ANNEX 2 to

"Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)"

[Public]

Defence Translation

Republic of Serbia
CONSTITUTIONAL COURT
Number: Už-11470/2017
_____20 20 . years
White City

The Constitutional Court, the Grand Chamber, composed of: President S limb Snežana Marković, President of the Chamber , and judges Miroslav Nikolić, Dr Tijana Šurlan, Tatjana Đurkić, Dr. Milan Škulić, Lidija Đukić, Dr. Nataša Plavsic and Dr. Dragana Kolarić, members of the Council, in the proceedings constitutional appeal G . M . i K . R, both from Ć . near Pec , and H . A . i H . H, both of Z . near Pec, on the basis of Article 167, Paragraph 4 in conjunction with member om 170 of the Constitution of the Republic of Serbia, at the session The council held on October 1, 2020, was passed

O D L U K U

Denied as unfounded constitutional appeal G . M, K . R, H . A . i H . H . declared against the actions of the War Crimes Prosecutor's Office in the Kti case. 1/14 for violation of the right to life, guaranteed by Article 24 of the Constitution of the Republic of Serbia, while in the remaining part the constitutional complaint is rejected.

Explanation

1. M . G . i R . K, both from Ć . near Pec , as well as A . H . i H . H, both from Z . near Pec , filed with the Constitutional Court, on 15 December 2017, by proxy M . P, a lawyer from Belgrade, a constitutional complaint against the act of the War Crimes Prosecutor's Office Kti. 1/14 of March 1, 2017 and the act of the Republic Public Prosecutor's Office Ktpo. 58/17 of 7 December 2017 , due to violation of the rights under Art. 24, 25 and 32 of the Constitution of the Republic of Serbia.

The complainants substantially challenge the actions of the War Crimes Prosecutor's Office in the Kti case. 1/14, and in which case the disputed acts were passed.

The constitutional complaint states, inter alia:

- that the injured parties, here the submitters of the constitutional complaint, the disputed acts violated the right to a reasoned court decision , as well as the "principle of equality of arms", as an element of that right to a fair trial;

- that in the specific case the provisions of Art. 251 and 303 of the Code of Criminal Procedure because the suspect and his defense counsel inspected and copied the case file before the suspect D.Ž. heard, and the provisions of Article 300 and Article 51, paragraph 1, as well as Article 308, paragraph 2 of the Code of Criminal Procedure were violated;

- that “the Deputy Prosecutor for War Crimes did not hear all the witnesses who proposed both the Deputy Prosecutor for War Crimes and the suspect D.Ž. and his defense counsel, as well as the attorney of the injured parties. Out of a total of 14 witnesses of the Deputy Prosecutor for War Crimes, two witnesses were not examined, the suspect and his defense counsel proposed the examination of four witnesses, of which only two were examined, while the injured party's attorney proposed the examination of 12 witnesses, eight of whom were examined. Of the eight witnesses examined proposed by the injured party's attorney, four witnesses were examined without his presence because the Deputy Prosecutor did not inform the injured party's attorney about their examination ";

- that “the Deputy OWCP did not sufficiently assess or explain the reasons why he did not give adequate force to the evidence presented during the criminal proceedings before the High Court in Belgrade in the case of K. After .2. 48/10, nor the evidence presented before the International Criminal Tribunal for the Former Yugoslavia in the case of the team 'M. Milutinovic et al. ' and ' V. Djordjevic', which clearly indicated the existence of grounds for suspicion that members of the 125th Motorized Brigade of the Yugoslav Army during 1999 in the municipalities of Peja, Decani, Gjakova and others. a number of war crimes and other crimes against international law and humanity have been committed to the detriment of persons of Albanian nationality ”;

- that the applicants violated the procedural aspect of the right to an effective investigation;

- that “in the specific case 1) the Deputy Prosecutor did not examine all the proposed witnesses 2) that he did not give reasons why he considered their examination unnecessary, and especially 3) that he did not explain why the testimonies of some examined witnesses were not sufficient for further criminal proceedings (such as e. statements D . O . , which is directly Medium named N . M . 'M . ' as criminal offenders, which was the commander 177. VTOd "(referring to the Army territorial detachment Oven) " from where it follows that there was clear knowledge in the 125th mtbr command about the crimes committed in their area of responsibility) it cannot be concluded, without reasonable doubt, that the deputy conducted an effective and efficient investigation ”;

- that "the complainants emphasize that they have lost their closest relatives in the events in their places where they lived and that they have the slightest right to be adequately sanctioned for those responsible for the killings, attacks and displacement of the civilian population";

- that there are at least four documents indicating that 177 . VTOd presumed 125 mtbr (meaning the 125th Motorized Brigade of the Yugoslav Army , whose commander was the suspect) before 15 May 1999 ;

- that "it is obvious that the competent prosecutor's offices, for a completely unjustified reason, did not even take into account the definition of command responsibility," the injured parties did not receive answers to numerous questions, while the overall impression is that the investigation conducted by the Deputy War Prosecutor crimes, and supported by the second

instance prosecution, cannot, without reasonable doubt, conclude that the competent state body seriously tried to find out what happened in connection with these events in Kosovo. Moreover, it seems impossible to avoid the conclusion that the deputy made a hasty and unfounded conclusion that there is not enough evidence for the accusation, all in order to complete the investigation. "

Suggest one is the Constitutional Court accepts the constitutional complaint, establishes a violation of the law marked, to annul the disputed documents and ordered the Prosecutor's Office for War Crimes and the Republic Public Prosecutor to repeat the procedure to award them compensation for non-pecuniary damage and seek the one are the costs of the proceedings .

2. Pursuant to the provision of Article 170 of the Constitution of the Republic of Serbia, a constitutional complaint may be lodged against individual acts or actions of state bodies or organizations entrusted with public authority, which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if they are exhausted or no other legal remedies are provided for their protection.

During the procedure of providing constitutional court protection, on the occasion of examining the merits of a constitutional complaint within the limits of the stated request, the Constitutional Court determines whether the right or freedom guaranteed by the Constitution was violated or denied in the procedure of deciding on the rights and obligations of the constitutional complainant.

3. The Constitutional Court , in the completion of the procedure , from the case KTI. 1/14 of the War Crimes Prosecutor's Office and letters from the High Court in Belgrade - War Crimes Chamber dated 11 February 2020 , inter alia, found:

3.1. Facts and Circumstances Relating to the War Crimes Prosecutor's Office Kti. 1/14:

- that on 18 May 2014, the War Crimes Prosecutor's Office (hereinafter : OWCP) issued the Kti initiative. 1/14 to initiate criminal proceedings against the commander of the 125th Motorized Brigade, combat formations former Pristina cart with the Yugoslav Army - D.Ž , due to suspicion that he had done the wrong cally a war crime against civ ylacetic capita Istv under Article 142, paragraph 1. CRU;

- that it is TRZ. On July 28, 2014, it issued an order to conduct an investigation into Kti. 1/14 against D.Ž. , due to the existence of grounds for suspicion that “during the armed conflict on the territory of the Autonomous Province of Kosovo and Metohija, between the Army of FR Yugoslavia and the Police Forces of the Republic of Serbia on the one hand and members of the armed formation of the Kosovo Liberation Army on the other , which is a non-international armed conflict, and the simultaneous armed conflict between the armed forces of the FRY and the armed forces of the NATO Coalition in the period from March 23 to June 10, 1999 as an international armed conflict, as a member of the Yugoslav Army as a colonel and in the position of commander of the 125th Motorized Brigade - Kosovska Mitrovica, responsible for the application of international humanitarian law on the protection of civilians and their property and authorized to manage and command all units and formations within his brigade and through the authority to control his subordinates in carrying out orders, having effective command authority over all subordinate units, including the detachment 177. VTOd Peć (Vo Territorial Detachment of Peja) , which was under his command, on the basis of Article 16 of the then valid Law on Defense and on the basis of a special order of the Higher Command on Subordination,…, and thus violated the rules of Article 3, paragraph 1, item 1 under (a.), Article 33, paragraph 2, and Article 49 IV of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and the rules of Articles 51, 52, 75, Article 85, paragraphs 3a and 4a of the Supplementary Protocol to the Geneva Conventions of 12 August 1949 on the Protection of Victims of International Armed Conflicts (Protocol I) and the rules of Articles 4, 13, paragraph 2 and Article 17, paragraph 2 of the

Admission Protocol to the Geneva Conventions of 12 August 1949. on the Protection of Victims of Non-International Armed Conflict (Protocol II) , thus committing the criminal offense of War Crimes against Civilians under Article 142, Paragraph 1 of the CPC in conjunction with Article 30 of the CPC ";

- to act in the case of TRZ 1/14;

- that it follows from the minutes of the interrogation of the suspect dated 31 July 2014 that D.Ž. requested that, in accordance with Article 68, paragraph 1, item 7 of the Criminal Procedure Code, he be given sufficient time to prepare his defense, and the acting prosecutor adjourned the hearing and ordered it to resume on 1 September 2014, which did not continue. marked date ;

- that the defense counsel of the suspect could not act in the case due to the lawyer's strike;

- that on March 24, 2015, a trainee lawyer took over two binders and one disk with copies of the material related to the Kti case from the lawyer's office of the suspect's defense counsel. 1/14;

- that the suspect was not questioned on 16 April 2015 due to the justified absence of defense counsel , but was questioned on 28 April 2015 ; t Also, by the hearing was continued on 12 May 2015 i n a the hearing, Deputy Prosecutor has determined to call and examine witnesses Đ . N, V . S, D . Z, J . D, M . V, D . J, P . J, Ž . B, V . J, Č . D, M . J, Lj . DJ T . M . i S . J, and he suggested that the suspect be examined as a witness . L, N . P, A . S . i M . S;

- that the OWCP sent the act Kti 1/14 to the defense counsel and the suspect to attend the examination of witness D on 19, 21, 21, 22 and 26 May 2015 . J, V . J, M . J, V . S, T . M, Lj . Ђ, Ђ . N, D . Z, P . J, M . V, Č . D , Ž . B . i J . D;

- that during the questioning of witnesses - D . J, Lj . Đ , P . ,, Ђ . N , Č . D, M . V, Ž . B, J . D, M . J , A . S , M . S , T . M, V . J . i D . Z . among others, were present defense counsel - lawyer Đ.Č. or by proxy, attorney MM , as well as the suspect himself;

- that on 24 December 2015, the complainant was entitled to a lawyer N . T . to represent them in the Kti case. 1/14;

- that the examination of witnesses Z . P . The presence of ovals counsel (by replacing cal Power of Attorney for a lawyer Đ.Č. - attorney S. P), the suspect and proxy damaged - N lawyer . Č;

- that on December 18, 2016, the suspect's defense counsel submitted a submission stating that there were no new evidentiary motions;

- that the Office of the War Crimes Chamber on 13 June 2016, municipalities sent an invitation to a defense attorney and lawyer N . T . to attend the evidentiary actions - examination of the witness G . J, Lj . A, D . T . i D . Tr;

- that he is a proxy of the injured parties by the submission of 16 . In June 2016, he proposed that M be examined as a witness . G, B . M, Z . R, P . N, T . D, Lj . A, D . T, G . J, D . B , Security Officer of the 2nd Motorized Battalion in the 125th Motorized Brigade, Security Officer of the Armored Battalion in the 125th Motorized Brigade and Chief of Security of the Military District of Pristina . For the last three witnesses, it was suggested that the name and address be obtained officially ;

- that the OWCP informed the suspect's defense counsel and the injured party's attorney about the examination of several witnesses; The representative of the injured party was present at the T examination . D, M . G, B . M . i D . B ;

- that the Ministry of Defense - Military Security Agency is an act of the SP. I 12953-2 dated 15 September 2016. The annual not acting upon claim TRZ , notified the Prosecution the names and addresses of papers for the security 2. motorized battalion in 125 Motorized Brigade (D . O .) , A clerk of the security of an armored battalion 125. Motorized Brigade (B . T .) and the head of the security organ military district Priština (V , V, followed by N , C .) ;

that the suspect and his defense counsel were informed about the examination of these four witnesses , and that the injured party's attorney did not attend the examination of these four witnesses;

- that the TRZ 13 December 2016, after examination of the witness N . C, meeting held; and the transcript shows that the meeting was attended by the deputy war crimes prosecutor, lawyer N . Č, defense counsel for the suspect and the suspect ; n The meeting discussed the proposal proxy damaged to examine witnesses Z . R, D . T . and Lj . A ; o d examination of witness Lj . A . gave up due to his serious health condition ; the deputy prosecutor pointed out that the problem with the delivery calls witnesses . R . i D . T r. (who live on the territory of Kosovo and Metohija), that they cannot be served with a summons through the Military Security Agency, that they do not have the authority to communicate with the prosecutor from Pristina, or that the summons is delivered by EULEX, and that the address is insufficient. mail shafts ; the suspected noted that D . Tr . lives in Trebinje ; t Prosecutor during the proceedings and the witness mentioned e P . N . i G . J, but they have not been discussed ; the plenipotentiary damaged them and remained with his proposals;

- that during the procedure the acting Prosecutor's Office obtained the necessary documentation and data from , among others, the Ministry of Defense - Military Security Agency , Mechanism for International Criminal Courts - Hague Branch, to inspect other OWCP cases ; in the case file is under date has 15 August 2014 year and 9 February 2015, preliminary expert study - "The responsibility of command structures 125 and 549th Motorized Brigade of the Yugoslav Army for crimes committed by their members and members of other commands and units in their composition in the area of operation of these brigades for the period March - June 1999 ";

- that the order of TRZ Kti 1/14 of 13 December 2016 completed the investigation against the suspect for the criminal offense of War Crimes against Civilians under Article 142 of the CPC, because the state of affairs in the investigation was sufficiently clarified;

- that the act of TRZ Kti. 1/14 of 13 December 2016, informed the lawyer N . T . that the investigation was completed, and which act the lawyer received on December 21, 2016;

- that the disputed order of TRZ Kti. 1/14 of 1 March 2017, the investigation against the suspect was suspended because there was insufficient evidence for the indictment;

- that TRZ is an act of Kti. 1/14 of 2 March 2017, informed the lawyer N . T . that the Prosecutor's Office has issued an order suspending the investigation, as well as that against the order, pursuant to Article 51, paragraph 1 of the Code of Criminal Procedure, it has the right to file an objection directly to the higher public prosecutor; d the probate order on the act is dated March 3, 2017, and the act also contains the statement of March 9, 2017 that "the act has not been served, call a proxy to take over the act";

- that the disputed decision of the Republic Public Prosecutor's Office Ktpo. 58/17 of 7 December 2017 dismissing the complaint a lawyer storey N . T . declared against the order of TRZ Kti. 1/14 of 1 March 2017 ; that in the disputed decision , among other things, it was stated that "the suspect D.Ž. appointed commander of the 125th Motorized Brigade Command Brigade based in Kosovska Mitrovica on day 12 June 1998 year, the brigade during the 1999 year was subordinated to the Pristina Corps in under the command of General N. P . The area of responsibility of this brigade was represented by the territories of the Municipalities of Leposavic, Zvecan, Kosovska Mitrovica, Zubin Potok, Skenderaj, Vushtrri, Glina, Istok, Peja and Decani. There are over 500 villages in this area , including the villages where the crimes in question took place. The brigade was especially engaged in the fights against the units of the Kosovo Liberation Army in the area of Bajgora, Drenica and Rugova gorge . The suspected commander was authorized and obliged to make decisions, set the tasks of the units, control the execution of those tasks, demand their consistent execution regardless of the difficulties that arise during their realization. The suspect in his testimony did not dispute the circum an

outlet that is VT 177. The furnace was resubordinated his unit, but he claimed to have a concrete p retpočinjenja took place after 15 May 1999, ie after the Execute certain crimes on the territory ... . Witnesses are united in their claims that they have never heard of crimes in the villages around Peja where specific war crimes took place, but that they learned about them after the war or from the press at the time of the indictment against the perpetrators of this crime,… . These circumstances, the distance from the scene and the lack of direct radio or other communication on the ground, at a critical time, between the suspect and the commander of the unit whose members committed the crimes realistically call into question the commander's ability to know the situation at the time of the action. , or about the behavior of certain members of the detachment, as well as to have an idea of what was happening in the villages of Ljubenić, Đuška, Plavljane and Zahač, so that he had reason to react in an adequate and efficient way in order to prevent specific crimes " ;

3.2. Facts and circumstances relating to the case of the High Court in Belgrade - War Crimes Chamber K. Po.2 . 48/10 :

- that by the judgment of the High Court in Belgrade - War Crimes Chamber K. Po.2. 48/10 of 11 February 2014, defendants T.M., S.P., S.K., B.B., A.S., M.N., R.M., S.M. and D.B. found guilty of committing the criminal offense of War Crimes against Civilians under Article 142, Paragraph 1 of the CPC in conjunction with Article 22 of the CPC and sentenced to imprisonment ; and with that judgment the accused R.B. and V.K. they were also acquitted of the accusation that they committed the aforementioned criminal offense as co-perpetrators;

- that by the decision of the Court of Appeals in Belgrade - War Crimes Chamber Kž.1. Po.2. 6/14 of 26 February 2015, the appeals of the defendants were adopted, and the judgment of the High Court in Belgrade - War Crimes Chamber K. was revoked. Po.2. 48/1 0 of 11 February 2014 and the case was remanded to the first instance court for retrial;

- that the criminal proceedings were continued in the case of the High Court in Belgrade - War Crimes Chamber K. Po.2. 4/15.

4. The provisions of the Constitution , the violation of which is referred to by the submitters in the constitutional complaint, stipulate: that human life is inviolable (Article 24, paragraph 1); that physical and mental integrity is inviolable (Article 25, paragraph 2); that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, nor to medical or scientific examination without his or her free consent (Article 25, paragraph 2); that everyone has the right to an independent, impartial and legally established court, in a fair and reasonable time, to publicly discuss and decide on his rights and obligations, the grounds for suspicion which was the reason for initiating proceedings, as well as the charges against him (Article 32, paragraph 1.).

The provisions of the Criminal Procedure Code ("Official Gazette of the RS" , No. 72/11, 101/11, 121/12, 32/13 and 45/13) stipulate that: this Code establishes rules aimed at ensuring that no one is innocent convicted, and to impose a criminal sanction on the perpetrator of the criminal offense under the conditions prescribed by the criminal law, on the basis of a lawfully and fairly conducted procedure (Article 1, paragraph 1); that criminal proceedings have been initiated by issuing an order to conduct an investigation (Article 296) (Article 7, paragraph 1, item 1)); that the basic right and basic duty of the public prosecutor is to prosecute perpetrators of criminal offenses (Article 43, paragraph 1); that for criminal offenses prosecuted ex officio, the public prosecutor is competent to conduct an investigation (Article 43, paragraph 2, item 3); that the defendant, ie the suspect who was questioned in accordance with the provisions on the hearing of the defendant and his defense counsel, have the right to review the files and examine the collected items that serve as evidence (Article 251, paragraph 1); that an investigation be initiated against a certain person for whom there are grounds for suspicion that he has committed a criminal offense (Article 295, paragraph 1, item

1)); that the investigation gathers the evidence and data necessary to decide whether to file an indictment or discontinue the proceedings, evidence necessary to establish the identity of the perpetrator, evidence that is in danger of not being able to be repeated at the main trial, or their performance would be difficult, as well as other evidence that may be useful for the procedure, and the performance of which, given the circumstances of the case, proves to be expedient (Article 295, paragraph 2) ; that the public prosecutor is obliged to send a summons to the suspect's defense counsel to attend the hearing of the suspect, ie to send a summons to the suspect and his defense counsel, and inform the injured party about the time and place of examination of witnesses or experts (Article 300, paragraph 1); that the public prosecutor is obliged to enable the suspect who was questioned and his defense counsel to review the files and examine the cases that serve as evidence within a period sufficient for the preparation of the defense (Article 303, paragraph 1); that the public prosecutor may, during the investigation, withdraw from the prosecution of the suspect and suspend the investigation if there is insufficient evidence for the accusation (Article 308, paragraph 1, item 3)); that when he finds that the state of affairs in the investigation is sufficiently clarified, the public prosecutor will issue an order to complete the investigation, which he will deliver to the suspect and his defense counsel, if any, and inform the injured party about the completion of the investigation (Article 310, paragraph 1).

Provisions of the Criminal Code of the Federal Republic of Yugoslavia ("Official Gazette of the SFRY", No. 44/76, 36/77 - amended, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45 / 90- corrected and 54/90 and "Official Gazette of the FRY" No. 35/92, 16/93, 31/93, 3 7/93, 41/93, 50/93, 24/94 and 61/01) it was prescribed: that a criminal offense may be committed by doing or not doing (Article 30, paragraph 1); that a criminal offense may be committed by omission only when the perpetrator has failed to commit the act he was obliged to commit (Article 30, paragraph 2); who, in violation of the rules of international law during war, armed conflict or occupation, orders the attack on the civilian population, settlement, individual civilians or persons incapable of combat, resulting in death, grievous bodily harm or serious damage to human health , indiscriminate attack, which attacks on civilian population, to the civilian population carry out killing, torture , inhumane treatment, biological , medical or other scientific experiments, removal of tissue or organs for transplantation, causing great pain or injury t elesnog or health, displacement or relocation or forced denationalization or conversion to another religion, coercion to prostitution or rape; application of measures of intimidation and terror, taking hostages, collective punishment, unlawful bringing in concentration camps and other against the illegal arrests and detention, deprivation of rights to fair and impartial trial , forcible service in the armed forces of the enemy force or its Notify budget execution finds itself service or administration , forcing forced labor, starvation, confiscation of property, looting of property, illegal and arbitrary destruction or misappropriation of property not justified by military needs, taking illegal or disproportionately large contributions and requisitions, devaluation of domestic money or illegal issuance of money, or who commits any of the above offenses, shall be punished by imprisonment for a term not less than five years or by imprisonment for a term not exceeding 40 years (Article 142, paragraph 1).

The Criminal Code (" Official Gazette of the RS", No. 85/05, 88/05, 107/05, 72/09 and 111/0 9) prescribes: that no one may be sentenced or other criminal sanction for an act which than what was done by law was not determined as a criminal offense, nor can it be imposed a punishment or other criminal sanction that was not prescribed by law before the criminal offense was committed (Article 1); that the military commander or the person who actually performs this function, who, knowing that the forces he commands or controls, prepares or has started committing the criminal offense referred to in Articles 370 to 374, Article 376, Art. 378 to 381 and Article 383 of this Code does not take the measures he could

and was obliged to take to prevent the commission of the act, and as a result the commission of that act occurs, he shall be punished by the punishment prescribed for that act (Article 384, paragraph 1).); that this Code enters into force on January 1, 2006 (Article 432).

5 . 1. The complainants challenge the actions of the OWCP in the Kti case. 1/14 and in any case have been adopted and the act of the War Crimes KTI. 1/14 of March 1, 2017 and the act of the Republic Public Prosecutor's Office Ktpo. 58/17 of 7 December 2017 .

The complainants consider that the procedural aspect of the rights of the injured parties to an effective and efficient investigation has been violated . They explain this with the following statements:

1) that is not acting vice TRZ examined all proposed witnesses (V have not been tested . S, S , J , v.l, N. P , Z , R, P , N, Lj . A, D , T r. And G . J .), nor is d and the reasons why it considers that their hearing was unnecessary;

2) that the proposals of the suspect and his defense counsel to examine four sved eye (V , L , N , P , A , S , and M . S .) Has never made a formal decision, or in the case file there is a decision about why dropped by the examination of the witness in . S . i S . J; t akođe , TRZ not don eo decision on the proposal is not damaged on an examination of their witness;

3) At the time of Test D . O, B . T, V . V . and N . C . the injured party's attorney was not present, although he was the one who proposed the examination of the mentioned witnesses;

4) that it is not explained in the disputed decisions why the testimonies of individual witnesses are not sufficient for further continuation of the criminal proceedings , nor did the Deputy OWCP explain the reasons why he did not give adequate strength to the evidence presented during the criminal proceedings in the case of the High Court in Belgrade - Special Department K. Po.2. 48/10, nor the evidence presented before the International Criminal Tribunal for the Former Yugoslavia in the cases of “M. Milutinović et al. ”And“ V. Djordjevic " ;

5) that the disputed second-instance decision states that the 177th VTO of Peja was subordinated to the command of the 125th Motorized Brigade after 15 May 1999, after the war crimes were committed, and that the four documents in the case file indicate that these allegations untrue;

6) that the suspect and his defense counsel inspected and copied the file before the suspect was questioned , which is contrary to the provisions of Art. 251 and 303 of the Criminal Procedure Code , as well as that the provision of Article 300 of the Criminal Procedure Code has been violated ;

7) that “ the injured party's attorney was only notified on 16 November 2017 that the investigation had been suspended, and it cannot be avoided, without reasonable doubt, that the OWCP's action was aimed at preventing the injured parties from filing an objection within the prescribed time limits. CPC ”.

5 .2. The Constitutional Court alleges a violation of the right under Art. 24 and 25 of the Constitution assessed in the light of the violation of the right to life from Article 24 of the Constitution.

Making a decision in this constitutional court case, the Constitutional Court points out that even if the Constitution does not guarantee the right to prosecute third parties, and that according to the established practice of the Constitutional Court, guarantees of the right to a fair trial under Article 32 of the Constitution can be recognized as damaged. only if he has filed a property claim in criminal proceedings . The Court notes that in this particular case, the fact that this is a procedure conducted in connection with the violation of the right to life, which is guaranteed by Article 24 of the Constitution, is of decisive importance.

According to the European Court of Human Rights, the right to life belongs to the "hard core" of human rights that is guaranteed to every person, in all circumstances and in all places, and cannot be subject to any restriction or derogation. It is one of the rights that justifies

the freedom and the existence of which implies a positive obligation of the state to take all necessary measures to protect the life of the person within its jurisdiction (see judgment of the order of Human Rights in the case of *LCB v. The United Kingdom* , a submission a number oj 14/1997/798/1001, from 9 June 1998, I the reports 1998-III, § 36). This positive obligation of the state includes the substantive and procedural aspects.

From the substantive point of view, a positive obligation of the state implies taking all necessary measures to prevent violent death, and this presupposes the establishment of a legal framework that should provide effective protection against threats to the right to life (see, mutatis mutandis, judgment of the European Court of Justice). Human Rights *Osman v. the United Kingdom* , application no. 23452/94, 28 October 1998, First Report 1998-VIII, §§ 115 and 116). It is therefore necessary to have effective criminal and other norms that would deter the commission of crimes against the life of a person, as well as procedural mechanisms to prevent, combat and punish violations of these norms (see: judgment of the European Court of Human Rights *Streletz, Kessler and Krenz v. Germany* , Petitions Nos 34044/96, 35532/97 and 44801/98 of 22 March 2001, § 86). This obligation extends to the taking of preventive measures to protect life, in particular in relation to dangerous activities which pose a potential risk to life (see also the judgment of the European Court of Human Rights *Oneryildiz v. Turkey* , application no. 48939/99, of 30. November 2004, paragraph 107).

From a procedural point of view, a positive obligation of the State, in the event of a person being deprived of life, is to conduct an independent and effective investigation (see *McKe v. United Kingdom* Court of Human Rights *v. The United Kingdom* , application no. 28883/95, no . May 2001, paragraph 111), which implies the existence of an efficient judicial system within which proceedings will be conducted which do not necessarily have to be criminal in nature.

Bearing in mind the foregoing, and the fact that they are in the present case, collect evidence and data that are necessary in order to decide whether to bring an indictment or suspend proceedings against the suspect D.Ž. for the criminal offense of War Crimes against Civilians under Article 142 of the CPC in conjunction with Article 30 of the CPC, and for which offense proceedings are currently being conducted in the case of the High Court in Belgrade - War Crimes Chamber K. Po.2. 4/15 (earlier in this case the verdict was issued in the High Court in Belgrade - About sharing war crimes K. Po.2. 48/10 of 11 February 2014 , which repealed the decision of the Appellate Court in Belgrade - Department war crimes) against several defendants (members of the 177th Military Territorial Detachment of Peja) , the Constitutional Court considers that the obligation of the state body - the Public Prosecutor's Office was to effectively investigate the circumstances under which the event took place and to collect the necessary evidence and data on participation of the suspect in the critical event .

In view of the above, the Constitutional Court said that the positive obligation to protect the rights contained in Article 24 of the Constitution, which includes a fast and efficient examination of the subject matter of the case, without undue delay, to be assessed in the context of procesnoprav legs aspects of the right to life in relation to the actions of the War Crimes Prosecutor's Office in the Kti case. 1/14.

5 .3. Examining the existence of the preconditions for deciding on this constitutional complaint in relation to the alleged violation of the right to life from Article 24 of the Constitution, and starting from the provision of Article 170 of the Constitution and Article 82 of the Law on the Constitutional Court, as well as from the previous practice of the Constitutional Court and legal positions in dealing with constitutional complaints adopted at the sessions of the Court on 30 October 2008 and 2 April 2009, the Court finds that it is necessary to examine the existence of three preconditions for deciding on this constitutional complaint, and to: A) whether the constitutional complaint is allowed *ratione personae* ; B)

whether the constitutional complaint is admissible *ratione temporis* ; and C) whether the constitutional complaint is timely.

A) Examining the existence of the first presumption, ie the admissibility of a constitutional complaint *ratione personae* , the Constitutional Court started from the guarantees provided by the Constitution in the provision of Article 24 and concluded that the Constitution guarantees that human life is inviolable. The right to life is an absolute right and a basic human right guaranteed by the Constitution. According to the assessment of the Constitutional Court, this right shall include, inter alia, the positive obligation to take all necessary measures to protect the lives of those within its jurisdiction (see the aforementioned verdict of the European Court of Human Rights in the cases: *LCB v. The United Kingdom* , of 9 June 1998, Report 1998-III, paragraph 36 , as well as the judgments in *Guerra and Others v. Italy* , application No. 116/1996/735/932, of 19 February 1998, Report 1998-I , *Botta v. Italy* , application no. 21439/93, 24 February 1998, Report 1998-I).

Also, the Constitutional Court points out that there is a well-established case law of the European Court of Human Rights, which considered the complaints of relatives of persons deprived of life from the aspect of the right to life from Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because no effective and efficient investigation concerning the deaths of those persons (see, inter alia, the judgments: *Šilih v. Slovenia* , application no. 71463/01, 9 April 2009; *Akdeniz and Others v. Turkey* , application no. 25165/94, 31 May 2001 . years ; *Mc since r v United Kingdom* , application No. 28883/95, dated 4 May 2001). Bearing in mind that the provision of Article 18 para. 3 of the Constitution stipulates that the provisions on human and minority rights are interpreted in favor of promoting the values of a democratic society, in accordance with applicable international standards of human and minority rights and the practice of international institutions monitoring their implementation. the court, following the above practice in an analogous situation in which the submitters of the constitutional complaint were close relatives of persons deprived of life, and whose death is being investigated , concluded that the constitutional complaint was allowed *ratione personae* .

B) Considering the question of the admissibility of a constitutional complaint ratione temporis, the Constitutional Court recalls that the Constitution of the Republic of Serbia, which establishes a constitutional complaint as a legal remedy for the protection of human rights and freedoms, entered into force on 8 November 2006. they can challenge only individual acts of state bodies and organizations that have public authorities that have been adopted, ie actions that have been taken after the entry into force of the Constitution.

However, the Constitutional Court points out that the procedural obligation of the competent bodies from Article 24 of the Constitution to conduct an investigation is a special and independent duty, which obliges even when the death occurred before the entry into force of the Constitution. Despite the above, having in mind the principle of legal certainty, the temporal jurisdiction of the Constitutional Court is not infinite. Therefore, the Constitutional Court assessed that, when the death occurred before the entry into force of the Constitution, only those procedural actions or omissions that occurred after 8 November 2006 could fall under the temporal jurisdiction of the Court. Also, there must be a real connection between the death and the entry into force of the Constitution in order for the procedural obligation to have effect, ie that a significant part of the procedural steps required by this provision has been performed, or should be performed after the Constitution enters into force. The Court also points out that circumstances may arise that call into question the effectiveness of the original investigation (before the entry into force of the Constitution), and there may be obligations to pursue the continuation of the investigation.

Bearing in mind that the critical event took place during 1999, that TRZ. On July 28, 2014, it issued an order to escort and guard Kti. 1/14 against D.Ž. , and that the investigation

was conducted after the entry into force of the Constitution , the Constitutional Court assessed that the applicants' constitutional complaint was compatible ratione temporis with the Constitution. This position of the Constitutional Court is also in line with the case law of the European Court of Human Rights (see , inter alia, the judgment in *Šilih v. Slovenia* , application no. 71463/01, 9 April 2009 , §§ 159 and 161; *Hacket t v. the United Kingdom* , application no. 34698/04, 10 May 2005). The Constitutional Court, for reasons of context, also had in mind the relevant events before that date.

V) Assessing the issue of timeliness of the constitutional complaint, the Constitutional Court had in mind that in this particular case the violation of the right to life was highlighted, which in its procedural aspect is expressed as an obligation of the state to fast thoroughly, independently and really during the investigation of suspicious deaths. , as well as that this aspect of the right to life cannot be protected in any other procedure except in the procedure before the Constitutional Court. On the other hand , the Constitutional Court notes that the decision of the Republic Public Prosecutor's Office is Ktpo. 58/17 issued on 7 December 2017, by which decision the legal remedies of the submitters of the constitutional complaint that were available to them on the basis of the relevant provisions of the Criminal Procedure Code were exhausted , and that the constitutional complaint was filed on 15 December 2017 within the deadline of 30 days provided for in Article 84, paragraph 1 of the Law on the Constitutional Court ("Official Gazette of RS", No. 109/07, 99/11 , 18/13 - Decision US , 40/15 - other law and 103/15) . Therefore, the Constitutional Court assessed that the constitutional complaint was timely.

In accordance with all the above , the Constitutional Court considers that there are preconditions established by the Constitution and the Law on the Constitutional Court for deciding on this constitutional complaint.

5 . 4. Starting from the allegations and reasons of the constitutional complaint, as well as the established factual situation, the Constitutional Court points out the following:

The obligation to protect life under Article 24 of the Constitution, interpreted under Article 19 of the Constitution , that “the guarantees of inalienable human and minority rights in the Constitution serve to preserve human dignity and achieve full freedom and equality of every individual in a just, open and democratic society rights ", points out that in this case the positions of the European Court of Human Rights expressed in the case *Mladenović v. Serbia* , application no. 1099/08, dated 22 May 2012, should be applied , according to which: the obligation to protect life according to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires some kind of effective official investigation when individuals are killed on suspicion of using force, either by civil servants or by private individuals (see, for example, the judgment of the European Court of Human Rights). Human Rights *Branko Tomašić and Others v. Croatia* , application no. 46598/06, 15 January 2009, § 62); that this investigation must be effective in that it may lead to the identification and punishment of those responsible (see *Oğur v. Turkey* , application no. 21594/93, judgment of 20 May 1999, § 88); that it is not an obligation of purpose but an obligation of means, which means that the competent state authorities are obliged to take all reasonable measures at their disposal to provide evidence in connection with that event, including, inter alia, the cause of death; that any shortcoming in the "investigation" that undermines its ability to determine the cause of death or the person responsible may pose a risk that the standard will not be met (see, inter alia, *Bazorkin v. Russia* , no. 69481/01, no . 27 July 2006, paragraph 118); that there is an implicit request for urgency and ra zumnom expediency (see *Yasa against Turkey* , a submission a number oj 63/1997/847/1054, from 2 September 1998, Reports 1998-VI, pp. 102-04 and *Mahmut Kaya v Turkey* , application no. 22535/93, 28 March 200, 2000-III, §§ 106 and 107); that although there may be real difficulties preventing the progress of a particular investigation, a rapid response by the authorities in situations

involving the use of lethal force may generally be considered essential to maintain public confidence in the rule of law and prevent any conspiracy or toleration of illegal acts (see *Jularić v. Croatia* , Application No. 20106/06, dated 20 January 2011, paragraph 43); that for the same reasons there must be a sufficient element of public scrutiny of the investigation or its results to ensure accountability both in practice and in theory and that the degree of public scrutiny required may vary from case to case, and that close relatives of the victim they must take part in the proceedings in all cases to the extent necessary to *safeguard* their legitimate interests (see *Shanagha v. the United Kingdom* , application no. 37715/97, judgment of 4 May 2001, §§ 91 and 92).).

Applying the stated general principles to the circumstances of the specific case, the Constitutional Court first points out that in the case of the 5th High Court in Belgrade - Department K. Po.2. 4/15 conducts criminal proceedings against the accused T.M., S.P., S.K., B.B., R.B., V.K., A.S., M.N., R.M., S.M. and DB , for the criminal offense of War Crimes against Civilians under Article 142, Paragraph 1 in conjunction with Article 22 of the CPC. They were charged with committing a war crime as members of the 177th Military Territorial Detachment in Peja, during the armed conflict in 1999, on the territory of the villages of Ljubenić, Ćuška, Plavljan and Zahać, near Peć.

The War Crimes Prosecutor's Office , having in mind the criminal proceedings in the case of the High Court in Belgrade - War Crimes Chamber K. Po.2. 4/15, as well as by reviewing the base of the International Criminal Tribunal for the former Yugoslavia , submitted the initiative to Kti. 1/14 from 18 May 2014 to initiate criminal proceedings against the suspect D .Ž . On the occasion of the submitted initiative, the OWCP issued an order to conduct an investigation into Kti. 1/14 of 28 July 2014. D o criminal proceedings (investigations) against D.Ž. there was based on Žinić ijative competent state authority - TRZ , because of a war crime against the civilian population of a member of a 142, paragraph 1 CRU. D Akle, in this specific case is taken official investigation , by the relevant government authority. The Constitutional Court points out that 31 . July 2014, the interrogation of the suspect was interrupted in order to allow him sufficient time to prepare his defense in accordance with Article 68, paragraph 1, item 7) of the Criminal Procedure Code , and the interrogation was to continue on September 1, 2014, until when it did not come as a result of a lawyer's strike.

After the initiation of the procedure, several actions were taken, among other things, extensive documentation was obtained, other OWC cases were inspected , and a preliminary expert study "Responsibility of command structures of the 125th and 549th Motorized Brigades of the Yugoslav Army for crimes committed by their members and members of other commands and units in their composition in the area of operation of those brigades for the period March - June 1999. " Prosecution is don principle decision to examine 14 witnesses , of whom two witnesses were not examined during the investigation . The suspect and the defense counsel template Ozil as if four witnesses , two of which have not been tested. The suspect and his defense counsel / deputy defense counsel, as well as in most cases the lawyer's trainee lawyer, were present at the examination of the witness.

Lawyer N . T . the 24 December 2015 delivery io power of attorney for the plaintiffs, on 16 June 2016 template Ozio examination of several witnesses - nine witnesses nav eo's name, and three witnesses nav eo is their function during armed conflict 1999. The OWCP found out the names of these persons, who were questioned without the presence of the injured party's attorney. The attorney was present when other witnesses were examined (a total of four witnesses) , and a meeting was held on December 13, 2016, to examine the other witnesses . N and the meeting , which was held in TRZ , discussed is the examination of other witnesses and the reasons why certain witnesses can be questioned. Namely , the minutes from the meeting show that witness Lj . A . n i is not be questioned due to severe disease, and for the two

witnesses (Z , R , and D , Tr .) , there were difficulties in determining the exact address, or the delivery of calls.

The investigation was completed on December 13, 2016, and lasted a year and five months in total. The Constitutional Court , having in mind all the above, determined that the War Crimes Prosecutor's Office undertook all actions, with adequate urgency, obtaining all the necessary material. In doing so , the Constitutional Court points out that the investigation gathers evidence and data necessary to decide whether to file an indictment or suspend the proceedings, evidence necessary to establish the identity of the perpetrator, evidence for which there is a danger that will not be able to repeat at the main trial or their presentation would be difficult, as well as other evidence that may be useful for the procedure, and whose presentation, given the circumstances of the case , proves expedient , as in Article 295, paragraph 2 of the Code on criminal proceedings stated. Also, it follows from Article 310, paragraph 1 of the Code that when he finds that the state of affairs in the investigation is sufficiently clarified, the public prosecutor will issue an order to complete the investigation , which he will deliver to the suspect and his defense counsel, if any, and notify the injured party.

The Constitutional Court notes that from the cited legal detachment aba follows that in this stage of collecting evidence and daci sufficient to clarify matters and to decide on the further course of the proceedings, but not necessarily all the (proposed) evidence and data. The Constitutional Court notes that the small number of witnesses proposed by the OWCP , the suspect and the injured party remained unanswered. It should be borne in mind that, when analyzing the investigation in light of the violation of the right to life, the obligation of public authorities - obligation assets, not liabilities goal .

In view of all the above, the Constitutional Court determined that the same raga was against the suspect D.Ž. was urgent and effective, and assessed that there was no violation of the procedural aspect of the right from Article 24 of the Constitution. Also, the Constitutional Court had in mind that the attorney of the injured parties filed an objection against the disputed act of TRZ Kti. 1/14 of March 1, 2017, which was rejected as unfounded by the disputed act of the Republic Public Prosecutor's Office Ktpo. 58/17 of 7 December 2017.

Starting from all the above, the Constitutional Court found that the complainant was not a violation of Article 24, paragraph 1 of the Constitution and the constitutional appeal dismissed as unfounded, pursuant to the provisions of Article 89 , paragraph 1. The Law on the Constitutional Court, deciding as in the first part of the proverb.

6. The Constitutional Court was also asked the constitutional question whether it was even possible to conduct an investigation / criminal proceedings against the accused D.Ž. on the basis of command responsibility, which indisputably requires an answer due to the wider importance for the protection of human rights and fundamental freedoms of both the accused (s) and the injured party (s) in similar situations.

The Constitutional Court notes that the War Crimes Prosecutor's Office also conducted a search against the accused D.Ž. in the case of Kti. 1/14, due to the existence of grounds for suspicion that he committed the criminal offense of War Crimes against Civilians under Article 142, Paragraph 1 of the CPC in conjunction with Article 30 . KZJ. The order to conduct the investigation states, inter alia, that “the established elements of command responsibility relating to the suspected commander of the 125th Motorized Brigade D.Ž. , above all, his formal status, ie the command position of the commander of the 125th mtb derive from the Of the High Court in Belgrade in the case "Ljubenić, Ćuška, Zahač and Pavlan", from the statement of D.Ž. which he testified as a witness in the Haradinaj et al. proceedings before the International Court of Justice in The Hague on 9 August 2007, in which he claims that on 12 June 1998 he was appointed commander of the 125th mtbr. in Kosovska Mitrovica, and that the brigade was subordinated to the Pristina Corps in under the command of General N. P ". Therefore, in the specific case , the defendant was liable on the basis of command responsibility

for the criminal offense under Article 142, paragraph 1 of the CPC in conjunction with Article 30 . KZJ.

The Constitutional Court finds that the Law on the Organization and Jurisdiction of State Bodies in War Crimes Proceedings applies to two categories of criminal offenses: 1) criminal offenses listed in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), formulated as " grave violations of international humanitarian law committed on the territory of the former Yugoslavia since January 1, 1991 ", as well as 2) certain exhaustively listed international crimes contained in the Criminal Code of Serbia, which includes crimes against humanity and other goods protected by international law , as and 3) the criminal offense of aiding and abetting the perpetrator of a criminal offense, when it relates to one of the aforementioned categories of international criminal offenses. The acts listed in item 2) include genocide, war crimes against civilians, war crimes against the wounded and sick, war crimes against prisoners of war, organizing and inciting the commission of genocide and war crimes, use of illicit means of combat, illicit production, trafficking and possession weapons whose use is prohibited, unlawful killing and wounding of enemies, unlawful seizure of property from the slain, injury to parliamentarians, cruel treatment of the wounded, sick and prisoners of war, unjustified delay in repatriation of prisoners of war, destruction of cultural property, misuse of international symbols and aggressive aggression. There is , otherwise , classified the two crimes, which did not exist in the Criminal Code of the SFRY and later the FRY and Serbia, until 2006, which means that such crimes were not applicable at the time of the civil war in Yugoslavia in the 1990s year, as well as during the NATO aggression on the FRY in 1999, and during the armed conflict, separatist armed rebellion, terrorist activities, the so-called. KLA and anti-terrorist activities of the Yugoslav Army and Serbian police in Kosovo and Metohija. These are crimes against humanity (Article 371 CC of Serbia, as well as a criminal offense under Article 384 of the CC of Serbia - failing to prevent the commission of offenses against humanity and other goods protected by international law, which is in fact criminalizing command responsibility. The classification of these two offenses set of criminal offenses in respect of which special rules of concentration of actual jurisdiction apply in combination with *sui generis* application of the universal principle of validity of Serbian criminal legislation, is not disputable in itself, but from the point of view of the principle of legality, ie its *lex praevia* element, crimes committed before the entry into force of the CC of Serbia in 2005 (entered into force in early 2006), because these two crimes were not prescribed in the CC of the SFRY, nor in the CC of the FRY, which were in force during the civil war in the former SFRY, as well as during the aggression on the FRY in 1999, and the retroactive application of the current Criminal Code is not constitutionally possible here , because in this particular case not a more lenient criminal law (see the subject of the European Court of Human Rights *Korbely v Hungary* , Application No. 9174/02 , decision of 19 . September 2008).

Therefore, the Constitutional Court considers that the institute of command responsibility in the Republic of Serbia can be applied only from the entry into force of the valid Criminal Code (" Official Gazette of RS", no. 85/05, 88/05, 107/05, 72/09 and 111 / 0 9) , on January 1, 2006, and whose retroactive application is prohibited in accordance with the principle of legality, which is guaranteed by Article 34, paragraph 1 of the Constitution, as well as the Criminal Code itself - Article 1, command responsibility is implemented by this the Code as a separate criminal offense of not preventing the commission of criminal offenses against humanity and other goods protected by international law under Article 384 of the Criminal Code. So did other states, such as Germany in its International Penal Code (*Völkerstrafgesetzbuch - VStGB*) , when it prescribed in § 4 the criminal offense of liability of a military commander and other superiors (*Verantwortlichkeit militärischer Befehlshaber und anderer Vorgesetzter*) .

Having in mind all the above, the Constitutional Court assessed that in the specific case the conditions for conducting an investigation , ie criminal proceedings, against the accused DŽ , due to the lack of command responsibility in the legal system of the Republic of Serbia before January 1, 2006, were not met . Conducting an investigation , ie criminal proceedings on the basis of command responsibility for criminal offenses committed before 1 January 2006, would be disputable from the point of view of guarantees established by Article 34, paragraph 1 of the Constitution.

7 . In relation to the alleged violation of the right to a fair trial, the Constitutional Court points out that, starting from the content of the right to a fair trial determined by the Constitution, this right in criminal proceedings is guaranteed primarily to the accused, since in that procedure the ground of suspicion was decided. for initiating proceedings, ie on charges against a person. In that sense, when an investigation has been conducted against the defendant by the competent public prosecutor, it is in the exclusive competence of the public prosecutor to decide whether the results of the investigation provide sufficient grounds for filing an indictment with the competent court. Therefore, a person who has the position of injured party in criminal proceedings cannot invoke that his right to a fair trial has been violated by the fact that no criminal proceedings have been instituted against the defendant, or that the criminal proceedings have not ended with the conviction of the accused. criminal sanction.

Starting from the previously stated, and having in mind the allegations of the constitutional complaint and the procedural position of the applicants in the case of the War Crimes Investigation Court. 1/14 , the Constitutional Court assessed that the constitutional complaint, *ratione personae* , was incompatible with the stated violation of the rights from Article 32 of the Constitution, and, in accordance with the provision of Article 36, paragraph 1, item 7) of the Law on the Constitutional Court, rejected the constitutional an appeal in relation to the alleged violation of the right to a fair trial, resolving as in the second part of the dictum.

8. The Constitutional Court is due to the character s e o dluke to protect constitutionality and legality , human rights and civil liberties , pursuant to Article 49, paragraph 2 of the Law on the Constitutional Court decided that the decision published in the 'Service “ .

9 . Following all the above, the Constitutional Court, on the basis of the provisions of Article 42b paragraph 1 item 1) and Article 45 item 9) of the Law on the Constitutional Court, rendered the Decision as in the dictum.

PRESIDENT OF THE CHAMBER
Snezana Markovic , s.r.

For shipping accuracy:

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