



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

FIRST SECTION

CASE OF GETOŠ-MAGDIĆ v. CROATIA

(Application no. 56305/08)

JUDGMENT

STRASBOURG

2 December 2010

FINAL

02/03/2011

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

In the case of Getoš-Magdić v. Croatia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Giorgio Malinverni,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 9 November 2010

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 56305/08) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Ms Gordana Getoš-Magdić (“the applicant”), on 27 October 2008.

2. The applicant, who had been granted legal aid, was represented by Ms J. Rinceanu, a lawyer practising in Freiburg, and by her sister, Ms A.M. Getoš. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged that her right to be released pending trial had been violated, that the reasons relied on by the domestic courts for extending her detention had not been relevant and sufficient throughout the detention and that the proceedings to review the lawfulness of her detention had not complied with the requirements of Article 5 § 4 of the Convention.

4. By a decision of 24 June 2010 the Court declared the application partly admissible.

5. The applicant filed further written observations (Rule 59 § 1) on the merits. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1968 and lives in Osijek.

A. Background to the case

7. In 1991 and 1992 the Osijek Police reported finding, at various locations in Osijek, a number of corpses showing signs that the victims had been murdered. At some point in 2001 the police, at the request of the State Attorney, commenced an inquiry into allegations that during the years 1991 and 1992 a number of civilians had been tortured and executed in Osijek, Croatia. A large number of individuals who had knowledge of these events were interviewed by the police. A voluminous case file was compiled and the inquiry resulted in the identification of the supposed perpetrators, one of whom was the applicant.

8. On the afternoon of 18 October 2006 at about 8 p.m. the applicant, accompanied by her father, arrived at the Osijek Police Department, having answered a telephone call from the chief of the Osijek Police for an interview in connection with a suspicion that she had committed war crimes against the civilian population. The applicant was questioned until the early morning of 21 October 2006.

B. Criminal proceedings against the applicant

1. Investigation

9. On 20 October 2006 the Osijek-Baranja Police Department filed a criminal complaint against five individuals, including the applicant, alleging that there was a reasonable suspicion that during 1991 and 1992 they had committed war crimes against the civilian population.

10. On 21 October 2006 the investigating judge heard evidence from the five suspects.

11. On 22 October 2006 the investigating judge of the Osijek County Court opened an investigation in respect of the applicant and five other suspects in connection with suspected war crimes against the civilian population in 1991 and 1992 in Osijek. Several defendants lodged an appeal against the decision ordering the investigation. The appeals were dismissed on 2 November 2006 by a three-judge panel of the Osijek County Court.

12. On 3 and 13 November 2006 two other investigations in respect of two further suspects were joined to that concerning the applicant.

13. On 3 and 6 November 2006 the investigating judge of the Osijek County Court heard evidence from six witnesses. On 13 November 2006 the investigating judge examined the applicant. Since her counsel denied her further services, the judge appointed new counsel for the applicant.

14. On 24, 27, 29 and 30 November and 1 December 2006 the investigating judge heard evidence from twenty witnesses.

15. On 4 December 2006 the applicant found new counsel for herself.

16. On 5 December 2006 the investigating judge ordered the exhumation of two unidentified corpses for DNA analysis.

17. On 7 December 2006 the investigating judge heard evidence from four witnesses. On 11 December 2006 he heard evidence from two medical experts and six witnesses. On 12, 13 and 14 December he heard evidence from eighteen witnesses. On 15 December 2006 the judge ordered that a forensic examination be carried out. On the same day he heard evidence from a further six witnesses. On 18 December 2006 the forensic expert submitted his report. On the same day the investigating judge heard evidence from six witnesses and on 20 December 2006 from one more witness. On 21 December 2006 the judge heard evidence from the forensic expert. On 22 December 2006 the exhumation of two corpses was carried out.

18. On 28 December 2006 the judge heard evidence from the applicant.

19. On 5 January 2007 medical experts submitted their report on the DNA analysis of the two exhumed corpses.

20. On 12, 17, 22 and 30 January and 1 February 2007 the investigating judge heard evidence from a further eighteen witnesses. On 5 February 2007 the judge held consultations with defence counsel for all defendants. On 7 and 8 February 2007 the judge heard evidence from thirteen witnesses and on 9 February 2007 from two of the defendants. On 14 February 2007 the judge heard evidence from six witnesses. On 15 February 2007 he heard evidence from a medical expert. On 22, 23 and 27 February and 1, 5 and 7 March 2007 the judge heard evidence from one defendant and twenty-three witnesses. On 22, 27 and 29 March and 2 and 3 April 2007 the judge heard evidence from two defendants and sixteen witnesses.

2. Criminal trial

21. On 16 April 2007 the applicant and six other defendants were indicted before the Osijek County Court for war crimes against the civilian population, an offence under Article 120 of the Croatian Criminal Code. The applicant was accused of the illegal arrest, torture and liquidation of a number of civilians.

22. Between 20 and 30 April 2007 all defendants lodged objections to the indictment (*prigovor protiv optužnice*). The objections were all dismissed on 22 May 2007 by a three-judge panel of the Osijek County Court and the indictment became final.

23. On 29 May 2007 the Supreme Court transferred jurisdiction to the Zagreb County Court (*Županijski sud u Zagrebu*) and the proceedings continued before that court.

24. On 26 June 2007 the applicant's counsel informed the Zagreb County Court that she no longer represented the applicant.

25. At the hearings held before the Zagreb County Court on 15, 17 and 18 October and 5 November 2007 the parties gave their lists of evidence, commenting on the evidence proposed by their opponents, and the court decided what evidence from the lists was to be called. At hearings on 3, 4, 5, 7, 14 and 20 December 2007 and 7 and 8 January 2008 the seven defendants gave their evidence.

26. On 11 January 2008 the County Court commissioned a report from a graphology expert. The report was submitted on 17 January 2008.

27. At hearings on 21, 22 and 23 January 2008 five witnesses gave evidence.

28. On 25 January 2008 the County Court carried out an on-site inspection of a house in Dubrovačka Street in Osijek.

29. At hearings on 31 January and 1 February 2008 two witnesses and the expert in graphology gave evidence. On 6 February 2008 the County Court commissioned an additional report from the same expert. The report was submitted on 11 February 2008.

30. At hearings on 13, 14, 15, 18 and 25 February, 13, 14, 20 and 25 March, 24 April, 12, 13, 14, 28, 29 and 30 May, 3, 4, 9, 10, 11, 16, 17, 18 and 23 July, 2, 3, 4, 7, 8, 14 and 15 July, 29 August and 1 and 2 September 2008, thirty-nine witnesses gave evidence, as well as an expert in graphology and a medical expert.

31. On 17 September 2008 the applicant was released, but the criminal trial continued. A judgment was delivered by the Zagreb County Court on 7 May 2009. The applicant was found guilty of committing war crimes against the civilian population and sentenced to seven years' imprisonment. The defendants all lodged appeals and the appeal proceedings are currently pending before the Supreme Court.

C. Decisions concerning the applicant's detention

32. On 19 October 2006 at 1.30 a.m. the police formally arrested the applicant, who had already been on the police-station premises since 8 p.m. on 18 October 2006, and took her into police custody for twenty-four hours, under Article 97 of the Code of Criminal Procedure.

33. On 19 October 2006 an investigating judge of the Osijek County Court ordered her to be held in police custody for a further twenty-four hours, until 1.30 a.m. on 21 October 2006, under Article 98 § 1 of the Code of Criminal Procedure. The relevant part of the decision reads:

“In the submission ... of 19 October 2006 the Osijek-Baranja Police Department, Criminal Police Division, informed this investigating judge that police questioning of the suspect Gordana Getoš-Magdić had been carried out in connection with the criminal offence set out in Article 120 § 1 of the Criminal Code, committed in the territory of the city of Osijek in 1991 and 1992.

They allege that Gordana Getoš-Magdić was arrested on 19 October 2006 at 1.30 a.m. in connection with a reasonable suspicion that she had committed the said criminal offence and that ... several other members of the [military] squad under her command had also been arrested; [they] were giving their statements on fresh relevant facts and indications, which additionally confirmed the reasonable suspicion that Gordana Getoš-Magdić had committed the said criminal offence; the identification of other members of that squad was also under way, as was identification of the murder victims whose identity had not yet been established, for all of which the first twenty-four hours after the arrest did not suffice. Therefore they ask that the detention in police custody be extended.

The request is well-founded.

The documents in the case file of this court, no. Kio-170/06, which also contains the police case file ..., show that a reasonable suspicion that Gordana Getoš-Magdić committed the criminal offence with which she has been charged arises from the defence given by M.S. ...

Since a police investigation has been carried out in order to establish the identity of the other member of the [military] squad under the command of Gordana Getoš-Magdić and since several members of that squad have also been arrested and the interviews with them are ongoing, and since it is necessary to identify the victims ..., it is obvious that the first twenty-four hours following the arrest could not suffice for these tasks and that a further twenty-four hours in police custody is necessary and sufficient for collecting [further] information on the evidence. In respect of the suspect Gordana Getoš-Magdić, the grounds for detention under Article 102 § 1(2) of the Code of Criminal Procedure exist for the time being because there is a reasonable suspicion that, in order to exculpate herself, she could hinder the criminal proceedings by suborning witnesses. Grounds for detention also exist under Article 102 § 1(4) of the Code of Criminal Procedure since the criminal offence [for which she is being held] falls within the category of offences set out in Article 181 of the Code of Criminal Procedure, that is, the criminal offence under Title XII of the Criminal Code, which carries a sentence of imprisonment for twenty years. In view of the fact that [the charges involve allegations of] liquidation by firearms, after which the corpses were thrown into the river Drava, actions typical of an execution, the court finds that these [factors] characterise the circumstances of the offence as serious and thus call for a custodial measure ...”

34. On 21 October 2006 at 1 a.m. the investigating judge of the Osijek County Court, relying on Article 98 of the Code of Criminal Procedure, ordered an extension of the applicant's detention in police custody for forty-eight hours, until 23 October 2006 at 1 a.m.

35. On 22 October 2006 the investigating judge of the Osijek County Court ordered the detention of the applicant and four other suspects for a further month, until 1.30 a.m. on 19 November 2006. The relevant part of the decision reads:

“Since it is necessary to interview a large number of witnesses during the investigation, many of whom are members of the Croatian Army, that is, colleagues of the defendants, the court finds that there is a reasonable suspicion that the defendants, if at large, might suborn these witnesses; this fulfils the conditions for detention under Article 102 § 1(2) of the Code of Criminal Procedure.

Furthermore, the first to fifth defendants are suspected of having committed the criminal offence set out in Article 120 § 1 of the Criminal Code, which carries a sentence of twenty years' imprisonment, in that they illegally arrested some individuals of Serbian origin, then illegally interrogated and ill-treated them, after which they bound their hands and mouths with self-adhesive tape and took some of them to the banks of the river Drava, where they killed them with shots from firearms and threw their bodies into the river Drava. Therefore, since these are actions typical of an execution, the court finds that the circumstances of the offence can be characterised as particularly serious and thus call for a custodial measure ...”

36. On 22 October 2006 the applicant was transferred to Zagreb Prison. The proceedings continued before the Osijek County Court, about three hundred kilometres away.

37. On 25 October 2006 the applicant lodged an appeal against the decision of 22 October 2006 ordering her detention. She argued that she had cooperated with the investigative bodies and admitted that she had committed the offences of which she was accused, and that therefore the same purpose might have been achieved through other measures such as home detention, bail or preventive measures. Furthermore, she was ready to hand over her passport. She further stressed her young age and that she was the mother of a minor child who, owing to her age and health, had constant need of a mother's presence, and that she, the applicant, contributed to the subsistence of her family.

38. On 31 October 2006 the appeal was dismissed by a three-judge panel of the Osijek County Court. The relevant part of the decision reads:

“Contrary to the allegations in the defendants' appeals, the investigating judge correctly found that the legal grounds for the defendants' detention under Article 102 § 1 (2 and 4) of the Code of Criminal Procedure did exist.

There is a reasonable suspicion that the defendants committed a criminal offence against humanity and international law, namely war crimes against the civilian population as set out under Article 120 § 1 of the Criminal Code. A decision by the investigating judge ... of 22 October 2006 ordered that an investigation be carried out in respect of the said defendants, in connection with a reasonable suspicion that in the period from the middle of October to the end of December 1991 in Osijek, during the defence of the city from the joint aggression by the Y[ugoslav] P[eople's] A[rmy] and rebels from the local Serbian population against the constitutional order of the Republic of Croatia, they [acted] contrary to Article 3 of the [Fourth] Geneva Convention Relative to the Protection of Civilian Persons in Time of War and Article 4 §§ 1 and 2(a), Article 5 § 3 and Article 13 § 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), in that B.G., as the secretary of the Secretariat for People's Defence of the Osijek Municipality, acting as the *de facto*, and from 7 December 1991 also the formal, commander-in-chief of the defence of the city

of Osijek, ordered the first defendant, I.K., and the ... defendant Gordana Getoš-Magdić to form a [military] squad of dependable and loyal persons for special reconnaissance and sabotaging tasks, which would be under his supervision. After they had formed such a squad, on a number of occasions he illegally ordered them to arrest civilians of Serbian origin, and ordered their ill-treatment and killing; the first defendant, I.K., as the squad commander, and the ... defendant, Gordana Getoš-Magdić, as commander of one of the subdivisions of the squad, accepted and carried out these orders or transmitted them to the members of the squad ...

The investigating judge's order accepted a request by the Osijek County State Attorney's Office to hear evidence from thirty-one persons in connection with the commission of the said criminal offences ... Furthermore, the investigation order states that some of these witnesses had been members of the same squad as the defendants ... None of the witnesses has been examined so far. Therefore, the investigating judge's conclusion that, once at large, the defendants might hinder the criminal proceedings by suborning witnesses was justified. There is therefore a legal ground for detention under Article 102 § 1 (2) of the Code of Criminal Procedure.

Furthermore, in view of the manner in which the criminal offences of which the defendants were accused had been committed, and because of a reasonable suspicion that they had committed the criminal offence of war crimes against the civilian population, carrying a sentence of twenty years' imprisonment, and in view of the illegal arrests, interrogations and ill-treatment, binding of hands and mouths [of the victims] with self-adhesive tape and subsequent liquidation of a large number of civilians, the investigating judge correctly found that these factors, taken together, characterised the circumstances of the offence as particularly serious and held that detention was necessary because the legal grounds set out in Article 102 § 1(4) of the Code of Criminal Procedure had been fulfilled."

39. On 17 November 2006 the investigating judge of the Osijek County Court extended the detention of the applicant and four other defendants until 19 January 2007, again on the grounds set out in Article 102 § 1(2) and (4) of the Code of Criminal Procedure. This decision was upheld by a three-judge panel of the Osijek County Court on 29 November 2006.

40. On 22 December 2006 the applicant was transferred to Osijek Prison.

41. On 18 January and 17 February 2007 the investigating judge of the Osijek County Court again extended the detention of the applicant and four other defendants, on the grounds set out in Article 102 § 1(2) and (4) of the Code of Criminal Procedure.

42. On 3 April 2007 the applicant requested that her detention measure be lifted.

43. On 16 April 2007 the Osijek County State Attorney's Office filed an indictment against the applicant in the Osijek County Court, on charges of having committed war crimes against the civilian population. On the same day a three-judge panel of the Osijek County Court ordered the applicant's further detention under Article 102 § 1(4) of the Code of Criminal Procedure. The relevant part of the decision reads:

“Defence counsel for the third defendant, Gordana Getoš-Magdić, relied in particular on the health ailments of the defendant and her minor child. She argued that the same aim could have been achieved by preventive measures.

...

In the indictment filed by the Osijek County State Attorney ... on 16 April 2007 the defendants ... were accused of having ordered killings and ill-treatment of members of the civilian population, ... and thus of committing a criminal offence against humanity and international law – war crimes against the civilian population – as set out in Article 120 § 1 of the Criminal Code. The factual description from the indictment alleged that in November and December 1991 in Osijek, in the period when the city was being defended from the joint aggression by the YPA and the paramilitary formations of the rebel local Serbian population against the constitutional order of the Republic of Croatia, the defendants had acted contrary to Article 3 of the [Fourth] Geneva Convention relative to the Protection of Civilian Persons in Time of War, as well as Article 4 §§ 1 and 2(a), Article 5 § 3 and Article 13 § 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), in that the first defendant, B.G., initially as the secretary of the Secretariat for People's Defence of the Osijek Municipality and from 7 December 1991 as the commander-in-chief of the defence of the city of Osijek, the second defendant, I.K., as a commander of the special [military] squad for reconnaissance and sabotaging tasks, the third defendant, Gordana Getoš-Magdić, as a commander of one of the subdivisions of that squad and the fourth to seventh defendants as members of that subdivision, had participated in illegal arrests, kidnappings, inhuman treatment and killings of civilians of Serbian origin. In November and December 1991 in Osijek, they had arrested an unknown man, and bound with self-adhesive tape J.G., M.K., S.V., an unknown woman and B.G., and had taken them to the banks of the river Drava. Once there they had shot them in the head with firearms and thrown their bodies into the river. They had also taken B.L. and A.Š. to 30 Dubrovačka Street, where they had struck A.Š. all over his body, and had then taken them to the banks of the Drava, where they had shot them with firearms before throwing them into the river. They had beaten M.S., thus causing him multiple injuries, and had then tied him up with rope and killed him by throwing him from a railway bridge into the Drava. They had arrested P.L., taken him to the banks of the Drava, shot him with firearms and thrown [his body] into the river. They had arrested R.R. and taken him to 30 Dubrovačka Street and then to the banks of the Drava, where they had shot him at least twice with firearms and thrown him into the river, but he had nevertheless survived; [the defendants] had thus committed the criminal offence of war crimes against the civilian population under Article 120 § 1 of the Criminal Code.

The existence of a reasonable suspicion that the defendants committed a criminal offence is a general ground for ordering and extending their detention.

The said criminal offence carries at least five years' imprisonment or imprisonment for twenty years. Taken together, the above-mentioned circumstances of the offence, involving particularly brutal and ruthless actions by the defendants against the victims, constitute particularly serious circumstances, which require that the custodial measure imposed on the defendants ... be extended ... under the legal grounds set out in Article 102 § 1(4) of the Code of Criminal Procedure.

...”

44. In an appeal of 19 April 2007 the applicant argued, *inter alia*, that the court had failed to give adequate reasons for the necessity of her detention, particularly in view of her difficult health and family situation. She relied on medical documentation showing that she had suffered from post-traumatic stress disorder since 1999, together with back problems and epilepsy. She also relied on medical documentation showing that her daughter, born in 1999, suffered from nightmares.

45. On 27 April 2007 the Supreme Court quashed the impugned decision on the ground that the County Court had failed to give adequate reasons for extending the applicant's detention and that the reasons given had been contradictory.

46. On 30 April 2007 a three-judge panel of the Osijek County Court extended the applicant's detention on the grounds set out in Article 102 § 1(4) of the Code of Criminal Procedure. The relevant part of the decision reads:

“This panel finds that since the last decision on detention ordered under Article 102 § 1(4) of the Code of Criminal Procedure there have been no significant changes as regards the relevant circumstances in respect of the defendant ... Gordana Getoš-Magdić. That is to say that the acts of which the defendants are accused, as regards their *modus operandi* and entire criminal activity, surpassed the usual manner of committing the criminal offence of war crimes against the civilian population. This is indicated by the facts in the indictment showing that the defendants had acted as an organised group, had been mutually connected and that [their acts] had all been motivated by national hatred. ...”

47. In an appeal of 5 May 2007 the applicant reiterated her previous arguments.

48. On 11 May 2007 the Supreme Court dismissed the appeal. The relevant part of the decision reads:

“At this stage of the proceedings, now that the indictment has been lodged ... this court considers that there is a high degree of suspicion that the defendants committed the criminal offences with which they have been charged. The decision on their further detention must be based exclusively on an assessment of the elements which, judging from the facts alleged in the indictment, might lead to the conclusion that in this case ... the manner in which the offence was committed, or the fact that it was committed in particularly serious circumstances, justify detention under Article 102 § 1(4) of the Code of Criminal Procedure.

The defendants are correct in their assertion that the gravity of the offence in itself does not suffice to conclude that there are particularly serious circumstances which make detention necessary. However, the first-instance court found that such circumstances did exist on the basis of the concrete facts and acts of which the defendants are accused. The criminal offence of war crimes against the civilian population may be constituted by various acts. The defendants have been charged with the gravest acts, involving illegal arrests, ill-treatment and killings of civilians who had not given any cause for such acts. All the victims were citizens of Osijek, whose security the first defendant was under an obligation to defend, a fact correctly pointed out by the first-instance court when assessing the gravity of the charges against him.

The Supreme Court considers the finding of the first-instance court that the offence was committed in particularly serious circumstances to have been correct. The charges against the defendants include the fact that, on the order of the first defendant, B.G., the defendants I.K. and Gordana Getoš-Magdić formed a [military] squad for special reconnaissance and sabotaging tasks and ordered the members of the squad to illegally arrest civilians of Serbian and other national origins, torture and kill them, which orders the defendants M.S., D.K., T.V. and Z.D. carried out. Thus they, *tempore criminis*, organised the liquidation of the civilian population in that territory, in that they systematically arrested, detained, tortured and killed individuals. The treatment of victims was exceptionally brutal and utterly inhuman. Some of them had been severely beaten, bound with self-adhesive tape and then taken to the banks of the river Drava, where they had been executed by shots from firearms to their heads and bodies, before being thrown into the river. In the case of the victim R.R., who had survived being shot in the head and being thrown into the river, an additional order that he be killed in hospital had been issued.

The court also considers that the above acts by the defendants represent particularly serious circumstances, which exceed the ordinary form of such crimes. Further detention of the defendants on the grounds provided for under Article 102 § 1(4) of the Code of Criminal Procedure is therefore justified.

The defendants' assertion that the criminal proceedings could be conducted without their detention because the same purpose could be achieved by other preventive measures cannot be accepted. The aim of detention under Article 102 § 1(4) of the Code of Criminal Procedure is not to remove possible obstacles to the efficient and unhindered conduct of the criminal proceedings as is the case with the grounds for detention set out in Article 102 § 1(1), (2) and (3) of the Code of Criminal Procedure. The aim of detention under [Article 102 § 1(4) of the Code of Criminal Procedure] is that persons whose acts cause special moral reproach should not be kept at large, as this could influence the public in such a way as to diminish trust in the criminal justice system.”

49. On 29 May 2007 the Supreme Court ordered that the further proceedings be conducted before the Zagreb County Court.

50. On 11 July 2007 a three-judge panel of the Zagreb County Court extended the applicant's detention on the grounds set out in Article 102 § 1(4) of the Code of Criminal Procedure. That decision was quashed by the Supreme Court on 27 July 2007 because defence counsel had not been duly summoned to the hearing on the defendants' detention.

51. On 2 August 2007 a three-judge panel of the Zagreb County Court extended the applicant's detention. That decision was upheld by the Supreme Court on 21 September 2007. On 23 November 2007 the Zagreb County Court extended the applicant's detention. That decision was upheld by the Supreme Court on 12 December 2007. All the courts concerned relied on the particularly serious circumstances in which the applicant had allegedly committed the offence, on the basis of Article 102 § 1(4) of the Code of Criminal Procedure.

52. On 13 December 2007 the applicant lodged a request for the custodial measure against her to be lifted. She relied, *inter alia*, on Article 5 of the Convention, arguing that the courts ordering and extending her

detention had not made any relevant assessment as to her personal contribution to the offences with which she had been charged or to her personal situation, in particular her health. The request was dismissed by the Zagreb County Court on 14 December 2007.

53. On 12 February 2008 the Zagreb County Court extended the applicant's detention and at the same time dismissed her request for the custodial measure to be lifted. The relevant part of the decision reads:

“A reasonable suspicion that the third [the applicant], fifth and sixth defendants committed the criminal offences defined in the indictment still exists, this being a general statutory requirement under Article 102 § 1 of the C[ode of] C[riminal] P[rocedure] for extending the detention.

The third, fifth and sixth defendants have been indicted for criminal offences against humanity and international law – war crimes against the civilian population – under Article 120 § 1 of the Criminal Code, carrying a minimum of five years' imprisonment or imprisonment for twenty years; this is one of the criteria for detention under Article 102 § 1(4) of the CCP.

Furthermore, the third, fifth and sixth defendants have been indicted for the gravest acts which could possibly be committed against the civilian population, namely illegal arrests, torture and killings of civilians. The civilians were tortured and killed for no reason and the motive was national hatred.

The charge against the third defendant, Gordana Getoš-Magdić, states that she, together with the second defendant, I.K., on the order of the first defendant, B.G., formed a [military] squad for special reconnaissance and sabotaging tasks and illegally arrested civilians of Serbian and other national origins, tortured and killed them, and transmitted such orders to their subordinates in the said squad... The victims were severely beaten and then taken to the banks of the river Drava, bound with self-adhesive tape and shot in the head, their bodies then being thrown into the river.

A further charge against the third defendant, Gordana Getoš-Magdić, states that, together with the sixth defendant, T.V., and the seventh defendant, Z.D., she took B.L. from his family house ..., arrested him and detained him in a house at 30 Dubrovačka Street.

...

In respect of the victim R.R., who had been shot in the head on the orders of the first defendant, B.G., but nevertheless survived, it is alleged that the third defendant, Gordana Getoš-Magdić, ordered that he be killed in hospital.

The above descriptions of the acts of the third, fifth and sixth defendants contain a number of aspects which, by their nature and intensity, can be characterised as particularly serious circumstances of the offence; for this reason, detention under Article 102 § 1(4) of the CCP remains necessary.

...

Judging from the gravity of the offences with which they are charged and the sentences that could be expected on the basis of the information in the case file, the

length of time for which the third, fifth and sixth defendants have so far been detained does not appear disproportionate to a degree that is decisive in ordering their further detention.

The request of the third defendant Gordana Getoš-Magdić that her detention be replaced by house arrest is not well-founded, because the measure of house arrest has not been prescribed as an alternative for detention under Article 102 § 1(4) of the CCP.

Rule 3 of the Rules on House Arrest (Official Gazette no. 3 of 7 January 2008) provides that the freedoms and rights of a detainee under house arrest may be restricted to the extent needed for the fulfilment of the purpose for which house arrest has been ordered; to prevent the detainee from absconding; to prevent the repetition, completion or commission of a criminal offence he or she has been threatening to commit; and to prevent communication between the detainee and other persons, save for those he or she lives with or who provide him or her with the necessary means of subsistence.

Since the allegations in the request for the detention measure to be lifted are not of such a nature as to justify the lifting of that measure, in the opinion of this panel the conditions for ordering an alternative preventive measure have not yet been fulfilled, and the request has to be dismissed ...”

54. In an appeal of 14 February 2008 the applicant reiterated her arguments from her previous request for the custodial measure imposed on her to be lifted. On 22 February 2008 the Supreme Court dismissed the applicant's appeal. It reiterated its previous conclusions as to the gravity of the offence and the particularly serious circumstances in which the offence was committed, and further held as follows:

“The acts of the defendants as described above show a high degree of ruthlessness, brutality and cruelty towards civilians, which resulted in the grave consequence of the killing of these persons. Therefore, this appellate court finds that such acts by the defendants went significantly beyond the usual acts and consequences of such offences and, in their intensity and nature, show that the offence was committed in particularly serious circumstances, such that detention under Article 102 § 1(4) of the CCP remains necessary.

The arguments of the defendant Gordana Getoš-Magdić ... that the facts in the indictment had not been proven are not of decisive importance for extending her detention, because it is sufficient for there to be a relevant degree of reasonable suspicion; this follows from the indictment and the evidence so far presented, although the final assessment of all evidence and the defendants' defence, and the subsequent assessment of whether the relevant facts have or have not been proven in respect of the criminal offences at issue, is in the hands of the trial panel ...

Contrary to the arguments advanced by the defendant Gordana Getoš-Magdić, the provisions of the Code of Criminal Procedure concerning detention do not run counter to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), since Article 5 of the Convention provides for the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is

reasonably considered necessary to prevent his committing an offence of fleeing after having done so, and this is not at odds with Article 102 § 1 of the CCP.

The state of health of the defendant Gordana Getoš-Magdić does not preclude the existence of the statutory ground for extending her detention, because any necessary medical care could be provided in prison or, exceptionally, outside the prison. Likewise, any necessary medical, psychological or other assistance can be given to her child in suitable institutions, staffed by appropriate experts.

Contrary to the objections of the defendant Gordana Getoš-Magdić ..., the preventive measures under Article 90 of the CCP could not fulfil the aim of extended detention [under Article 102 § 1(4) of the Code of Criminal Procedure], nor can this measure be replaced by house arrest, because Article 102 of the CCP does not provide for such an option.”

55. On 25 March 2008 the applicant lodged a constitutional complaint, arguing, *inter alia*, that the duration of the investigation and of her detention had exceeded a reasonable time and that her detention could no longer be extended solely on the ground of the gravity of the charges against her.

56. On an unspecified date the applicant again lodged a request for the custodial measure against her to be lifted.

57. On 22 April 2008 a three-judge panel of the Zagreb County Court extended the applicant's detention and dismissed her request. It reiterated its previous reasoning from its decision of 12 February 2008.

58. In an appeal of 26 April 2008 the applicant again relied on her family and state of health as grounds for lifting the custodial measure. On 7 May 2008 the Supreme Court dismissed the appeal.

59. On 29 May 2008 the Constitutional Court declared the applicant's constitutional complaint of 25 March 2008 inadmissible, on the ground that the impugned decisions had ceased to exist since, in the meantime, a fresh decision extending the applicant's detention had been issued.

60. In a constitutional complaint of 9 June 2008 the applicant reiterated her arguments from her previous constitutional complaint of 25 March 2008.

61. On 4 July 2008 a three-judge panel of the Zagreb County Court extended the applicant's detention on the same grounds as before. On 28 July 2008 the Supreme Court upheld that decision.

62. The applicant lodged a constitutional complaint in which she reiterated her previous arguments.

63. On 17 September 2008 the Constitutional Court accepted the constitutional complaint and quashed the decisions of the Zagreb County Court of 4 July 2008 and of the Supreme Court of 28 July 2008, on the ground that the lower courts had failed to apply the principle of proportionality when assessing the necessity and appropriateness of the applicant's further detention. It further held as follows:

“Owing to their particular gravity and the possible public reaction, certain criminal offences may cause public unrest which could justify detention. In the view of this

court, when assessing whether further detention of an applicant is justified under the grounds set out in Article 102 § 1(4) of the CCP, the gravity of the offence in itself does not suffice but, in addition, the [above] ground for detention must exist in reality. The extension of detention should not amount to the anticipated prison term.

In the court's opinion, the significance of the initial grounds for the applicants' detention, in view of the passage of time and the fact that the applicants have so far been detained for almost two years, does not suffice to justify further extension of their detention.

The Constitutional Court considers that in the present case (apart from the fact that the detention has already lasted too long) the public interest in extending the applicants' detention during the criminal proceedings against them – in which their guilt for the alleged criminal offences has yet to be decided – does not carry more weight than the right of personal liberty guaranteed by the Constitution and the European Convention on Human Rights.

...”

The applicant was released on the same day.

II. RELEVANT DOMESTIC LAW

64. The relevant part of the Croatian Constitution (*Ustavni sud Republike Hrvatske*, Official Gazette nos. 41/2001 and 55/2001) reads:

Article 140

“International agreements concluded and ratified in accordance with the Constitution and made public, and which are in effect, are incorporated into Croatian law and are, in terms of legal effect, above statutes. ...”

65. The relevant provisions of the Code of Criminal Procedure (*Kazneni zakon Republike Hrvatske*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 62/2003, 178/2004 and 115/2006) read as follows:

Article 97

“(1) The police shall immediately, or within twenty-four hours at the latest, bring the arrested person to an investigating judge or release him or her. Reasons shall be given for any delay.

...”

Article 98

“(1) The investigating judge may, at the request of the police or the State Attorney, in a written and reasoned decision, order the detention of the arrested person for twenty-four hours where the investigating judge has established that there is a well-founded suspicion that the arrested person has committed the criminal offence

with which he or she has been charged, and where the grounds under Article 102 § 1(1) and (2) of the present Act exist and detention is necessary in order to establish identity, verify an alibi, collect evidence or remove a serious risk for the lives or health of persons or for assets of significant value ... Exceptionally, the investigating judge may, at the request of the police or the State Attorney, order that the arrested person be kept in police custody where [he or she has been charged] with criminal offences under Article 181 of this Act which are punishable by a prison term exceeding five years.

(2) The investigating judge may, *proprio motu* or at the request of the State Attorney, order that the arrested person be kept in custody for up to forty-eight hours where he or she considers that there is a well-founded suspicion that the arrested person has committed the criminal offence with which he or she has been charged and that grounds under Article 102 § 1 of the present Code obtain, in cases where the State Attorney has not made a request for an investigation or an indictment. Where the State Attorney fails to bring a request for investigation or an indictment within forty-eight hours, the arrested person shall be released.

(3) Where the arrested person has been kept in custody under paragraph 1 of the present Article, the investigating judge may order custody under paragraph 2 hereof for a further twenty-four hours.

...”

8. General Provisions on Detention

Article 101

“(1) Detention may be imposed only if the same purpose cannot be achieved by another [preventive] measure.

(2) The detention measure shall be lifted and the detainee released as soon as the grounds for detention cease to exist.

(3) When deciding on detention, in particular its duration, the court shall take into consideration the proportionality between the gravity of the offence, the sentence which ... may be expected, and the need to order and determine the duration of the detention.

(4) The judicial authorities conducting the criminal proceedings shall proceed with particular urgency when the defendant is being held in detention and shall review as a matter of course whether the grounds and legal conditions for detention have ceased to exist, in which case the custodial measure shall immediately be lifted.”

9. Grounds for Ordering Detention

Article 102

“(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in detention:

...

2. if there is a risk that he or she might destroy, hide, alter or forge evidence or traces relevant for the criminal proceedings or might suborn witnesses, or where there is a risk of collusion;

...

4. if the charges involved relate to murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion or any other offence carrying a sentence of at least twelve years' imprisonment, when detention is justified by the *modus operandi* or other particularly serious circumstances of the offence;

...”

Article 106

“(1) Detention ordered by an investigating judge ... shall not exceed one month ...

(2) During the investigation the investigating judge ... may, for justified reasons, extend detention for the first time for a maximum of two months and then for a further maximum of three months.

(3) The maximum duration of detention during the investigation shall not exceed six months ...”

Article 107

“...

(2) After the indictment has been lodged ... a [judicial] panel ... shall examine every two months whether the statutory conditions for detention have continued to exist ...”

Appeal against a decision ordering, lifting or extending a custodial measure

Article 110

“(1) A defendant, defence counsel or the State Attorney may lodge an appeal against a decision ordering, extending or lifting a custodial measure, within two days thereof...

...”

66. The relevant part of Article 120 of the Criminal Code (*Osnovni krivični zakon Republike Hrvatske*, Official Gazette no. 31/1993) reads as follows:

War Crimes against the Civilian Population

“Whoever, in violation of the rules of international law during war, armed conflict or occupation, orders: ... the killing, torture or inhuman treatment of civilians; ... the infliction of grave suffering on or injuries to the bodily integrity or health of civilians; ... measures of fear and terror against civilians or the taking of hostages, ... illegal

arrests ... shall be sentenced to not less than five years' imprisonment or to twenty years' imprisonment.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

67. The applicant complained that her right to trial within a reasonable time or release pending trial had not been respected and that the gravity of the offences she had been charged with could not be regarded as a relevant and sufficient reason for the domestic courts repeatedly to extend her detention. She relied on Article 5 § 3 of the Convention, the relevant part of which provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. The parties' arguments

68. The applicant argued that the grounds for ordering and extending her detention had been insufficient. As regards the danger of suborning witnesses, the applicant maintained that such a ground for ordering her detention was in contradiction with the national authorities' finding that she had already signed her confession in front of the police, although she explained that she had done so under duress. As regards the gravity of the charges against her, the applicant argued that the detention orders relying on that ground had completely disregarded her confession, the fact that the proceedings had not been public and her personal circumstances such as her state of health, and that no alternative measures had been considered.

69. The Government argued that the reasons relied on by the national courts for ordering and extending the applicant's detention – the danger of her absconding and the gravity of the charges – had been relevant and sufficient.

70. The Government also argued that, owing to the gravity of the charges against the applicant, her release could have caused public disorder. They explained that the case concerned the sensitive issue of charges of war crimes committed by Croatian soldiers.

71. They submitted further that the criminal proceedings against the applicant had been very complex since they had concerned a number of

allegations of criminal activity on the part of two defendants and that the national authorities had displayed due diligence in their conduct of the proceedings.

B. The Court's assessment

1. Grounds for detention

72. The Court has repeatedly held that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify his continuing detention (see *Yağcı and Sargin v. Turkey*, 8 June 1995, § 52, Series A no. 319-A). Moreover, the domestic courts “must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release” (see *Letellier v. France*, 26 June 1991, § 35, Series A no. 207).

73. The Court notes that the applicant in the present case was detained between 18 October 2006 and 17 September 2008. Her detention thus lasted one year and eleven months.

(a) Period between 18 October 2006 and 16 April 2007 (investigation)

74. In the period between 18 October 2006 and 16 April 2007, during the investigation, the national courts justified the applicant's detention by the reasonable suspicion that she had committed a criminal offence and the risk that she might suborn witnesses.

(i) Reasonable suspicion that the applicant had committed a criminal offence

75. According to the Court's settled case-law, the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty (see, among many other authorities, *Bochev v. Bulgaria*, no. 73481/01, § 55, 13 November 2008).

76. In the present case the Court accepts that the applicant's arrest and her initial detention were justified by a reasonable suspicion that she had committed the criminal offence of war crimes against the civilian population.

(ii) *The danger of suborning witnesses*

77. The Court acknowledges that the applicant's case was a very complex one, necessitating difficult inquiries. Some of the witnesses were members of the same military squad as the applicant, in which she held a high-ranking position. The authorities' belief that she should consequently be kept in detention in order to prevent her from being able to suborn those witnesses is easy to understand, at least at the outset.

78. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect; in the normal course of events the risks alleged diminish with the passing of time as the inquiries are conducted, statements taken and verifications carried out (see *Clooth v. Belgium*, 12 December 1991, § 43, Series A no. 225).

79. The Court notes that by 16 April 2007, when the investigation was completed, the national courts no longer relied on that ground as all the witnesses had already given their evidence before the investigating judge. The Court accepts that during the investigation, which lasted about six months, the applicant's detention was justified by the danger that, if released, she might suborn witnesses.

(b) Period between 16 April 2007 and 17 September 2008 (criminal trial)

80. The Court notes that in their decisions extending the applicant's detention for a period of about one year and five months between 16 April 2007, when the bill of indictment was filed, and 17 September 2008, when the applicant was released following the Constitutional Court's order, the national courts cited the gravity and nature of the offences and the severity of the likely penalty.

81. At this juncture the Court reiterates that a court decision extending detention requires a more solid basis to show not only that there was genuinely "a reasonable suspicion", but also that there were other serious public-interest considerations which, notwithstanding the presumption of innocence, outweighed the right to liberty (see, among other authorities, *I.A. v. France*, 23 September 1998, § 102, *Reports of Judgments and Decisions* 1998-VII). The Court will now examine whether such considerations existed in the particular circumstances of the present case.

82. The Court's assessment in that respect will take as its starting-point the statutory ground for the applicant's detention under the relevant domestic law. The national courts relied on the ground under Article 102 § 1(4) of the Code of Criminal Procedure. That provision allows for detention where a reasonable suspicion exists that the defendant has committed a criminal offence carrying a sentence of at least twelve years' imprisonment and where detention is justified by the manner in which the crime was committed or other particularly serious circumstances.

83. The Court has also held that any system of mandatory detention is *per se* incompatible with Article 5 § 3 of the Convention, it being

incumbent on the domestic authorities to establish and demonstrate the existence of specific circumstances outweighing the rule of respect for individual liberty (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84, 26 July 2001, and *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005).

84. As regards the statutory ground for the applicant's detention, the Court notes that the relevant domestic legislation does not provide for mandatory detention and was not applied to that effect in the applicant's case. The applicant was charged with a number of very serious individual offences, amounting to war crimes against the civilian population, carrying a sentence of twenty years' imprisonment. It was alleged that during 1991 and 1992 she had carried out a number of illegal arrests and liquidations of civilians in Osijek. These specific elements of the charges held against the applicant, together with the fact that the criminal offence of war crimes against the civilian population is punishable by up to twenty years' imprisonment, in the view of the national courts justified the application of the ground under Article 102 § 1(4) of the Code of Criminal Procedure.

85. The Court has repeatedly held that although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence (see *Ilijkov*, cited above, § 81; *Khudoyorov v. Russia*, no. 6847/02, § 180, ECHR 2005-X; and *Belevitskiy v. Russia*, no. 72967/01, § 101, 1 March 2007).

86. The Court notes that in the present case the national courts repeatedly explained in detail the charges against the applicant. They cited considerations such as the fact that the alleged criminal activity of the applicant had been undertaken in her role as one of the leaders of a military squad, that it had lasted for a long period of time, that it had been motivated by national hatred and that the manner in which the civilians had been executed had been exceptionally brutal and merciless. Thus, the grounds relied on by the national authorities cannot be said to have been stated *in abstracto*. These grounds were justified by the particular gravity of the specific circumstances in the case at issue, as explained by the decisions of the national authorities ordering and extending the applicant's detention, and in particular the decisions of the Supreme Court of 11 May 2007 (see paragraph 48 above) and 22 February 2008 (see paragraph 54 above), as well as the decision of the Zagreb County Court of 12 February 2008 (see paragraph 53 above). Furthermore, the national courts at no point ordered or extended the applicant's detention on identical or stereotypical grounds (contrast *Firat v. Turkey*, no. 37291/04, § 15, 30 June 2009). Therefore, taking into account the particular circumstances of the instant case, the Court considers that the severity of the anticipated penalty, taken in conjunction with the other grounds relied on by the authorities, namely the

nature of the charges against the applicant, was certainly of relevance (see, by way of comparison, *Dudek v. Poland*, no. 633/03, § 38, 4 May 2006).

87. In the instant case, the Court considers that the authorities were faced with the difficult task of determining the facts and the degree of alleged responsibility of the seven defendants, who had been charged with extremely serious offences. In these circumstances, the Court accepts that the need to obtain voluminous evidence from many sources constituted a relevant and sufficient ground for the applicant's detention during her criminal trial.

88. Also, the Court notes that the national courts examined whether any alternative measures, such as the applicant's house arrest, could satisfy the same purpose as her detention (see, for example, the decision of the Supreme Court of 11 May 2007, cited in paragraph 48 above, and that of the Zagreb County Court of 12 February 2008, cited in paragraph 53 above). The Court also acknowledges that the relevant issues pertaining to the duration of and grounds for the applicant's detention were also examined by the national courts, and after the applicant had been detained for one year and eleven months, the Constitutional Court found that the grounds for her detention were no longer sufficient and ordered her immediate release. Thus, it put end to the situation complained of by the applicant.

89. In view of the particular circumstances of the present case, the Court also reiterates its settled case-law to the effect that the question of whether a period of detention is reasonable cannot be assessed in the abstract. The reasonableness of the length of detention of an accused must be assessed in each case according to its special features (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

90. Thus, for example, in the case of *Miernicki v. Poland* (no. 10847/02, § 62, 27 October 2009), where the Court found that the applicant's detention lasting two years, six months and thirteen days was not excessive, it held:

“62. The applicant was charged with numerous counts of drug smuggling committed in an organised and armed criminal group (see paragraph 12 above).

In the Court's view, the fact that the case concerned a member of such a criminal group should be taken into account in assessing compliance with Article 5 § 3 (see *Bqk v. Poland*, no. 7870/04, § 57, 16 January 2007).”

Likewise, in the present case the Court considers that the fact that the applicant was charged with war crimes against the civilian population, allegedly committed over a lengthy period of time as one of the leaders of an organised group, is of significance.

91. In view of the fact that the applicant's detention, on the grounds of the particularly grave manner in which the alleged offences had been committed and the severity of the anticipated sentence, lasted one year and five months and the fact that the charges against her concerned the criminal offence of war crimes against the civilian population, and included very

serious allegations such as the illegal arrest and killing of a number of individuals, the Court considers that the particular seriousness of the alleged manner in which the offence was committed was a relevant ground for the applicant's detention in the period from 16 April 2007 to 17 September 2008 (see, by way of comparison, *Dudek*, cited above).

(c) Conduct of the proceedings

92. It remains to be ascertained whether the national authorities displayed “special diligence” in the conduct of the proceedings. In this regard, the Court firstly observes that the criminal case at issue was a complex one. It takes note of the seriousness of the charges brought against the applicant. A large amount of evidence had to be examined in the course of the proceedings. The complexity of the case thus undoubtedly prolonged its examination and contributed to the length of the applicant's detention (see, by way of comparison, *Dudek*, cited above, § 36).

93. The Court notes that the investigation commenced on 22 October 2006 and was concluded by the end of March 2007, thus lasting less than five months, in which period the investigating judge heard evidence from a large number of witnesses and compiled a voluminous case file. The applicant was committed to stand trial on 16 April 2007 and was released on 17 September 2008. Thus, the part of the trial relevant for the issue of the applicant's detention lasted one year and five months.

94. The Court further notes that the first hearings were held in October 2007. The Court is of the opinion that a certain amount of time was necessary for the trial court to prepare the trial. In view of the volume of the case file and the large number of relevant documents in it, the Court is willing to accept that the fact that the first hearings were held in October 2007, about six months after the indictment had been filed, appears reasonable in the circumstances. Further hearings until the applicant's release in September 2008 were held at regular intervals (altogether fifty-two hearings at which fifty-three witnesses, as well as seven defendants, gave evidence).

95. After the applicant's release, the trial continued and on 7 May 2009 the court delivered its judgment finding the applicant guilty and sentencing her to seven years' imprisonment. The appeal proceedings are currently pending before the Supreme Court.

96. The Court considers that the conduct of the criminal proceedings by the national authorities complied with the requirements of efficiency, and that therefore the domestic authorities cannot be criticised for failing to observe “special diligence” in the handling of the applicant's case. There has accordingly been no violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

97. The applicant also complained that the proceedings concerning her appeals against the detention orders issued against her had not met the requirements of Article 5 § 4 of the Convention, which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

1. The parties' arguments

98. The applicant maintained that the Constitutional Court had declared her constitutional complaint of 25 March 2008, lodged against the decisions of the Supreme Court of 22 February 2008 and the Zagreb County Court of 12 February 2008, inadmissible solely on the ground that a fresh decision extending her detention had been adopted in the meantime. In the applicant's view, such a practice ran counter to the requirements of Article 5 § 4 and Article 13 of the Convention.

99. The Government argued that the applicant's detention had been frequently reviewed by the competent courts of their own motion and that the applicant had also had the possibility under domestic law of applying for her detention order to be lifted. The applicant had always been able to lodge an appeal with the Supreme Court against every decision extending her detention and her appeals had been speedily decided. As regards the powers of the Constitutional Court in matters concerning detention, the Government submitted that that court was empowered to review decisions ordering and extending detention and to quash such decisions where it found that they had contravened the right to personal liberty, as guaranteed by the Constitution and the Convention. However, the requirements of Article 5 § 4 in Croatia were satisfied through judicial protection by the lower courts, up to and including the Supreme Court, and could not go so far as to be applicable to constitutional complaint proceedings.

2. The Court's assessment

(a) General principles

100. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12, and *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or

her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

(b) Application of these principles in the present case

101. The Court firstly notes that under the relevant domestic law, detention during an investigation must be reviewed by the investigating judge after one month and then again after two months and three months (Article 107 of the Code of Criminal Procedure). After the indictment has been filed, detention must be judicially reviewed every two months. The Court notes that in the circumstances of the present case the lawfulness of the applicant's detention was considered by the domestic courts on many occasions.

102. The applicant was able to lodge requests for her release. She was able to lodge an appeal with the Supreme Court against each decision of the Zagreb County Court extending her detention. The Court finds that the national courts periodically and automatically reviewed the applicant's detention and gave reasons for its extension. Each time the applicant was able to lodge an appeal with the Supreme Court and a constitutional complaint. However, the Court notes that the practice of the Constitutional Court is to declare inadmissible each constitutional complaint where, before it has given its decision, a fresh decision extending detention has been adopted in the meantime. Thus, the applicant's constitutional complaint of 25 March 2008 was declared inadmissible on such grounds. The Court therefore has to address the question of the compliance of the Constitutional Court's decisions of 29 May 2008 with the requirements of Article 5 § 4 of the Convention.

103. In this connection the Court reiterates that, according to its case-law, Article 5 § 4 enshrines, as does Article 6 § 1, the right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence (see *Shishkov v. Bulgaria*, no. 38822/97, §§ 82-90, ECHR 2003-I, and *Bochev*, cited above, § 70).

104. Furthermore, Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which institutes such a system must in principle accord detainees the same guarantees on appeal as at first instance (see *Toth v. Austria*, 12 December 1991, § 84, Series A no. 224; *Rutten v. the Netherlands*, no. 32605/96, § 53, 24 July 2001; *Lanz*

v. Austria, no. 24430/94, § 42, 31 January 2002; and *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III). The Court considers that the same applies in a system which provides for a constitutional complaint against decisions ordering and extending detention.

105. However, the Croatian system, although allowing for a constitutional complaint, leaves it to the Constitutional Court to await a fresh decision on extending detention and then to declare the complaint against the previous decision on detention inadmissible. Thus, although the applicant lodged a constitutional complaint against the decision of the Supreme Court of 22 February 2008, the Constitutional Court did not decide on the applicant's complaint until 29 May 2008, only to declare the complaint inadmissible because a fresh decision had meanwhile been adopted. The Court finds that the applicant's constitutional complaint of 25 March 2008 was not decided upon speedily and that the issue of the constitutionality of her detention was allowed to remain unaddressed.

106. In the Court's opinion, the Constitutional Court's failure to decide speedily on the applicant's constitutional complaint made it impossible to ensure the proper and meaningful functioning of the system for the review of her detention, as provided for by the national law. By declaring the applicant's constitutional complaint inadmissible simply because a fresh decision extending her detention had meanwhile been adopted, the Constitutional Court did not satisfy the requirement "that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy" (see *Peša v. Croatia*, no. 40523/08, § 126, 8 April 2010). Thus, it fell short of its obligation under Article 5 § 4 of the Convention to review the lawfulness of the applicant's detention. There has accordingly been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

108. The applicant claimed 80,000 euros (EUR) in respect of non-pecuniary damage.

109. The Government deemed the amount claimed excessive and unsubstantiated.

110. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to her on that amount.

B. Costs and expenses

111. The applicant also claimed EUR 60,000 for the costs and expenses incurred before the domestic courts; EUR 54,200 on account of her family visits to prison and telephone and mailing expenses related to her imprisonment; EUR 3,700 on account of her living costs in prison; and EUR 51,850 for the costs and expenses incurred before the Court, plus EUR 3,921,50 on account of taxes on the latter amount.

112. The Government submitted that the applicant was not entitled to the reimbursement of any costs and expenses before the national courts and also deemed the sum claimed for the costs and expenses before the Court excessive.

113. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds that the criminal proceedings against the applicant were not aimed at remedying the situation that gave rise to the violation it has found. On the other hand the Court considers it reasonable to award, in addition to the legal aid already granted, the sum of EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to her on that amount.

C. Default interest

114. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been no violation of Article 5 § 3 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, which are to be converted into Croatian kunas at the rate applicable on the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President

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

C.L.R.
A.M.W.

PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, MALINVERNI AND NICOLAOU

We are in agreement with the majority that the applicant's detention spanning the whole of the investigation period from 18 October 2006 to 16 April 2007 was justified. We observe in this regard that although the domestic courts relied both on Article 102 § 1(2) and Article 102 § 1(4) of the Code of Criminal Procedure to justify the detention (see the excerpts in paragraphs 33 and 38 of the judgment, as well as what is stated in paragraphs 39 and 40) the majority has, quite rightly, upheld the detention solely on the ground, provided for in Article 102 § 1(2), that if the applicant were released prior to the completion of the investigation “she might suborn witnesses.” The judgment does not cite the Article 102 § 1(4) ground as additional justification for that period of detention. It is in fact completely silent in so far as that ground is concerned.

Yet, for the subsequent period of detention – the pre-trial detention which commenced when the bill of indictment was filed on 16 April 2007 – the domestic courts justified the applicant's detention entirely on the Article 102 § 1(4) ground, and the majority accepts that justification as valid. We are unable to share that view. It has not been suggested that Article 102 § 1(4) might be applicable for the latter period but not for the former, and there is certainly nothing to indicate any such dividing line. It is necessary to see what this provision contains and we propose, for a better understanding of its effect, to place it in the context of the overall structure of Article 102 § 1:

Article 102

(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in detention

1) if there are circumstances indicating a danger of flight (the person is in hiding, his identity cannot be established, etc.);

2) if there is a risk that he or she might destroy, hide, alter or forge evidence or traces relevant for the criminal proceedings or might impede the investigation by influencing witnesses, co-principals or accessories after the fact;

3) if special circumstances support the concern that he will repeat the offence, or complete the attempted one, or perpetrate the offence he threatens to commit;

4) if the charges involved relate to murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion, abuse of powers in economic business activities, abuse of office or authority, association to commit a criminal offence or any other criminal offence punishable by imprisonment for a term of twelve years or more and if this is necessary because of the particularly grave circumstances of the offence.

It is quite obvious that detention may be founded on any one of the four above-stated grounds of Article 102 § 1 alone; it is equally obvious that

Article 102 § 1(4) refers only to the gravity of the offence and the severity of the penalty. It is not at all concerned with the danger of flight. That falls exclusively under Article 102 § 1(1). We think we should underline this, lest it be thought that reference to the gravity of the actual offence and the likely severity of the punishment might also, by way of shorthand, allude to the possibility of an accused absconding. In fact the domestic courts never hinted at that and there is no reason to think that if they had contemplated such possibility they would not have relied on Article 102 § 1(1) as well.

It is clear that throughout the pre-trial period the domestic courts relied exclusively on the gravity of the offences charged and the likely punishment, laying emphasis on the horrendous nature of the acts charged and on the fact that those acts had been motivated by national hatred directed against blameless civilians. This is illustrated by the following extracts, taken from the decision of the Supreme Court dated 11 May 2007 (see paragraph 48 of the judgment):

“The decision on their further detention must be based exclusively on an assessment of the elements which, judging from the facts alleged in the indictment, might lead to the conclusion that in this case ... the manner in which the offence was committed, or the fact that it was committed in particularly serious circumstances justify detention under Article 102 § 1(4) of the Code of Criminal Procedure ...

... The defendants have been charged with the gravest acts, involving illegal arrests, ill-treatment and killings of civilians who had not given any cause for such acts ...

... The aim of detention under [Article 102 § 1(4) of the Code of Criminal Procedure] is that persons whose acts cause special moral reproach should not be kept at large, as this could influence the public in such a way as to diminish trust in the criminal justice system.”

The aim of preserving public trust in the criminal justice system, to which the Supreme Court referred, may explain the dismissal of the applicant's request that her detention be replaced by house arrest. The Zagreb County Court said, in its decision of 12 February 2008, that such a measure was not available in respect of an Article 102 § 1(4) detention. It described the ambit of house arrest in the following terms:

“Rule 3 of the Rules on House Arrest (Official Gazette no. 3 of 7 January 2008) provides that the freedoms and rights of a detainee under house arrest may be restricted to the extent needed for the fulfillment of the purpose for which house arrest has been ordered; to prevent the detainee from absconding; to prevent the repetition, completion or commission of a criminal offence he or she has been threatening to commit; and to prevent communication between the detainee and other persons, save for those he or she lives with or who provide him or her with the necessary means of subsistence.”

We also note, however, that the Constitutional Court, which was the final court before which the applicant brought her complaint about her detention, gave a different interpretation of the aim of Article 102 § 1(4), saying that it was intended to guard against public unrest. In its decision of 17 September 2008, by which it quashed the lower courts' decisions, it explained that

“Owing to their particular gravity and the possible public reaction, certain criminal offences may cause public unrest which could justify detention.”

In respect of the applicant's detention (she was one of a number of accused) the Constitutional Court criticized the lower courts in no uncertain terms. It said that

“The failure of the courts to assess the appropriateness, necessity and proportionality of detaining the applicants further on the basis of Article 102, paragraph 1, point 4 of the CCP, without a valid explanation according to the principle of proportionality, amounted, in the estimation of the Constitutional Court, to a violation of their constitutional right to personal liberty.”

Not only did it conclude that in the circumstances the right to personal liberty outweighed any public interest in extending the detention, but it also admitted frankly that the detention had already lasted too long:

“The Constitutional Court considers that in the present case (apart from the fact that the detention has undoubtedly already lasted too long) the public interest in extending the applicants' detention during the criminal proceedings against them – in which their guilt for the alleged criminal offences has yet to be decided – does not carry more weight than the right of personal liberty guaranteed by the Constitution and the European Convention on Human Rights.”

The nature and the actual seriousness of the offences or the gravity of the charges brought, as well as the severity of the penalty that may be imposed, are obviously relevant factors which may indicate, especially when the prosecution evidence is strong, that there is a risk of absconding or reoffending. In such a situation it is incumbent on the national judicial authorities to ascertain and evaluate the various elements and factors involved, to explain their conclusions and to give reasons for their decision to detain, or for their decision to grant bail on terms that exceed what may normally be expected. In doing so, they are expected to balance the recognized requirements of public interest that may justify detention against respect for individual liberty, which at that stage is reflected in the presumption of innocence. The constant case-law of the Court leaves no doubt that the seriousness of the offence, whatever form the offence may actually have taken, and the probable severity of sentence do not of themselves, without more, justify detention, at least after the initial period. Article 102 § 1 (4) does not, on the face of it, seem to require more. Accordingly, it cannot constitute a valid basis for detention. However, in interpreting that provision, both the Supreme Court and the Constitutional Court have attributed to it an aim or a purpose to which we must now briefly refer.

In just two cases, both cited in the judgment – we are not aware of others – the Court has accepted that the particular gravity of an offence may generate a public-order issue justifying pre-trial detention. The first was *Letellier v. France*, 26 June 1991, Series A no. 207, and this was followed by *I.A. v. France*, 23 September 1998, *Reports of Judgments and Decisions*

1998-VII. We quote from the former (§ 51), but the same was repeated in the latter (§ 104):

“The Court accepts that, by reason of their particular gravity and public reaction to them certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognizes ... the notion of disturbance to public order caused by an offence.

However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.”

It is unnecessary in the present case to express a considered view on the “preservation of public order” ground. Even if we were to accept, in the light of what was stated by the Constitutional Court, that Article 102 § 1 (4) recognized such a ground, the domestic courts did not refer to facts capable of supporting it. Indeed, the County Courts and the Supreme Court never mentioned it at all.

In *I.A. v. France* (cited above) the Court also dealt with detention on the basis of a need to protect an accused. That has not been an issue here and we shall say no more about it.

As to the view of the Supreme Court that detention under Article 102 § 1(4) was justified as a measure aimed at preserving public trust in the criminal justice system, we would point out that the Court's case-law does not envisage such a measure and we do not think that it should be accommodated. The right to personal liberty – a core right guaranteed by Article 5 of the Convention – must be vigilantly shielded from all kinds of erosive inroads.

We are therefore of the opinion that it has not been shown that the applicant's pre-trial detention had a sound legal basis and, further, we do not consider that it was in any event supported by relevant and sufficient reasons. Finally, let us respectfully say that we fail to see how, even on the basis of the analysis relied on by the majority, one could arrive at the conclusion that the length of the detention had not exceeded what was reasonable when the Constitutional Court, which looked into the particular requirements of the case, had held that at the time of its decision the applicant had already been in detention for too long.