MINISTRY OF FOREIGN AFFAIRS

AGENT OF THE GOVERNMENT
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

**Mrs. Marialena Tsirli**
**Section Registrar**
**Fourth Section**
**European Court of Human Rights**
*Bucharest, 6 December 2018*

**Application no. 75317/17**
**Dragnea v. Romania**
L1/14214
9163 R/AG/11

**Written Observations on the admissibility and merits of the case**

1. On 25 October 2018, following a preliminary examination of the admissibility of the application, the President of the Section to which the case had been allocated decided, under Rule 54 § 2 (b) of the Rules of Court, that notice of the application should be given to the Government of Romania and that the Government should be invited to submit a statement of facts together with written observations on the admissibility and merits of the complaint concerning Article 6 § 1 of the Convention. The remainder of the application was declared inadmissible.
2. The President of the Section also decided that the application be treated with priority, under Rule 41 of the Rules of Court, upon the request of the applicant's representative.
3. The application concerns the alleged non-compliance by domestic authorities with their obligations imposed under Article 6 § 1 of the Convention, given the absence, from the reasoning of a final judgement in a criminal trial concerning the applicant, of the signatures of two of the judges from the five-judge panel having delivered the aforementioned final judgement.
4. The Court invited the Government to answer the following question:

*"Le bien-fondé de l'accusation en matière pénale dirigée contre le requérant a-t-il été examiné équitablement, comme l'exige l'article 6 § 1 de la Convention, dans la mesure où la motivation de l'arrêt du 22 avril 2016, de la Haute Cour de cassation et de justice n'a pas été signée par deux des cinq juges ayant siégé*

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*dans la formation de jugement ayant prononcé l'arrêt et compte tenu des motifs exposés à ce titre dans l'arrêt du 24 avril 2017 de la Haute Cour (mutatis mutandis, Cerovšek et Božičnik c. Slovenie, n°s 68939/12 et 68949/12, 7 mars 2017)?"*

5. The Government's observations are structured as follows:

**I. THE FACTS**

**II. DOMESTIC LAW AND CASE-LAW. COMPARATIVE LAW**

**IV. THE LAW**

## I. THE FACTS

6. Firstly, the Government do not endeavour to submit an in-depth statement on the merits of the criminal procedures finalised by the judgement whose alleged faults are complained of. As such, the Government take into consideration the complex nature of the facts concerning the *per se* criminal proceedings, as only the final judgement in the concerned trial is 303-pages long.

7. Secondly, the Government note that the main facts complained of by the applicant, as communicated by the Court, refer to the absence, from the reasoning of the final judgement in the *per se* criminal trial, of the signature of two of the five judges in the panel, whereas the application does not complain of the criminal proceedings before the delivery of the judgement.

8. Thirdly, the case-law indicated by the Court in their question to the Government provides that, in determining issues of the fairness of proceedings for the purposes of Article 6 of the Convention, the Court sets upon itself the task to assess the proceedings as a whole. Moreover, the Court decided that it is not its function to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. The Court set itself to ascertain whether the proceedings in their entirety were fair (see *Cerovšek and Božičnik v. Slovenia,* cited above, §37, *Edwards v. the United Kingdom*, judgement of 16 December 1992, Series A no. 247-B, § 34; *Mishgjoni v. Albania*, no. 18381/05, § 49, 7 December 2010; and *Saranchov v. Ukraine,* no. 2308/06, § 45, 9 June 2016).

9. The Government shall therefore submit the below statement of the facts they consider relevant to the above principles and to the herein application, i.e. a summary of the *per se* criminal proceedings and a statement of facts regarding the complaint against the final judgement delivered in the former criminal trial. The Government nonetheless kindly ask the Court that, should it consider that other information regarding the facts and points of law thereon are also of relevance, to instruct that the Government submit them before the Court.

### I.1. Summary of the criminal proceedings against the applicant

10. In August 2012, the National Anticorruption Directorate (DNA) opened preliminary investigations regarding potential offences prescribed by the election and anticorruption laws, suspected to have been committed during the national referendum for the removal from office of the back-then President, following impeachment by Parliament. In September 2012, criminal investigations regarding the applicant were opened in respect to four distinct potential

offences. In regard to three of those offences, criminal investigations were subsequently discontinued, as the prosecutors concluded that none of them had been committed (*"faptele nu există"*), whereas for the fourth the applicant would later be indicted. In September 2013, the DNA arraigned 75 persons, including the applicant. According to the arraignment, the applicant had been, at the relevant time of the impugned offences, a Member of Parliament, President of the National Union of County Councils and Secretary General of a leading political party. The applicant was indicted and subsequently arraigned for the offence of having used his influence and authority over mayors, town and county councillors, county campaign managers, party members and supporters in order for the latter to use such means, forbidden by the election law, with a view to unlawfully raise participation at and win the national referendum. The offence had been, in the prosecution's opinion, prescribed by Article 13 of Law no. 78 of 2000 regarding the prevention, discovery and sanctioning of corruption. The rest of the 74 accused, who had been members of several local election commissions, were arraigned for various offences, including the adding of forged signatures to official ballot lists and subsequent fraudulent adding of ballots. The latter offences had been prescribed by the relevant articles of the election law in conjunction with the Criminal Code (see pages 29-35 of the judgement of 22 April 2016 of the High Court of Cassation and Justice [HCCJ], enclosed by the applicant).

11. The indictment submitted the following evidence: preliminary investigations' report, criminal complaints and reports lodged by third-parties, witness testimonies, warranted searches' reports, various documents lifted from the political party in question, from the Permanent Electoral Authority, transcripts of recorded conversations and intercepted telephone conversations, various material evidence, forensic graphology reports, reports regarding IT examination of evidence, testimonies of the accused and reports regarding the discovery of evidence to the accused before arraignment (*"prezentarea materialului de urmărire penală"*).

12. In October 2013, the HCCJ registered the arraignment. Following the preparatory procedure, when procedural requests were heard and ruled on, two of the accused admitted to the charges and their cases were severed and the three-judge panel started administering evidence. *Inter alia,* 337 witness, whose testimonies had been taken during pre-trial proceedings, were heard again directly by the domestic court. Some of these 337 witnesses were heard more than once by the court. The rest of the testimonies, i.e. taken during pre-trial proceedings from witnesses who could not be brought before the court, due to objective reasons, were read aloud before the court, in public hearings. Testimonies were also heard from all of those accused, who did not use their right to remain silent. Starting March 2015, part of the administered evidence was re-administered from the beginning before the court as one of the judges from the panel was replaced. The re-administration of evidence was ruled according to the principles of the Court's case-law (*Cutean v. Romania,* no. 53150/12, 2 December 2014), after debating with the accused which evidence was to be entirely re-administered and which - partially. Additional testimonies were taken from 19 witnesses requested by the accused, other than the witnesses heard during pre-trial investigations. Of the latter, 17 were requested by and granted to the applicant in the herein application. Other additional requests for the administration of evidence granted to the applicant

in the herein application regarded documents from the Central Electoral Bureau, press articles, sociologic studies (all of the above are described in pages 72-78 of the judgement of 22 April 2016 of the HCCJ).

13. Evidence against and in favour of the applicant, their relevance to the facts and points of law were thoroughly debated by the domestic court with the applicant in the herein application. Following the aforementioned debate, the HCCJ three-judge panel held, within the subsequent judgement, that only part of the material acts and deeds of the applicant, as impugned by the prosecution, constituted a breach of the criminal law, as provided by Article 13 of Law no. 78 of 2000 (a summary of the said debates and the courts' conclusions following debates are described in pages 79-111 of the judgement of 22 April 2016 of the HCCJ).

14. The absence of effects regarding the enactment and entry into force of a new Criminal Code in regard to the provisions of Law no. 78 of 2000, as relevant to the sentencing of the applicant, were also reasoned by the domestic court (see page 166 of the 22 April 2016 judgement). The duration of the sentence given to the applicant was again reasoned by the first instance court, which delivered a 1-year (i.e. the minimum provided by the law) suspended sentence (see pages 171-172 of the 22 April 2016 judgement).

15. In May 2015, 33 of the accused, including the applicant, were found guilty of breaking the criminal law and were given various sentences. The Government recall that 2 of the 75 initially indicted cases had been severed. The rest were found not guilty. 28 of the accused and the DNA appealed (a summary of the reasons for the appeals was described in the 22 April 2016 judgement – pages 178-182, whereas a summary of the applicant's reasons for appeal is listed at page 179). The appeals were registered in July 2016, when the case-file was allocated to a five-judge panel ("*Completul de cinci judecători*").

16. Evidence was re-administered and the appellate panel granted additional requests for evidence (see pages 183-195 of the 22 April 2016 judgement).

17. As to the applicant in the herein application, he was granted requests to testify before the court and to have three additional witnesses testify in his favour before the court. Three other such additional witnesses testified regarding the charges against the applicant, following a request from the DNA (see pages 183-185 and 189 of the 22 April 2016 judgement).

18. After the administration of evidence, the five-judge panel held debates, similar to those held by the first-instance court (see para 13 above). The debates were finalised on 8 April 2016, when the appellate panel gave the accused the possibility to lodge written closing arguments ("*concluzii scrise*").

19. The five-judge panel examined the reasons for appeal lodged both by the DNA and the applicant in respect to the first-instance judgement. To do so, it reviewed all the evidence and its relevance to the statement of facts, as administered during pre-trial prosecution and before the two domestic courts (first instance and appeal), ruled regarding the relevance of the evidence both in favour and against the defendant, held as to the facts and relevant provisions of the election law, applicable to the facts (see pages 215 – 230 of the 22 April 2016 judgement). The appeal panel reasoned why it upheld that only part of the material acts and deeds of the applicant, of those arraigned by the prosecution, constituted a breach of the criminal law. Subsequently, it analysed and ruled

regarding the application of the criminal law to the facts, as proved by the administered evidence, to the culpability and to the sentencing of the applicant, by raising it to a 2-years suspended sentence (see pages 230-235 and 299-302 of the 22 April 2016 judgement).

20. The operative part of the sentence or the minute (*"minuta"*) was pronounced on 22 April 2016. Following deliberations, the said operative part of the judgement was signed by all of the five judges unanimously (see the certified copy of the minute, appended to the HCCJ letter – Annex I). The drafting of the reasoning of the judgement, as it transpired from the deliberations, was assigned to the assistant-magistrate (*"magistrat-asistent"*) who had taken part in the hearings and deliberations. On 1 May 2016 and 13 July 2016, two of the judges from the panel retired. A draft of the written reasoning was finalised by the assistant-magistrate and presented on 29 November 2016 to the three judges still in office at the time. The reasoned judgement was finalised and signed by the latter and by the President of the HCCJ on 2 February 2017. The President of the HCCJ signed on behalf of the two judges who had retired from office after signing the minute, clearly stating the reasons for affixing her signature ("for judge [...], retired, signs the President of the HCCJ").

**I.2. The complaint against the final judgement**

21. On 3 February 2017, the applicant lodged a complaint against the execution (*contestație la executare*) of the final judgement of 22 April 2016. The appeal was initially lodged before the Bucharest County Court. The latter relinquished its jurisdiction in favour of the HCCJ. On 21 February 2017, the case-file was received at the HCCJ. On 21 March 2017, it was allocated to another five-judge panel of the HCCJ. A certified copy of the case-file for the complaint against the execution is appended to the HCCJ letter (Annex I).

22. Initially, the applicant based its appeal on the provisions of Article 598(1) points a) and c), second limb, of the Criminal Procedure Code (CPC, see para 39 below). Following the delivery onto the applicant of the reasoning of the 22 April 2016 judgement and prior to the first hearing, the applicant withdrew its complaint under Article 598(1) point a) of the CPC and relied solely on Article 598(1) point c), second limb of the CPC.

23. The first hearing was held on 10 April 2017. The applicant argued that the absence, from the reasoning of the 22 April 2017 final judgement, of the signatures of two of the judges from the five-judge panel having delivered the aforementioned final judgement, constituted a hindrance to the execution of the said final judgement. On points of law, the applicant complained that there was a difference between a relative hindrance to execution, which allows the president of the panel to delegate his right to sign the reasoning, and the absolute impossibility to perform the obligation to write the reasoning, as was the case of the two judges who had retired before the reasoning was finalised. The applicant argued that where the sitting judge is absolutely prevented by law to sign the reasoning, such as when removed from office, the judgement becomes null and void. The applicant concluded that such a situation had led to a hindrance to the execution of the final judgement (see para 6 of the second page of the interlocutory ruling of 10 April 2017). The applicant further argued that an opinion regarding the impossibility of a judge to reason his judgements in written had been adopted by the Superior Council of Magistracy (CSM) in 2011 and that the latter subsequently referred to the Ministry of Justice a

proposal for amendments to the legislation. The applicant noted that the Government failed to choose between the legislative solutions suggested by the CSM and send such a proposal to Parliament. The applicant finally argued that there is a legislative void for such situations (see the request for evidence and written arguments on points of law, submitted by the applicant on 15 February 2017, and page 4 of the interlocutory ruling of 10 April 2017, as enclosed by the applicant and in Annex I).

24. The applicant requested that the following evidence be administered in support of his complaint on points of law, as such evidence would lead to factual findings regarding the time when the two judges wrote and then delivered the reasoning of the 22 April 2015 final judgement or whether that judgement had been reasoned by other persons:

    i. copies of internal documents of the HCCJ regarding the reasoning of the 22 April 2016 judgement (from the Registry for the reasoning of judgements, from the Archive Registry, from the surrender of documents' sections of the retirement reports of the two judges);

    ii. a forensic analysis of the IT programme used by the computer network of the HCCJ and a forensic analysis of the computers used at the HCCJ;

    iii. documents from the Superior Council of Magistracy regarding the retirement of the two judges.

25. The HCCJ requested the applicant's lawyers to clarify their legal grounds for lodging the complaint against the execution. The applicant's lawyers confirmed that they relied (solely) on the provisions of Article 598(1) point c), second limb of the CPC (see first two paragraphs of page 4 of the interlocutory ruling of 10 April 2017).

26. Following debates on the usefulness of the requested evidence, the court adjourned for deliberations on the motion for evidence and, upon resuming the hearing, presented the applicant and his lawyers with a copy of an internal document of the HCCJ, signed and approved for the purpose of press releases, upon inquiries from the press. The said document, dated 14 February 2017, was more elaborate than the press statements themselves and confirmed the following (see the said document and e-mails to the press, as appended to the HCCJ letter in Annex I, and an additional written statement by the assistant-magistrate in question, for the purpose of the proceedings before the Court, appended to the same HCCJ letter):

- the drafting of the reasoning of the judgement along the lines developed during deliberations was assigned by the president of the panel to the assistant-magistrate who had participated in the hearings and deliberations;
- a draft was finalised and delivered to the remaining three judges from the panel on 29 November 2016;
- the reasoned judgement was finalised and signed by the three said judges, by the assistant-magistrate and by the President of the HCCJ on 2 February 2017. The President of the HCCJ signed on behalf of the two judges who had retired in the meantime, clearly stating the said reason for affixing her signature (see para 20 above).

27. Considering the administration into evidence of the aforementioned document, which had answered the applicant's questions regarding the facts, the HCCJ rejected the requests for evidence lodged by the applicant (see pages 6-7 of the interlocutory ruling of 10 April 2017).

28. The applicant's lawyers complained of the refusal of evidence and requested the referral of the said refusal to the Court of Justice of the European Union (CJEU). The Court rejected the request for referral to the CJEU and reasoned its rejection (see pages 7-9 of the interlocutory ruling of 10 April 2017). The Government do not wish to elaborate, given that the Court rejected as inadmissible the applicant's complaint under the access of evidence limb of Article 6.

29. When debating the facts and the law, the applicant argued that (see pages 11-14 of the interlocutory ruling of 10 April 2017):

- the evidence cannot lead to the establishment of the author(s) of the written reasoning;
- the judgement must represent the agreement of the judges from the panel, whereas such an agreement must not be met not only in regard to the operative part or the minute, but also in regard to the reasoning; he argued that the retirement of the two judges before the signing of the reasoning equals to the absence of an agreement in regard to the written reasoning, which does not represent the view of the entire panel in respect to the criminal proceedings;
- the signing of the reasoning did not abide by the domestic law and it did not provide a safeguard against arbitrariness; the operative part was clear, but the reasoning should have been verified entirely.

30. The court adjourned, in order for the applicant to be allowed the possibility of lodging final closing arguments (*"concluzii scrise"*).

31. On 24 April 2017, the HCCJ denied the applicant's complaint against the execution of the final judgement as ill-founded. The reasoning for the denial held that (copy enclosed by the applicant and by the Government in Annex I – see pages 3-6 of the 24 April 2017 judgement):

- the complaint against the execution may be used, in general, when, for various reasons, the execution cannot take place or when, during the process, the execution is hindered by certain incidents related to the judgement to be executed;
- the particular legal ground relied on by the applicant against the execution may be used *when there are legal grounds to discontinue the execution* (the emphasis belongs to the HCCJ – see para 3 of page 4 of the judgement), for example when the execution of a prison sentence is implicitly suspended by means of an extraordinary appeal or by means of a law suspending the execution, therefore leading to a sentenced person continue serving prison, even if that sentence is suspended by a subsequent legal provision;
- the applicant only *formally* relied on the provisions of Article 598(1) point c), second limb of the CPC, whereas *the facts argued do not fall under the relied provisions, as they do not represent a cause able to discontinue the execution of the contested final judgement* (the emphasis belong to the HCCJ – see para 5 of

page 4 of the judgement). The applicant in fact criticised the application of Article 406 of the CPC (see para 36 below), whereas, in his opinion, the judgement could no longer have been reasoned, due to the retirement of the two judges, as the reasoning thus could not have represented the points of view of the same judges who had deliberated and pronounced the judgement;

- pursuant to Article 393(1) of the CPC (see para 36 below), judges deliberated on all the facts and applicable points of law, on the existence of indicted facts and the culpability of the accused, on the sentencing, on other measures; the result of the deliberations is written in the form of minutes, which are identical to the operative part of the reasoned judgement, and the minutes were signed by all the judges, pursuant to Article 400 of the CPC (*Ibid*);
- the minutes of the final judgement of 22 April 2016, as they were signed by all of the judges in the panel, represented the result of deliberations and of an unanimous agreement regarding the operative part of the judgement and the reasoning regarding the facts and points of law behind the decision;
- pursuant to Article 552(1) of the CPC (see para 36 below), a judgement becomes final when pronounced, in the said case on 22 April 2016, when it was pronounced by the HCCJ, it became executory and was conferred with *res judicata*;
- as such, the absence from the reasoning of two signatures represented no hindrance to the execution of the 22 April 2016 judgement, as long as the absence was determined by the known retirements and as all panel members had signed the minutes, thus confirming their agreement in respect to the settling of the case, the grounds behind it and the logical and legal reasoning that had substantiated the solution;
- where the applicant had claimed that the final judgement was either non-existent or null, the court held that the facts were not similar to the situation where the reasoning would have been either signed by only part of the panel judges, without the rest being hindered from signing, or signed by judges without a legal right to sign, other than those who were part of the panel;
- regarding the interpretation of Article 406(4)[1], second limb, the HCCJ held that the relevant provisions did not distinguish between causes preventing either of the panel members for signing the reasoning, contrary to the applicant's claims. Therefore, the said provisions apply to all such situations where a panel member cannot sign, as *ubi lex non distinguit, nec nos distinguebere debemus* and *actus interpretandus est potius ut valeat quam ut pereat*;
- as regards the applicant's request before the HCCJ for the latter to apply the CSM opinion dating from 2011, the HCCJ held that the said opinion had not been enacted by law, therefore was not mandatory, and that the same opinion referred only to <u>*single-judge formations*</u> ("*complete necolegiale*", the emphasis belongs to the HCCJ – see last para of page 5 and first para of page 6 of the 24 April 2017 judgement), and was therefore not applicable to the contested final judgement, pronounced by a five-judge panel of the HCCJ. The said panel strictly applied the legal provisions regarding the signing of the reasoning on behalf of one or more judges of a panel formation.

[1] The Government infer that there was a material error in the reasoning, as Article 406, not 404, provides for the procedure regarding the signing of the judgement

## II. DOMESTIC LAW AND CASE-LAW. COMPARATIVE LAW

### II.1. Domestic law and case-law

*A. The Constitution*

32. Article 126 provides:

"1. Justice is served by the High Court of Cassation and Justice and by other courts established by law. [..]

4. Composition of the High Court of Cassation and Justice and its Rules of the Court are established by organic law."

*B. The Criminal Procedure Code (the "CPC")*

33. Criminal proceedings are, according to the CPC, the following, in chronological order: criminal investigations ("urmărirea penală"), preliminary chamber (where the arraignment submitted by the prosecutor is subjected to a preliminary review regarding the competent court for trial and the lawfulness of administered evidence), criminal trial and execution of criminal judgements. After pronouncement of a final judgement, the following extraordinary appeals are available during the criminal trial stage: the extraordinary appeal for annulment ("*contestație în anulare*"), the extraordinary appeal for cassation ("*recurs în casație*") and the extraordinary appeal for re-examination ("*revizuire*"). During the execution of criminal judgements, a complaint against the execution ("*contestație la executare*") is available.

34. The stages of the criminal trial before a court were the following, according to the CPC:

a) preparatory acts ("*măsuri premergătoare*"), such as summoning of the parties and witnesses, ruling on procedural exceptions etc.;

b) administration of evidence ("*cercetare judecătorească*"), which includes hearing the testimony of the accused, if they do not use the right to remain silent;

c) debates ("*dezbateri*"), where the facts and points of law are orally argued by the parties. The accused is given the final word, without the prosecution being able to question the accused, and parties may lodge written closing arguments;

d) deliberations in chambers and pronouncement in public of the operative part of the judgement, which is written in the form of minutes, signed by the single judge or by all the members of the panel formation, by case;

e) writing and signing the reasoning of the judgement and subsequent delivery of the judgement.

35. Pursuant to Article 370 of the CPC, judgements (or court rulings) are of the following types: a) sentences ("*sentință*"), when first instance courts rule on the merits or relinquish jurisdiction, b) interlocutory rulings ("*încheiere*"), when recording hearings, regardless of jurisdiction, or when ruling on pre-trial requests and c) decisions ("*decizie*"), when ruling on the merits of appeals. Interlocutory rulings are written by the registrar within 72 hours of the hearing and signed by the registrar and by the president of the panel.

36. The relevant provisions regarding deliberations, pronouncement and reasoning of judgements read:

"**Article 391 – Settling the case**

(1) Deliberations and pronouncement of the judgement take place in the same day of the debates or at a later date, but no later than 15 days from the closing of the debates.

(2) Under extraordinary circumstances, where, given the complexity of the case, deliberations and pronouncement of the judgement cannot be done within the term provided under para 1, the court may adjourn pronouncement once, for 15 days at the most.

**Article 392 – Deliberations**

(1) Only the members of the panel before whom debates were held take part in deliberations.

(2) The members of the panel deliberate in secret.

**Article 393 – Object of deliberations**

(1) The panel deliberates firstly in regard to the facts and then regarding points of law.

(2) Deliberations concern the existence of the offence and the culpability of the accused, the determination of the sentence, the imposing of an educational or safety measure, by case, and deducting deprivation of liberty under preventive measures or admission to a medical unit.

(3) The panel also deliberates regarding the awarding of just satisfaction for damages, preventive measures and asset freezing, material evidence, expenses and any other issue in connection with the just adjudication of the case.

(4) All members are under an obligation to state their opinion on each issue of the case.

(5) The president is the last to state his opinion.

**Article 394 – Adopting a judgement**

(1) The judgement is the result of the agreement of all members of the panel regarding the solutions to all issues having been subjected to deliberations.

(2) When unanimity is not met, the judgement is adopted by majority.

(3) If more than two opinions result from deliberations, the judge who opts for the most severe opinion must join the opinion closest to his.

(4) Reasoning of a dissenting ("*separată*") opinion is mandatory.

(5) Where the panel cannot reach unanimity or a majority, hearing the case is resumed in a divergence panel.

**Article 395 – Resuming administration of evidence or debates**

(1) Where during deliberations the court holds that a certain circumstance needs to be made clear and administration of evidence or debates need to be resumed, it resumes hearing the case. Summoning provision apply accordingly. [..]

**Article 400 – The minute**

(1) The outcome of deliberations are recorded in minutes, of the same content as the operative part of the judgement. The minutes are signed by all members of the panel.

(2) Writing the minutes is mandatory where the [single] judge or the panel rules regarding preventive measures and in other cases prescribed by law[2].

(3) The minutes are written in two original copies. One original is kept in the case-file and the other is conserved at the court's file for minutes.

**Article 401 – The content of a judgement**

The judgment by which the court rules on the merits of the case must contain an introductory part, the reasoning and an operative part.

**Article 403 – The content of the reasoning**

(1) The reasoning must contain:

a) information regarding the identity of the parties;

b) a description of the facts that were object of the arraignment, with indications regarding the time and place where they were committed, as well as the legal classification of the offence, according to the indictment;

c) a reasoning of the solution to the criminal action, by analysing evidence that served as grounds for settling the criminal action and those that had been repelled, and a reasoning of the solution to the civil action, as well as an analysis of any facts that supported the solution reached in the case;

d) an indication of the points of law relied on by the solutions reached in the case.

(2) Where pronouncing a sentence [...], the reasoning must show each fact attributed to the defendant by the court, the form and the degree of culpability, mitigating or aggravating circumstances, recidivism, the duration deducted from the pronounced sentence [...].

(3) Where the court finds that only part of the facts in the arraignment are attributable to the accused, the judgement will show for which acts a sentence was pronounced [...] and for which – dismissal of charges or acquittal.

(4) Where [...] a suspended sentence under supervision is pronounced, the judgement will show the reasons [...] for the suspension [...].

**Article 404 – The content of the operative part of the judgement**

(1) The operative part of the judgement shall contain the information [...] regarding the accused, the solution of the court regarding the criminal offence, indicating the name of the offence and the legal provisions that prescribe it, and in case of acquittal or dismissal of charges, the grounds on which it is based [...] and the solution regarding the civil action.

**Article 405 – Pronouncement of the judgement**

(1) The judgement is pronounced in a public hearing by the president of the panel, assisted by the registrar.

(2) Parties are not summoned for pronouncement[3].

(3) The president of the panel pronounces the minute of the judgement.

**Article 406 – Writing and signing the judgement**

(1) The judgement is written within 30 days from pronouncement.

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[2] Para 2 applies to interlocutory rulings, whereas para 1 applies to sentences or decisions

[3] When the judgement is pronounced at a later hearing, not immediately after the closing of debates, the interlocutory ruling of adjournment for pronouncement also informs the parties of the date of pronouncement.

(2) The judgement is written by one of the judges who participated in the examination of the case, within 30 days from pronouncement, and is signed by all the members of the panel and by the registrar.

(3) The operative part of the judgement must be the same as the minutes.

(4) Where any of the members of the panel is hindered from signing, the judgement is signed by the president of the panel. If the president of the panel is also hindered from signing, the judgement is signed by the president of the court. When the hindrance concerns the registrar, the judgement is signed by the chief-registrar. In all cases, the cause of the hindrance is mentioned in the judgement.

**Article 407 – Delivery of the judgement**

(1) Following pronouncement, a copy of the minutes shall be sent to [..] the parties [...]. Following the writing of the [reasoned] judgement, it is sent entirely to the same [aforementioned].

**Article 424 – Content of the decision of the appellate court and its delivery**

(1) The decision of the appellate court must state [...], within the reasoning, the factual and legal grounds that lead to the deny or granting of the appeal, by case, as well as the grounds that lead to the adoption of any of the solutions prescribed by Article 421[4]. [...]

(5) The decision of the appellate court is communicated to the prosecutor, to the parties, to the aggrieved person and to the administration of the detention unit.

**Article 552 – When the judgement of the appellate court [...] becomes final**

(1) The judgement of the appellate court becomes final at the date when it is pronounced, if the trial ends before the appellate court[5]."

37. The 30-days term for the writing of the reasoning was not a statutory term. In practice, breaches of that term by a judge might have led to disciplinary action, if the caseload did not explain such breaches (case-law of the Constitutional Court, see para 45 below). The Government shall not adduce case-law to that effect, given that, firstly, the applicant did not complain of the breach, secondly because the breach of that term is not included in grounds for nullity of the judgement (see Article 281 of the CPC, in para 40 below) and, lastly, given the below-cited case-law of the Constitutional Court (again, see para 45), therefore confirming that the 30-days term is not a statutory one.

38. Both the former CPC and the current CPC, in force starting 1 February 2014, provided for several extraordinary appeals. Even if the current CPC is applicable to the relevant proceedings for the herein application, a brief presentation of both the former and current CPC is useful in respect to the domestic case-law regarding the annulment of final judgements for reasons related to signing minutes and reasoning of judgements, in comparison to factual and legal grounds that may substantiate a complaint against the execution.

39. The relevant provisions regarding extraordinary appeals and the complaint against the execution, under the former CPC, read:

**"Article 292(2).** The panel must remain the same throughout the trial. When it is not possible, the panel may change by the beginning of debates.

[4] All possible solutions in appeal: denied as out-of-time, inadmissible or ill-founded, granted and sent for retrial, granted with a new judgement on the merits, pronounced by the appellate court.

[5] The judgement is not final where the appellate court rules to resend the case for retrial before the first instance court.

**Article 385⁹ (1).** Judgements are subject to cassation where:

[...]

3. the court was not composed according to the law or there was a breach of Article 292(2) or there was a situation of incompatibility.

**Article 461 – Complaint against the execution (*"contestație la executare"*)**

(1) A complaint against the execution of a criminal judgement may be lodged where:

a) a judgement that was not final started to be executed;

[...]

c) an uncertainty arises regarding the executed judgement or a hindrance to execution arises;

[...]

(2) The complaint against the execution is lodged [...] before the court that pronounced the judgement to be executed for situations under point c). [...]"

40. The relevant provisions regarding extraordinary appeals and the complaint against the execution, under the current CPC, read:

**"Article 281 – Absolute nullities**

(1) Nullity shall always apply where there is a breach of the provisions regarding:

a) composition of the panel;

b) subject-matter or personal jurisdiction of courts, where the hearings took place before a court, inferior to the competent one;

c) public character of hearings;

d) participation of the prosecutor, when mandatory according to the law;

e) the presence of the suspect or of the accused, when mandatory according to the law;

f) assistance of an attorney to the suspect or to the accused, as well as to other parties, when mandatory according to the law;

(2) Absolute nullity is found *ex officio* or upon request.

**Article 426 – Situations for extraordinary appeals for annulment (*„contestație în anulare"*)**

(1) An extraordinary appeal for annulment of a criminal judgement may be lodged where:

[...]

c) the judgement settling an appeal was pronounced by another panel than the one having held debates on the merits;

d) the appellate court was not composed according to the law or there was a situation of incompatibility; [...]

**Article 598 – Complaint against the execution (*"contestație la executare"*)**

(1) A complaint against the execution of a criminal judgement may be lodged where:

a) a judgement that was not final started to be executed;

[...]

c) an uncertainty arises regarding the executed judgement or a hindrance to execution arises;

[...]

(2) The complaint against the execution is lodged [...] before the court that pronounced the judgement to be executed for situations under point c). [...]"

*C. Law no. 303 of 2004 on judges and prosecutors*

41. The relevant articles of Law no. 303 of 2004, as in force at the relevant time of the appeal, finalised by the delivery of the final judgement of 22 April 2016, read as follows:

**"Chapter VIII – Assistant-magistrates of the High Court of Cassation and Justice**

**Article 66**

(2) Assistant-magistrates are named and promoted in office by the Superior Council of Magistracy, after passing examination.

(3) General conditions for becoming an assistant-magistrate are those prescribed for judges and prosecutors.

**Article 70**

Assistant-magistrates participate in court hearings held by sections.

**Article 71**

Those assistant-magistrates who participate in court hearings held by the High Court of Cassation and Justice [also] draft the interlocutory hearings, participate in deliberations by a consultative vote and draft the reasoning of the judgements, according to the distribution made by the president of the panel for its members."

*D. Regulations for the functioning of the HCCJ*

42. The relevant provisions of the Regulations for the functioning of the HCCJ read:

**"Article 45(1)**

The president of the panel has the following attributions:

[...]

4. after the pronouncement of judgements:

a) delegates the reasoning of the judgements to judges and assistant-magistrates; [..]

**Article 51(3)**

Assistant-magistrates who attend hearings have the following attributions:

[...]

m) draft judgements, where delegated by the president of the panel, within the terms provided by law"

43. The Government would like to submit the below relevant case-law principles of the Constitutional Court and of the HCCJ, as determined chronologically by the below-cited judgements, published on-line and enclosed in Annex III.

*E. The case-law of the Constitutional Court*

44. The relevant parts of the Decision no. 501 of 21 September 2016 of the Constitutional Court, published in the Official Gazette no. 733 of 21 September

2016, regarding the start of the statutory term for lodging an extraordinary appeal for annulment of a final judgement, read as follows:

"18. At the same time, the Court observes that the law-maker has supplemented the grounds for the extraordinary appeal for annulment, as provided by the new Criminal Procedure Code, by adding, to the aforementioned grounds, the grounds for the extraordinary appeal for annulment regarding the continuity of the panel (Article 426, point c)), the composition of the panel (Article 426, point d), first limb), the existence of an incompatibility situation (Article 426, point d), second limb) [...]. The Court holds that the new grounds for an extraordinary appeal for annulment are also grounds for absolute nullity, as prescribed by Article 281 of the Criminal Procedure Code [...].

19. The Court holds that the person who is subject to execution has the possibility to come to know the judgement whose annulment is requested, namely [...] the decision of the appellate court, when communicating it, pursuant to Article 424(5) [...]".

45. The relevant parts of Decision no. 33 of 23 January 2018 of the Constitutional Court, published in the Official Gazette no. 146 of 15 February 2018, regarding amendments to Law no. 304 of 2004 on judicial regulations, read as follows, in respect to the previous practice of domestic courts regarding the term for writing the reasoning of court judgements:

"106. Regarding the term for writing the reasoning of court judgements, the Court observes that the common legal provisions, civil and criminal, already prescribe the 30-days term starting from the pronouncement of judgements. Thus, pursuant to the provisions of Article 426(5) of the Civil Procedure Code, "the judgement shall be written and signed in 30 days at the most from pronouncement. The dissenting opinion of a judge left in minority, as well as, by case, the concurring opinion, are signed and written within the same term". Likewise, provisions of Article 406(1) of the Criminal Procedure Code prescribe that "the judgement is written within 30 days from pronouncement", and Article 406(2) that "the judgement is written by one of the judges who participated in the examination of the case, within 30 days from pronouncement, and is signed by all the members of the panel and by the registrar". The procedure provisions are only formally imperative, as a breach of the term cannot affect the validity of the pronounced judgement, but, when the causes for delay are attributable to the judge, the breach may constitute a [disciplinary] misbehaviour, under the terms of Article 99(h) of Law no. 303 of 2004 on judges and prosecutors. [...]

175. Finally, by its judgement of 7 March 2007, in *Cerovšek and Božičnik v. Slovenia*, the European Court held that judges who did not participate in the trial cannot reason and sign the court judgement, as they cannot guarantee a good administration of justice. [...] "In conclusion, the Court considers that the applicants' right to a fair trial was breached because of the failure of the judge who conducted their trial to provide written grounds for her verdict and because of the absence of any appropriate measures compensating for that deficiency" (para 47).

176. Given the herein arguments, the Constitutional Court holds that **the writing of the judgement,** the final and adjudication act of a court, by which the litigation between parties is settled as *res judicata*, **is the result of the deliberations**, held in secret, in which only judges who are members of the panel that has hold the hearings participate. Only those [...] judges may rule on issues of facts and law lodged for trial and give a solution. As follows, **the law expressly provides that the judgement is written by one of the judges who participated in the settling of the case.** Furthermore, ***the writing of the judgement is inevitably connected to its reasoning***, as the latter is, as aforementioned, ***an obligation of the judge of the trial, deriving for Article 6 of the Convention [...]*** (emphases belong to the Constitutional Court)."

46. The relevant parts of Decision no. 633 of 12 October 2018 of the Constitutional Court, published in the Official Gazette no. 1020 of 29 November 2018, regarding amendments to the Criminal Procedure Code and to Law no. 304 of 2004 on judicial regulations, reads as follows, in respect to signing the reasoning of court judgements:

"975. Where the reasoning/writing of court judgements is the act inherent to the functions of the judge of the trial, as an intrinsic manifestation [of those functions], the signing of the judgement is the extrinsic, formal act, which certifies performing the trial function by the judge. For single-judge formations, the judgement is written and signed by the single judge, whereas for panel formations the judgement is written by one or more judges from the panel and signed by all of the judges in the panel.

976. As such, the signing of the judgement is done by all of the members of the panel who took parts in the debates and deliberations and by the registrar. Where any of the members of the panel is prevented from signing, the judgement is signed, pursuant to Article 406(4) of the Criminal Procedure Code, by the president of the panel and, where even the president of the panel is prevented from signing, the judgement is signed by the president of that court. When the hindrance regards the registrar, the judgement is signed by the chief-registrar. In all situations, the cause of the hindrance is mentioned in the judgement.

977. Given the aforementioned reasons, the corroborated analysis of the procedural provisions leads to the conclusion that the circumstance where a judgement is not signed by the judge who participated in the settling of the case may constitute a cause for revision [of the judgement] only where Article 406(4) is not incident, therefore there was no cause for hindrance [to the signing]."

*F. The case-law of the HCCJ*

47. Where the minute was not signed by all the members of the panel who participated in deliberations, such a situation breached the provisions of Article 292(2) of the CPC [regarding the composition of the panel] and the case was sent for retrial, *ex officio*, pursuant to Article 385⁹(1) point 3 of the former CPC (Decision no. 1419 of 24 February 2005 of the HCCJ).

48. Reasoning of the judgement is an obligation that provides a safeguard against the arbitrary when serving justice. It provides the parties and the public with a possibility to be convinced that the pronounced solution is lawful and founded and the appellate courts – with the required elements for the latter to exert their attributions. In appeal, the reasoning must refer to the factual and legal grounds that led to the granting or denial of the appeal, by case, and where the appeal is granted – the grounds that justify a reversal or change of the first instance solution. If the reasoning contradicts the operative part of the judgement on the merits of the appeal, the court hearing the case shall grant a cassation of the judgement (page 3 of the Decision no. 7186 of 11 December 2006 of the HCCJ – paras 6-10). Where, following deliberations, the hearings were resumed for additional debates on points of law, one judge in the panel was changed without justification and the new panel pronounced a final judgement, such a change in the composition of the court breached the provisions of Article 292(2) of the CPC. The case was sent for retrial, *ex officio*, pursuant to Article 385⁹(1) point 3 of the CPC (*Idem* – paras 11-17).

49. According to the provisions of the CPC, when the president of the panel is hindered from signing the reasoning, the president of the court signs on his behalf. Where, in a particular situation, the president of the panel is also the president of the court and he is hindered from signing the reasoning, the

reasoning may be lawfully signed on behalf of the latter by the judge who was temporarily delegated, pending the nomination of a new president of the court, to exert the attributions of the president of the court (Decision no. 2832 of 17 October 2014 of the HCCJ – page 39, chapter 3, first four paragraphs).

50. Complaints against the execution, pursuant to Article 598(1) point c), may be lodged where there is an uncertainty in the judgement (first limb) or a hindrance to execution (second limb). A hindrance to the execution must be determined by causes that, according to the law, prevent the execution of a judgement to be started or continued. Furthermore, the equivocal writing of the operative part of the judgement or its lack of precision or clarity may substantiate a complaint against the execution. Procedural faults regarding the signing of minutes or subsequent delivery do not represent an uncertainty regarding the execution or a hindrance to it (Decision no. 1354 of 21 October 2016). Nonetheless, the HCCJ held that the accused was delivered only a copy of the minutes (and not one of the two originals); therefore, the respective document could not have been signed by the members of the panel (*Ibid*).

*G. Opinions of the CSM regarding the reasoning of judgements*

51. In November 2011, the Department for legislation, research and litigation (DLRL) under the CSM submitted before the latter a point of view based on a study, made in cooperation with the Judicial Inspection and domestic courts, concerning the lack of regulations in respect to the reasoning of judgements by single-judge formations ("*complete necolegiale*" - see para 1 of the point of view / "*punct de vedere*" in Annex II), where after the pronouncement of the minute such a judge is not able to proceed to the reasoning due to objective reasons – demise, serious illness, resignation, retirement or disciplinary removal from office.

52. The aforementioned opinion suggested several options, to be implemented either by law or by administrative regulations, by case. The study was approved by the CSM, which opted for one of the suggested solutions and in December 2012 sent to the Ministry of Justice a proposal to amend the relevant provisions of the law with a view to prevent such situations regarding single-judge formations (see para 1 of the letter to the Ministry of Justice in Annex II):

- amend Law no. 303 of 2004 and enact a period of 60 days for the removal from office of judges, upon their request to either retire or resign. The said 60 days would be used only for the reasoning of judgements (see the bolded title of the suggested amendment, on page 2 of the letter to the Ministry of Justice).
- amend the civil and criminal procedure codes to change the principle of reasoning a verdict after pronouncement (see para 3 of the letter to the Ministry of Justice).

53. The Government note that an up-date letter from the CSM appended a similar study made by the DLRL under the CSM and point of view submitted to the former. The respective study, dating March 2017, further develops the previous one and notes the following (see CSM letter of 21 November 2018 - Annex II enclosed):

- In July 2016, a similar study, done by the Judicial Inspection and domestic courts, concluded that there is a legislative void where either the judge from the

single-judge formation or all of the judges from a panel formation retire from office before reasoning pronounced judgements. Where that judge from a panel formation, who was allocated the writing of the reasoning, retires from office before finalising the reasoning, it seems that the unanimous opinion of the consulted magistrates was that either of the judges from the panel, still in office, may write the reasoning, pursuant to the relevant provisions of Article 406 of the CPC (see page 5 of the study no. 7109/2017 of the CSM - paras 1, 2, and 4 and last para).

- The same aforementioned conclusions were upheld in May 2017 by the CSM and were the subject of a letter to the minister of justice, sent on 18 May 2017, upholding the conclusion regarding the legislative void only when the retirement concerns either the judge from the single-judge formation or all of the judges from a panel formation. The letter reiterates that, where that judge from a panel formation, who was allocated the writing of the reasoning, retires from office before finalising the reasoning, either of the judges from the panel, still in office, may write the reasoning, pursuant to the relevant provisions of Article 406 of the CPC (see pages 2 and 3 to of the letter to the minister of justice – last 3 paras).

54. The Government also note that none of the proposed amendments have been enacted by law and that, starting in 2017, the CSM instructed the Human Resources Department under the CSM to forward retirement requests from judges only if appended with a situation of the number of judgements they still have to reason in writing (see CSM minute of 2 May 2017, point 12 – Annex II).

*H. Criminal trials – specific features, relevant for the herein application*

55. The Government underline that, compared to lower courts, which are only assisted by a registrar during criminal trials, the HCCJ panels are also assisted by assistant-magistrates (see para 41 above). The latter take part in hearings and deliberations, where they give a consultative vote. They also provide the panel judges with case-law and other such information, useful for deliberations, get to know all the facts and points of law discussed during deliberations and record their result (the minutes). During deliberations, all factual elements and points of law are discussed. Such discussions practically lead to an agreement regarding the content of the subsequent written reasoning, as all members are under the obligation, as prescribed by Article 393(4) of the CPC, to state their opinion on each issue of relevance to the case. Furthermore, contrary to the relevant provisions of the Civil Procedure Code[6], the CPC does not allow for concurring opinions. Therefore, where unanimity is met regarding the verdict, there is also unanimity regarding the reasons[7]. Where unanimity is not met, there is an obligation that the minutes state the existence of a dissenting opinion (*"opinie separată"*), as prescribed by Article 393(2) in conjunction with Articles 393(3) and 393(4) of the CPC. In conclusion, where there is unanimity after deliberations in criminal trials, the unanimity regards both the verdict, the choice of sentence and the reasoning. This is why all elements regarding the

6 The provisions of Article 426(3), regarding the reasoning and signing of a civil judgement, read:
"Where a judge or a judicial assistant is in minority after deliberations, they will write their own dissenting opinion, which will include their reasons, their proposed solution and their signature. Likewise, the judge who agrees with the solution, but for different reasons, will separately write their concurring opinion.
7 The possibillity to adjust such opinions and not allow potential concurring opinions is also facilitated by the provisions of Article 394(3) of the CPC.

reasoning are consequently analysed during deliberations, as the majority or, by case, unanimity rule applies not only to the solution regarding culpability and sentencing, but also to the reasoning (see paras 36 and 41 above and the enclosed HCCJ letter – Annex I).

56. After adopting solutions in all the cases that had been programmed for deliberations within a specific day, the president of the panel allocates the writing of the reasoning to one of the members of the panel or to the assistant-magistrate, at the HCCJ. After the latter finishes the reasoning, the draft is circulated to the other members of the panel, finalised if corrections are necessary and subsequently signed (again, see the enclosed HCCJ letter – Annex I).

**II.2 Comparative Law**

57. The Government do not endeavour to submit an in-depth analysis of up-to-date comparative case-law. Nonetheless, the Government would like to make a brief statement of the relevant comparative law regarding the reasoning of judgements, as available in the Court's case-law, and regarding signing of reasoning of judgements, as made available by the OSCE Office for Democratic Institutions and Human Rights[8]. The Government are of the opinion that such a brief statement of comparative law is useful, given the Court's question to the Government, when giving notice of the application.

58. Firstly, regarding the reasoning of judgements, the Government note that detailed reasoning of criminal judgements is usually prescribed as an obligation in countries where a judgement on the merits is given by professional judges. From this point of view, Council of Europe member States may be divided into three categories: those without any form of jury trial or any model of lay adjudication in criminal matters; those using a collaborative court model of lay adjudicators sitting and deliberating alongside professional judges in criminal matters; and those which have opted for the "traditional" jury model in criminal matters. Among the models examined, fourteen Council of Europe member States have a system based exclusively on professional judges. The collaborative system, which can also be employed alongside the traditional jury model, is characterised by the fact that the professional judges and the jurors collectively determine all questions of law and fact, the issue of guilt and the sentence. The general rule appears to be that reasons are not given for verdicts reached by a traditional jury. This is the case for all the countries concerned, except Switzerland (Canton of Geneva) and Spain (*Taxquet v. Belgium*, [GC], no. 926/05, 16 November 2010, §44-60).

59. However, even where traditional juries do not give a "traditional reasoning" of their verdicts, the Government note that a somewhat "indirect reasoning" derive from the procedure in each such member State: questions from the President of the Assize Court, established *ex officio* or at the request of the prosecutor or of the accused, addressed to the jury beforehand concerning the facts; records of jury deliberations regarding the facts; directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced (*Idem,* §85-92, with further references).

[8] https://www.legislationline.org/documents/section/criminal-codes - criminal procedure codes of OSCE participating States

60. Of the Council of Europe member States with a court model of either professional judges or a collaborative system and in Switzerland (where jury judgements are reasoned), the Government note the following examples[9] regarding the reasoning of the judgements in criminal matters and signing of the reasoning:

- In Germany, the reasoning is given in writing within a period of 5 to 9 weeks from the pronouncement of the verdict. The aforementioned term may be prolonged. The judgment shall be signed by the judges who participated in the deliberations. If a judge is prevented from affixing his signature, this fact, and the reason behind it, shall be noted under the judgment by the presiding judge and, if he is prevented from doing so, by the most senior associate judge. The signatures of the lay judges (jurors) are not required (Section 275 of the German CPC);
- In Poland, the final verdict shall be signed by each member of the panel in a given case, including each member who voted contrary to the majority. The same procedure is applicable to the subsequent reasoning, except for cases examined in a panel of one judge and two lay judges, where the reasons shall be signed only by the presiding judge, unless a dissenting opinion is expressed. If the signature of the presiding judge or of another member of the panel cannot be affixed, one of those members who signed states the cause for the absence of the signature in the reasoning (Articles 113 and 115 of the Polish CPC);
- In Finland, verdicts are signed only by the chairperson of the panel. The written reasoning and operative part are delivered separately, after the pronouncement of the verdict, and signed, as well, only by the chairperson of the panel. The 14-days general term for written reasoning may be prolonged (Sections 3-8 of the Finnish CPC).
- In the Netherlands[10], the minutes of the verdict shall be signed by the presiding judge and the clerk. In the absence of the presiding judge, a member of the court in chambers shall sign. If the clerk to the court is unable to sign, this shall be stated in the decision given in chambers (minutes). An abridged reasoning, signed by the judges who judged the case and by the clerk to the court who was present at the deliberations, shall be delivered within 48 hours after the pronouncement of the judgment. If one of them is unable to sign, this inability shall be stated at the bottom of the written judgment. A supplemented reasoning shall be written within four months after a legal remedy has been exercised. The supplement shall be signed by one of the judges who rendered the abridged judgment or, in their absence, by the presiding judge of the court (Section 24, 365, 365a and 365b of the Dutch CPC).
- In Switzerland, judgements are signed only by the director of the proceedings and the clerk. They are reasoned only if they determine substantive criminal or civil issues (Article 80 of the Swiss CPC).

[9] Except for the Netherlands, relevant articles from the criminal procedure codes of the respective countries are cited as available at the aforementioned OSCE-ODIHR colection

[10] http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf

- In the Former Yugoslav Republic of Macedonia, the verdict shall be reasoned in writing within 15 to 60 days after it has been pronounced. The Presiding Judge of the Trial Chamber and the court clerk shall sign the verdict (Article 407 of the CPC of the FYROM).
- In Slovenia, judgements are reasoned within 15 to 30 days from the pronouncement of the verdict. The aforementioned term can be prolonged. The reasoned judgement is signed by the presiding judge and the clerk (Article 363 of the Slovenian CPC).
- In Hungary, the minute of the verdict is mandatory to be signed by all panel members in person. The subsequent reasoning in writing is also to be signed by all panel members, but if one of them is hindered from doing so, another member or the chairperson of the panel may sign on their behalf (Sections 257 and 321 of the Hungarian CPC).

Given the priority communication and the short deadline awarded by the Court for submitting observations, the Government are aware of the rather incomplete presentation of comparative law. They will submit, on the occasion of additional observations, more elements on the regulation and practice on the signing of reasoned judgements in the different States, parties to the Convention.

## III. THE LAW

### III.1. The applicant's complaints regarding potential violations of the Convention

61. The applicant relied on Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

62. The Government recall that, in his application before the Court, the applicant complained, under Article 6 of the Convention, of an alleged violation of his right to a fair trial (see point 59 of the application form). Regarding the factual elements and points of domestic law substantiating his complaint under Article 6, the Government note that the applicant relied on Article 406 of the CPC, claiming that the HCCJ wrongfully interpreted the said provisions. The applicant further claimed that the HCCJ interpretation of Article 406 of the CPC is contrary to the Convention, to the principles of legal certainty, proportionality and protection against arbitrariness. The applicant recalled the Court's case-law regarding the lack or insufficient reasoning of judgements and the standards regarding the reasoning of appeal judgements, which cannot merely endorse without further ado the findings reached by a lower court. The applicant cited several judgements from the Court's case-law (see the applicant's arguments under point 59 of the application form).

63. The Government further note that, when giving notice of the application, the subject-matter of the case, as described by the Court, referred to the absence, from the reasoning of a final judgement in a criminal trial concerning the applicant, of the signatures of two of the judges from the five-judge panel having delivered the aforementioned final judgement of 22 April 2016. The two judges had retired before the written reasoning was finalised and their signatures were replaced by that of the President of the HCCJ, even if the latter was not part of the panel. The aforementioned led to a complaint against the execution lodged

by the applicant and denied as ill-founded[11] by the HCCJ on 24 April 2017. The denial of the appeal relied, *inter alia*, on the fact that the minutes had been signed by all five judges and that the absence of two signatures from the reasoning was not, *per se*, an obstacle to execution, as they were faced with an objective impossibility to sign the reasoning, as provided by Article 406 of the CPC, which authorised the President of the HCCJ to sign on their behalf, only to confirm that they were prevented from signing the reasoning, and not as an expression of the President of the HCCJ's opinion on the merits of the case (see para 20 above).

64. The Government lastly note that the rest of the complaints from the application were declared inadmissible and that the Court's question referred to the consequences to the fairness of the examination on the merits of the criminal charges against the applicant of the lack of the two signatures from the reasoning of the 22 April 2016 final judgement, given the reasons to that effect in the 24 April 2017 of the HCCJ (*mutatis mutandis*, *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, 7 March 2017).

65. Given the aforementioned, the Government infer that the Court decided to examine only the complaint regarding the application of Article 406 of the CPC by the HCCJ, in its judgements of 22 April 2016 and 24 April 2017, and its consequences to the fairness of the criminal proceedings against the applicant.

66. The Government shall therefore submit their below opinion regarding the application of the Convention and the Court's case-law to the facts in the herein application.

**III.2. The Court's case-law, as indicated in the notice of the application**

67. The Government note that, in *Cerovšek and Božičnik v. Slovenia (cited above)*, the applicants expressly complained that their right to a fair trial had been violated because the reasons for their conviction had been given by judges who had not reached the verdict and had not participated in the trial (see para 30 of the cited judgement).

68. The Government also note that, in *Cerovšek and Božičnik v. Slovenia*, both the applicants and the respondent State submitted their own arguments in respect to which facts were relevant to the standards of a fair trial. The Government further note that the Court's assessment of the merits (paras 37-48 of the cited judgement) relied only on some of those facts. The Government thus infer that the factual elements expressly stated by the Court in the said assessment of the merits where the actual relevant facts that led to the finding of a violation, as summarised below:

i. the domestic case of the two applicants concerned a trial before a professional judge sitting as a **single judge** (para 39 of the judgement);

ii. the single judge who had examined all the evidence produced during the trial had retired after pronouncing her verdict, **without providing oral grounds during the pronouncement of the verdict or written grounds afterwards** (paras 39 and 41 of the judgement);

iii. **the case files were lost**, had to be reconstituted more than 3 years after the verdict and **the reasons were written by judges who had not participated**

[11] Not manifestly ill-founded – see para 32 above

**in the hearings, solely on the reconstituted case files, with no input from the judge that had heard the case**, facts that added to the above exceptional circumstances (paras 41 and 44 of the judgement);

iv. the Court indicated the **alternatives available** to the single judge having heard the cases, **that would have prevented potential violations** of the right to a fair trial: either to expedite the reasoning, given that the domestic case was not a particularly complex one, or **to involve another judge at an early stage in the proceedings** (para 44 of the judgement);

v. the verdict was given in first instance proceedings and no reparations to the aforementioned defects were made during appeal before higher courts, which **upheld the first-instance court's judgment without directly hearing any of the evidence** (paras 45-46 of the judgement).

**III.3. The Court's case-law, of general application to the reasoning of a judgement. Convention safeguards, *ratione materiae***

69. The Government recall the general principles determined by the Court, in respect to the reasoning of criminal judgements, as follows:

- A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention. Furthermore, in cases arising from individual petitions the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair (*Taxquet v. Belgium, cited above,* §83-84, with numerous references).

- In proceedings conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions. Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case. While courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed (*Ibidem*, §91, again with numerous references). The extent to which the duty to give reasons applies may vary according to the nature of the decision at issue. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of

judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (*Helle v. Finland*, no. 157/1996/776/977, 19 December 1997, §55, with further references). Finally, national courts should also indicate with sufficient clarity the grounds on which they base their decision so as to allow a litigant to usefully exercise any available right of appeal (*Ibid*, 60§, and *Boldea v. Romania*, no. 19997/02, § 30, 15 February 2007).

70. Given the aforementioned principles, the Government conclude that the Convention only requires domestic courts to adequately reason their judgements, whether under the form of "traditional reasoning", by professional judges, or "indirect reasoning", deriving from the substantial issues of the proceedings before the pronouncement of the verdict by the jury (*Taxquet v. Belgium, cited above,* §85-92, with numerous references). *A minori,* the Government infer that there is no Convention requirement at all as to the procedure itself regarding the reasoning of judgements by professional judges.

71. The Government recall that in most Contracting States where explicit reasons are given in writing by courts, whether composed of professional judges or in a collaborative model including lay judges, more or less generous terms are provided for writing the reasons, after pronouncing the verdict (see para 60 above). The verdict, or minute, or operative part of the judgement, is usually pronounced in public hearings, immediately or shortly after deliberations, a practice that may lead to a speedier resolution of practical issues in criminal proceedings, such as the release or, by case, taking into custody of the accused, the lifting or, by case, imposing of asset freezing etc. There is no general rule regarding the signing of the minutes. In some countries where the verdict is pronounced by a panel of judges, only the president of the panel signs (e.g. the Netherlands), where in others all the members of the panel sign the minutes of the verdict (e.g. Poland). The procedure for signing the minutes may differ within the same Contracting State, depending on whether the panel is composed exclusively of professional judges, where they all affix their signatures, or whether the panel is an assize court, where only the presiding, professional judge signs both for himself and on behalf of the jurors (e.g. Germany).

72. The same variations apply to given written reasons for the verdicts. In Contracting States where all members of the panel are under the obligation to sign the reasoning, an exception is provided where one or more of the members are unavailable to do so. The presiding judge of either the panel or of the court or a senior member of the panel signs on their behalf (see para 60 above). The Government have found no restrictions, provided explicitly by law in those Contracting States, for that exception, in the sense that it would apply either to a temporary or permanent incapacity to sign the reasoning or only to specific reasons behind such an incapacity (again, see para 60 above).

73. Given the above, the Government draw the conclusion that in several, if not in many Contracting States, where the criminal proceedings are conducted by a panel of judges, the signature of at least one of them is enough procedural safeguard that the written document, either minutes or reasoning, entirely corresponds to the oral deliberations attended by all members of the panel in

chambers, who fully debate the evidence, facts and points of law, give their votes and reach a verdict regarding the culpability and the sentence.

74. Following the aforementioned arguments regarding comparative law, the Government would like to again recall the case-law indicated by the Court as directly relevant for the herein application (*Cerovšek and Božičnik v. Slovenia, cited above*). The Government note that the Court expressly indicated that involving another judge at an early stage in the proceedings would have been a remedy for the incapacitation of the sitting single judge to write the reasoning of the verdict (para 44 of the judgement) due to retirement from office after pronouncement of verdict. The Government thus infer that, according to the Court's case-law, where the merits are examined by a panel of judges, one of the sitting judge may *a pari* sign the reasoning on behalf of another judge sitting in the same panel, where, after the pronouncement of the verdict, the latter is unable to sign the reasoning (see para 68, limb iv, above). The Government conclude that such practices, as described by comparative law, are also in line with the Court's case-law regarding criminal proceedings conducted by panel formations.

**III.4. Compliance with Article 35(1) of the Convention**

75. Article 35(1) of the Convention reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken".

76. The applicant did not complain, either before domestic courts, or before the Court, that the three remaining judges and the assistant-magistrate did not entirely or accurately reflect, in the written reasoning, the result of the verbal reasoning of the verdict, as agreed upon unanimously by the entire panel during deliberations.

77. Article 426(1) point c) of the CPC provides that an extraordinary appeal for annulment of a criminal judgement may the lodged where the final judgement was pronounced by another panel than the one having held debates on the merits. Thus, the CPC offers a domestic remedy for a breach of the unanimous opinion during deliberations by the magistrates that signed the subsequent reasoning of the judgement.

78. The applicant, assisted by two lawyers of his own choice, lodged a complaint against the execution and the HCCJ denied the complaint. The HCCJ held that such a complaint, under Article 598(1) point c), second limb, was not the effective national remedy. The reasons for denial were consistent with the interpretation of Article 406 of the CPC in the case-law of the Constitutional Court, of the HCCJ and of lower courts, as received from the CSM (see Annexes II and III and paras 44-49 and 53 above).

79. As described by the HCCJ case-law, procedural faults regarding the signing of the reasoning represent a breach of the imperative provisions regarding the composition of the panel, sanctioned by the annulment of the respective judgement, either by means of cassation, under Article $385^9$ (1) point 3 the former CPC (see para 39 above), or by means of granting an extraordinary appeal for annulment (see para 40 above), or, as proposed in amendments in 2018 that have never been enacted as they were declared unconstitutional, by means of a re-examination ("*revizuire*") of the final judgement (see para 50 above

regarding Constitutional Court case-law). Thus, such potential faults cannot be relied on to substantiate the complaint against the execution, as lodged by the applicant (see para 31 above). The conclusion in the HCCJ and Constitutional Court is that the effective remedy for alleged differences between the oral reasoning during deliberations and the written reasoning after pronouncement of the minute is to lodge an extraordinary appeal for annulment.

80. The applicant's lawyers argued before the HCCJ that the reasoning complained of was "either non-existent or null", without indicating factual arguments in support of such a complaint or adducing evidence in support of the factual claims (see paras 23 and 31 above). They lodged a complaint against the execution, which is the remedy for hindrances to the execution. A hindrance to the execution must be determined by causes that, according to the law, prevent the execution of a judgement to be started or continued, such as equivocal writing of the operative part of the judgement or a subsequently enacted law that prevents the start or continuation of the execution. Procedural faults regarding the signing of minutes or subsequent delivery do not represent an uncertainty regarding the execution or a hindrance to it (Decision no. 1354 of 21 October 2016).

81. The aforementioned paras 76-82 refer to the application of the first limb of Article 35 § 1 of the Convention.

82. Regarding the application of the second limb of Article 35 § 1 of the Convention, it is to be noted that the reasoning of the 22 April 2016 final judgement was available to the applicant by 7 March 2017, when the latter lodged the request for evidence in the trial regarding the complaint against the execution (see para 24 above). The application before the Court was signed on 3 November 2017, which is more than 6-months after the delivery of the final judgement onto the applicant, given also that the complaint against the execution is not the appropriate national remedy for nullity of final judgements.

**III.5. Considerations on the well-founded character of the application**

83. Firstly, the applicant complained, in substance, that the HCCJ wrongfully applied the provisions of Article 406 of the CPC, in its judgements of 22 April 2016 (adjudication of the criminal proceedings *per se*) and 24 April 2017 (ruling on the merits of the complaint against the execution). Precisely, the applicant claimed that Article 406(4) of the CPC should have been interpreted restrictively and that it did not allow a third-party judge to affix his signature to the reasoning, on behalf of a sitting judge, where the latter had retired from office after pronouncement of the verdict and before the drafting of the reasoning.

84. With regard to how the HCCJ interpreted the relevant provisions of the CPC, it is the Court's constant case-law not to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Convention. It may not itself assess the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance (*García Ruiz v. Spain*, no. 30544/96, [GC], § 28, 21 January 1999).

85. Also according to the Court's case-law, the Court may, as an exception to the above rule, question the findings and conclusions of a domestic court where the latter are flagrantly and manifestly arbitrary (*Sisojeva and Others v. Latvia*

(striking out), no. 60654/00, [GC], §89, 15 January 2007). The interpretation given by both the appellate panel and the one judging the complaint against the execution are in line with the *prima facie* meaning of Article 406(4) of the CPC and with previous HCCJ case-law, as subsequently confirmed by the Constitutional Court (see paras 44-50 above) and the studies made by the CSM in consultation with domestic courts (see para 53 above). The CSM studies argue, *inter alia,* that even broader interpretations of the same provisions are possible. The Court's case-law has constantly indicated that it is not its role to act as a "fourth instance" and reverse the interpretation of domestic law constantly given by national courts.

86. Secondly, the applicant further complained that the interpretation of Article 406 of the CPC, as given by the HCCJ, is contrary to the Convention.

87. According to the facts, the verdict and sentence were adopted unanimously by all the sitting judges, the magistrate-assistant witnessed the deliberations of the five-judge panel and she was delegated to draft the reasoning (see para 26 above). The unanimous decision on the culpability and sentence also implied unanimity in regard to the reasoning, as the CPC does not allow concurring opinions (see para 55 above, deriving from the HCCJ letter). The assistant-magistrate drafted the reasoning, which she signed, alongside the three judges from the panel still in office and the President of the HCCJ, the latter only on behalf of the two judges who had retired, clearly stating this reason. The signature of the President of the HCCJ only came to confirm that the two judges had retired, thus being prevented from signing. In conclusion, the four signatures of persons having participated or witnessed in deliberations and thus, in the unanimous reaching of a solution and its reasons, represent procedural safeguards that the written reasoning corresponds to the oral one, reached during deliberations (remedy indicated *a pari* in the *Cerovšek and Božičnik v. Slovenia* judgement, cited above). The HCCJ appended another written statement of the assistant-magistrate to that effect (see Annex I), for the purpose of the proceedings before the Court, additionally to the result of the internal inquiry, submitted before and administered into evidence by the HCCJ, during the complaint against the execution lodged by the applicant. The signature of the President of the HCCJ is an added procedural element to the aforementioned safeguards and does not represent a position of the latter on the merits of the appeal.

88. The applicant's complaint may refer to either the interpretation *per se,* from the abstract point of view regarding the compatibility with the Convention, or to the fact that, in his particular situation, such an interpretation led to at least one concrete infringement of his rights to a fair trial.

89. In what the compatibility with the Convention, in general, is concerned, the Convention does not impose any requirement at all as to the entire procedure itself regarding the reasoning of judgements, whether given by professional judges or assize courts. *A minori*, the Convention does not impose any requirement regarding the procedure of signing the written reasoning (see para 70 above). Moreover, the Court implicitly indicated that, where a panel of judges examines the merits and pronounces the verdict, subsequent reasoning may be written by only one of the two, where the other retires from office shortly after the verdict is pronounced (see para 74 above).

90. The applicant complained *in abstracto* that his right to a fair trial was breached. No concrete consequences for the right to a fair trial were indicated as deriving from the lack of the two signatures on the final judgement concerned in the herein application. In *Cerovšek and Božičnik v. Slovenia (cited above* and relied on by the applicant), the applicants expressly complained that their right to a fair trial had been violated because the reasons for their conviction had been given by judges who had not reached the verdict and had not participated in the trial (see para 67 above).

91. In *Cerovšek and Božičnik v. Slovenia*, the verdict was pronounced by a single judge. In the present case the verdict was pronounced unanimously by the same judges who heard the appeal and the evidence. 3 members of the panel and the assistant-magistrate, i.e. 4 of the 6 who took part in deliberations, signed the reasoning, which the HCCJ, in its letter appended in Annex I, considered to be enough procedural safeguard that the written reasoning was consistent with the verbal reasoning agreed by the 5 judges during deliberations. The President of the HCCJ signed on behalf of the two judges not as a safeguard on the merits, but only to formally confirm that the remaining two signatures were objectively missing from the reasoning, in a manner consistent with the Court's case-law (*a pari* interpretation of the remedy indicated in the *Cerovšek and Božičnik v. Slovenia judgement,* cited above).

92. In *Trofimchuk v. Ukraine*, no. 4241/03 (dec.), 31 May 2005, *Baillard v. France,* no. 6032/04 (dec.), 25 September 2008, the Court applied the provision of Article 35(3), point a), second limb, given that the alleged breaches were not obvious from the facts submitted in the applications, that the same applications relied on one or more provisions of the Convention without explaining in what way they have been breached or by indicating at least one such concrete infringement.

93. Subsequent complaints regarding factual breaches of the Convention, lodged after the application before the Court and not used before domestic courts fall under the provisions of the first limb of Article 35(1) of the Convention.

94. Thirdly, during the criminal proceedings themselves (see paras 10-31 above, submitting a statement of the facts), the applicant:

- was heard in public hearings by the competent court, which, given his position as MP, was the HCCJ, both for the first instance trial (a three-judge panel), and for the appeal (a five-judge panel);
- was assisted in all hearings by at least a lawyer of his own choice and he did not complain of any procedural faults in the hearings themselves, before the final judgement. The proceedings were conducted in accordance with the procedural requirements of domestic law;
- had the opportunity of adducing his arguments and evidence, which were duly heard by the HCCJ. He, thus, had the opportunity to rebut prosecution evidence and his requests for evidence in his defence were granted by the court, who heard the testimonies of 20 witnesses and administered into evidence all the documents, as requested by the applicant (see paras 12 and 17 above). During the extraordinary appeal, the applicant requested the establishment of specific facts and proposed evidence that, in his opinion, would have achieved the aforementioned purpose. The HCCJ administered into evidence an internal document, produced following an internal inquiry, leading

to the establishment of those same facts, as requested by the applicant, of a speedier manner (see paras 24 and 26 above);

- all the factual and legal elements which, viewed objectively, were relevant to the fair resolution of the case were took into consideration and the HCCJ expressly stated for which of the elements of the offences charged with by the DNA the applicant was held culpable, and for which he was acquitted, and the reasons behind those decisions. The subjective element, namely the applicants' intention to commit the impugned acts (see *Cerovšek and Božičnik v. Slovenia judgement*, cited above, §42) was also analysed, by administering evidence, including hearing the testimony of the applicant;
- the reasoning of the 22 April 2016 judgement was highly complex and detailed, met the Convention standards and those imposed by the CPC. It gave a rigorous, detailed and chronological description of the criminal proceedings, including of the administration of evidence, it analysed the relevance of the evidence, both in favour and against the accused, for the establishment of facts and it gave detailed reasons for the application of criminal law, the finding of culpability and the sentencing itself. The reasoning also went beyond the mandatory standards prescribed by the CPC. For example, not only did it chronologically account for the criminal proceedings, but it also mentioned summaries for each hearing, with accounts of what evidence was heard, by which party it was requested, even if this is usually done in interlocutory rulings only. The reasoning also analysed each fact, from the point of view of the prosecution, of the first instance court and, by comparison, expressly reasoned the final solution given by the appellate court;
- in their letter enclosed in Annex I, the HCCJ underlined that, in the particular situation of the applicant, three of the judges who voted in the deliberations signed the reasoning, as well. According to the HCCJ, in this particular situation, it is concluded that, given that the three judges represented the majority and given the rules regarding unanimity, majority, dissenting and concurring opinions during deliberations, the signatures of the three judges are an additional procedural safeguard that the reasoning was shared by all of the five judges. Thus, in the particular situation of the applicant, even if, theoretically, the three judges still in office would have missed one or another of the reasons put forward by one of the retired judges during deliberations, given that the verdict was pronounced and signed unanimously, the solution would not have changed. The herein statements cannot be construed as a speculation regarding the accuracy of the written reasoning, but even if such a possibility of inaccuracy might be analysed, the fact that the two retired judges were not consulted regarding the accuracy of the reasoning could not have jeopardised the rights to a fair trial under Article 6 § 1.

95. In the absence of any extraordinary circumstances, the signing of the reasoning by four (three judges and the assistant-magistrate) of the six persons participating in deliberations is not, in itself, a violation of the right to a fair trial, *a pari* according to the judgement in *Cerovšek and Božičnik v. Slovenia* (see para 74 above). According to the HCCJ judgement of 24 April 2017, the five judges who gave the 22 April 2016 judgement deliberated and analysed all factual and legal elements and voted on all matters of relevance regarding evidence, facts and points of law, finding of culpability and sentencing. The unanimous vote on the said issues, without any dissenting opinion, actually

represent an oral reasoning of the verdict, which is unavoidable during deliberations, given the provisions of the CPC (see para 55 above). The fact that three of the five magistrates having participated in the deliberations alongside the assistant-magistrate subsequently signed the written judgement is, according to the Court's judgement in *Cerovšek and Božičnik v. Slovenia* (see para 74 above), enough procedural safeguard that the written reasoning corresponded entirely to the oral reasoning during deliberations. The assistant-magistrate to whom the drafting of the reasoning was allocated signed a statement to that effect, for the purpose of the proceedings before the Court, which adds to the results of the internal inquiry, administered into evidence during the complaint against the execution (see paras 24, 26 above and Annex I). The signature of the President of the HCCJ on the final judgement complained of only came to certify that the two judges had retired and they were thus prevented from signing the reasoning. The signature of the President of the HCCJ is, thus, only an additional safeguard of the procedure prescribed by Article 406(4) of the HCCJ, regarding the objective hindrance from signing for two of the retired judges.

96. As mentioned in para 78, the two studies of the Judicial Inspection and domestic courts, approved by the CSM (Annex II) and subsequent points of view of the CSM confirm the reasoning of the judgement denying the complaint against the execution lodged by the applicant. Therefore, the HCCJ case-law, the CSM studies, including the opinion of the Judicial Inspection and of lower domestic courts, are in line with the interpretation and application of Article 406 of the CPC to the facts complained of by the applicant. The first CSM study had been included in the case-file and taken into account by the panel that gave the 24 April 2017 judgement regarding the complaint against execution (see Annex I). The Constitutional Court expressly confirmed that annulment of a final judgement is possible where a judge who participated in the settling of the case did not sign the reasoning only where Article 406(4) is not incident, therefore there was no cause to prevent him from signing (see para 46 above).

97. For all the reasons expressed above, the Government respectfully ask the Court to conclude on the conformity of the application of the domestic law in the applicant's case and therefore on the respect, by the defendant State, of his right to a fair trial.

**p. Catrinel Brumar**
**Agent of the Government**