments are also in violation of their right to family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and 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, in support of which they outlined identical allegations as they did vis-à-vis right to a fair trial, which were examined in detail in this decision, which were eventually found to be ill-founded. In accordance with the aforementioned, the Constitutional Court holds that there is no need for it to examine these allegations in relation to the right to family life and the right to property.

### **VIII. Conclusion**

49. The Constitutional Court holds that there has been no violation of the appellants' 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, as there is nothing whatsoever in the reasoning of the challenged decision indicative of the arbitrary application of the substantive regulations to the detriment of the appellants, and where the court offered clear and precise reasons for its decision.

50. Having regard to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of the present decision.

**51. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.**

Valerija Galić  
President  
Constitutional Court of Bosnia and Herzegovina