



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

FIRST SECTION

CASE OF ŠUPUT v. CROATIA

(Application no. 49905/07)

JUDGMENT

STRASBOURG

31 May 2011

FINAL

31/08/2011

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

In the case of Šuput v. Croatia,

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

Anatoly Kovler, *President*,

Nina Vajić,

Christos Rozakis,

Peer Lorenzen,

Elisabeth Steiner,

Khanlar Hajiyeu,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 10 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49905/07) 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, Mr Željko Šuput (“the applicant”), on 15 October 2007.

2. The applicant was represented by Mr Đ. Vučinić, a lawyer practising in Rijeka. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. On 19 June 2008 the President of the First Section decided to communicate the complaints concerning the adequacy of the medical care administered to the applicant and the complaint that the reasons relied on by the domestic courts for extending the applicant’s detention were not relevant and sufficient throughout the detention to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1971 and lives in Korenica.

1. Background to the case

5. In July 2005 the police, at the request of the State Attorney, commenced an inquiry into allegations that during 1991, at the beginning of the Homeland War in Croatia, a large number of civilians were tortured and killed or detained in Korenica, Croatia by members of the so-called “Krajina Autonomous Region Militia” (*Milicija “Autonomne Oblasti Krajina”*), where they were allegedly tortured and some of them killed. A large number of survivors and other individuals who witnessed these events were interviewed by the police. A voluminous case file was produced and the inquiry resulted in the supposed perpetrators being identified, among whom was the applicant.

2. Criminal proceedings against the applicant

(a) Investigation

6. The applicant was arrested on 4 December 2006 on suspicion that he had committed war crimes against the civilian population and prisoners of war. On the same day the investigation judge of the Gospić County Court (*istražni sudac Županijskog suda u Gospiću*) heard evidence from the applicant in the presence of a defence counsel. The applicant denied the charges. On the same day the investigation judge heard evidence from two other suspects.

7. On 5 December 2006 an investigation was opened in respect of the applicant and two other suspects in the Gospić County Court in connection with suspected war crimes against the civilian population and prisoners of war in 1991 in Korenica, Croatia.

8. On 7 and 11 December 2006 the police interviewed two newly discovered potential witnesses.

9. On 14 December 2006 the investigation judge requested a report from the Korenica Social Welfare Centre (*Centar za socijalnu skrb Korenica*) on the suspects’ personal circumstances. On the same day the investigation judge scheduled a hearing, with an identification parade, for 21 December 2006, and ordered the Gospić Police Station to ensure the presence of twelve other individuals of an appropriate age and physical appearance at the identification parade.

10. At a hearing held on 21 December 2006 the investigation judge heard evidence from nine witnesses and held an identification parade. Two of the witnesses were asked to identify the applicant and both of them recognised the applicant as a person named Željko Šuput who they alleged had ill-treated prisoners in Korenica in 1991.

11. On the same day the Gospić State Attorney’s Office asked for evidence from eighteen witnesses to be heard by the investigation judge.

12. On 27 December 2006 the Korenica Social Welfare Centre submitted their report to the Gospić County Court on the applicant's personal circumstances. The report stated that the applicant and his family, who had left Croatia during the Homeland War, had returned to Croatia in 2001 and since then had lived in their own house in Korenica. Before his arrest the applicant had been employed as a driver in Rijeka, Croatia. On the same day the Ministry of Justice informed the Gospić County Court that the applicant had been fined twice for minor offences related to road safety and customs regulations. He had no criminal record.

13. On 3 and 17 January 2007 the investigation judge heard evidence from four and fifteen witnesses respectively. A voluminous case file was compiled containing evidence from witnesses and a large amount of documentary evidence.

(b) Criminal trial

14. On 31 January 2007 the applicant and another defendant were indicted before the Gospić County Court for war crimes against prisoners of war, an offence under section 122 of the Croatian Criminal Code. The applicant was accused of inflicting exceptionally brutal treatment on prisoners of war on several occasions, consisting of beatings with wooden rods and chains, kicking, administering electric shocks, death threats and forcing schoolchildren to urinate on the prisoners.

15. On 15 February 2007 the applicant lodged an objection to the indictment (*prigovor protiv optužnice*). His co-defendant also lodged an objection.

16. On 1 March 2007 the President of the Gospić County Court asked the Supreme Court to transfer jurisdiction to another court. This was refused on 8 March 2007.

17. On 19 March 2007 the objections to the indictment were dismissed by the Gospić County Court and the indictment became final.

18. On 4 April 2007 the President of the Gospić County Court again asked the Supreme Court to transfer jurisdiction to another court. On 26 April 2007 the Supreme Court transferred jurisdiction to the Rijeka County Court (*Županijski sud u Rijeci*) and the proceedings continued before that court.

19. A hearing scheduled for 12 July 2007 was adjourned owing to the absence of the parties.

20. On 18 July 2007 the applicant appointed new counsel, who asked the County Court to adjourn the trial in order to allow him sufficient time to consult the case file and prepare the applicant's defence. For that reason on 20 July 2007 the Rijeka County Court adjourned the hearings already scheduled for 24, 25, 26 and 27 July 2007. The hearings were scheduled for 3, 4, 5 and 6 September 2007.

21. At a hearing held on 3 September 2007 the County Court dismissed a number of procedural objections put forward by the defence and heard evidence from one witness. A hearing scheduled for 4 September 2007 was adjourned because the defence counsel of both defendants refused to continue to represent them. On 5 September 2007 the County Court appointed legal-aid counsel for the applicant. On 7 September 2007 the appointed counsel asked to be relieved of his duties. On 10 September 2007 the County Court accepted this request and on 12 September 2007 it appointed new legal-aid counsel for the applicant. On 21 September 2007 that lawyer also sought to be relieved of her duties. On 25 September 2007 the County Court refused this request. On 10 and 11 October counsel again sought to be relieved of her duties, on different grounds from those given in her previous request. This request was accepted on 11 October 2007 and on 15 October 2007 new legal-aid defence counsel was appointed.

22. A hearing scheduled for 22 October 2007 was adjourned because the applicant's counsel did not appear. A hearing scheduled for 10 December 2007 was adjourned because the case file had been forwarded to the Supreme Court upon the applicant's appeal against a decision extending his detention (see below, § 39).

23. At a hearing held on 8 January 2008 the County Court heard evidence from eight witnesses, on 9 January 2008 three witnesses and on 10 January 2008 also three witnesses. On the latter date the County Court commissioned an expert report from a medical expert. On 3 March 2008 the expert submitted her report.

24. At a hearing held on 10 March 2008 the County Court heard evidence from the medical expert and at a hearing held on 11 March 2008 it heard evidence from seven witnesses.

25. A hearing scheduled for 8 May 2008 was adjourned on account of the applicant's inability to attend owing to his post-surgery state of health (see below, §§ 60 and 61).

26. At a hearing held on 30 June 2008 the Rijeka County Court heard the applicant's evidence as to his health and decided to commission a report by a medical expert concerning the applicant's health. The report was submitted on 14 July 2008. The expert stated that the applicant's health was not incompatible with his ability to attend and follow the criminal trial against him (see below, § 63).

27. At a hearing held on 16 September 2008 the records of the identification parade (see above, § 10) were read and three witnesses gave evidence.

28. At a hearing held on 19 September 2008 the Rijeka County Court decided on a number of procedural objections put forward by the defence. At a hearing on 2 October 2008 two witnesses and both defendants gave evidence and the parties gave their closing arguments.

29. On 3 October 2008 the Rijeka County Court found the applicant guilty of war crimes against prisoners of war and sentenced him to four years' imprisonment. At the same time it lifted the applicant's detention.

30. On 11 and 19 February 2009 respectively the applicant and the other defendant lodged their appeals. The appeal proceedings are currently pending before the Supreme Court.

3. Decisions concerning the applicant's detention

31. On 4 December 2006 the investigation judge of the Gospić County Court remanded the applicant in custody for forty-eight hours. On the same day the investigation judge heard evidence from the applicant in the presence of a defence counsel. The applicant denied the charges against him. On the same day the investigation judge heard evidence from two other suspects.

32. On 5 December 2006 the investigation judge remanded the applicant in custody for one month on the grounds that there was a danger of absconding and that the offences allegedly committed by the applicant were serious ones. The relevant part of the decision reads:

“This court finds that the grounds for detention under Article 102 § 1(1 and 4) of the Code of Criminal Procedure apply ...

The case file shows that the first, second and third suspects lived in Serbia for a long time and therefore the circumstances indicated a danger of absconding because they might leave the territory of Croatia and thus impede the conduct of these criminal proceedings.

Also, what is at issue is a crime against humanity and international law – a war crime against prisoners of war, liable to twenty years' imprisonment, which was committed under particularly grave circumstances shown by a reasonable suspicion that the suspects brutally tortured the prisoners, and the injuries thus inflicted caused grave bodily impairments to the majority of the victims, resulting in their permanent grave disability.”

This decision was upheld by a three-judge panel of the Gospić County Court on 13 December 2006 which endorsed the reasoning of the investigation judge.

33. On 3 January 2007 the investigation judge extended the applicant's detention for a further two months on the same grounds as before. The applicant did not lodge an appeal.

34. On 14 February 2007 a three-judge panel of the Gospić County Court extended the applicant's detention on the same grounds (danger of absconding and gravity of offences). This decision was upheld by the Supreme Court on 26 February 2007. The relevant part of the decision reads:

“This court finds that the fact that the defendants lived abroad for a long time and are charged with a grave criminal offence liable to a lengthy prison term show that if

released, they might abscond. Thus, the extension of their detention on the ground under Article 102 § 1(1) of the Code of Criminal Procedure is justified.

The Supreme Court ... accepts the first-instance court's findings that the conduct of the defendants amounted to an offence committed under particularly grave circumstances, which necessitate their further detention on the ground under Article 102 § 1(4) of the Code of Criminal Procedure. The defendants are charged with particularly brutal conduct consisting of beatings with wooden sticks, rods and chains, administering electric shocks, throwing cold water over and psychologically torturing war prisoners N.N., M.L. and P.B. on many occasions in cells, halls and the courtyard of the building where they were detained, which caused grave bodily injuries to the victims."

35. On 12 April 2007 the Gospić County Court extended the applicant's detention on the same grounds.

36. On 7 May 2007 the Supreme Court quashed the decision of 12 April 2007 on formal grounds, namely the absence of the applicant's defence counsel from a panel meeting concerning his detention.

37. On 11 May 2007 the Gospić County Court extended the applicant's detention on the same grounds. The applicant did not lodge an appeal.

38. On 12 July and 19 September 2007 the Rijeka County Court extended the applicant's detention on the same grounds. The applicant did not lodge appeals.

39. On 23 November 2007 the Rijeka County Court extended the applicant's detention solely on account of the gravity of the offences. The relevant part of the decision reads:

"This panel finds that the grounds for detention under Article 102 § 1(4) of the Code of Criminal Procedure in respect of the first defendant Željko Šuput still apply on account of the manner in which he had allegedly committed the criminal offences held against him. The factual basis of the criminal offence shows exceptional cruelty and brutality which, in the opinion of this panel, represent an offence committed under exceptionally grave circumstances and that therefore detention is necessary under Article 102 § 1(4) of the Code of Criminal Procedure.

The record of the hearing held on 3 September 2007 shows that the first defendant Željko Šuput is a citizen of Croatia, that he was employed as a driver before his arrest, that he owns half a house in Korenica, and that he is married and the father of two children. These circumstances show that he has a connection with the Republic of Croatia and that, despite these criminal proceedings and a risk of imprisonment, the grounds for detention under Article 102 § 1(1) of the Code of Criminal Procedure have not been fulfilled, namely that there are no circumstances indicating a danger of absconding."

On 10 December 2007 the Supreme Court upheld this decision, endorsing the County Court's reasons. The applicant lodged a constitutional complaint.

40. On 29 January 2008 the applicant asked for his detention to be lifted.

41. On 8 February 2008 the Rijeka County Court dismissed the applicant's request and extended the applicant's detention on account of the

gravity of the charges. On 27 February 2008 the Supreme Court upheld this decision, endorsing the County Court's reasoning.

42. At the hearing held on 11 March 2008 the applicant's counsel asked for the detention to be lifted on the ground that he needed medical assistance outside prison, including surgery on his spine. The Rijeka County Court dismissed the request, finding that it was premature, since no surgery had yet been performed on the applicant. On 29 March 2008 the applicant was admitted to Zagreb Prison Hospital (*Bolnica za osobe lišene slobode*, "the ZPH"). On 9 April 2008 he was transferred to a civil hospital, where surgery on his spine was carried out on 14 April 2008.

43. On 15 April 2008 the applicant again asked for his detention to be lifted on health grounds. This was refused by the Rijeka County Court on 25 May 2008 and the applicant's detention was extended for a further two months. The relevant part of that decision reads as follows:

"This court finds that the ground for ordering the applicant's detention under Article 102 paragraph 1(4) of the Code of Criminal Procedure still exists because of ... a suspicion that in the period between 15 October 1991 and the end of April 1992 the first defendant, Željko Šuput, as a member of the intervention brigade of the Militia of the so-called Krajina Autonomous Region, on several occasions brutally ill-treated prisoners of war in the cells, corridor and courtyard of the Korenica Militia building by beating them with wooden sticks, rods and chains, kicking them and administering electric shocks until they lost consciousness.

These circumstances indicate utterly cruel and inhuman treatment of the prisoners of war, which significantly exceeded the basic features of the crime in question ... which represent an offence committed under particularly grave circumstances, which clearly warrant that the defendant remain in custody on the grounds under Article 102 paragraph 1(4) of the Code of Criminal Procedure."

44. As to the applicant's request that his detention be lifted, the County Court held:

"This court finds the first defendant's request for his detention to be lifted unfounded. The purpose of placing the first defendant Željko Šuput in Zagreb Prison Hospital is precisely to be able to administer adequate medical care appropriate to his needs and state of health. [The Hospital] is able to provide continuous monitoring and urgent medical interventions. There it is possible to administer the medical assistance the defendant needs, identical to that which he would receive in any other situation, irrespective of whether or not he is in detention."

This decision was upheld by the Supreme Court on 21 May 2008. The relevant part of the decision reads:

"... the finding of the first-instance court that the ground for further detention of the defendant Željko Šuput under 102 paragraph 1(4) of the Code of Criminal Procedure still applied is correct.

The indictment shows a relevant degree of reasonable suspicion that the defendant Željko Šuput committed the criminal offence under Article 122 of the Criminal Code, by which a general statutory condition under Article 102 paragraph 1 of the Code of Criminal Procedure for extending detention has been fulfilled.

The factual background of the indictment shows that the defendant Željko Šuput, in his capacity as a member of the intervention squad of the so-called Krajina A[utonomous] R[egion] Militia, in the period from 15 October 1991 to the end of April 1992, together with other members of that militia, on many occasions, in cells, hall and courtyard of the building [where they were detained] kicked prisoners and beat them with wooden sticks, rods and chains on the head and body and administered electric shocks until they lost consciousness, all of which resulted in numerous and grave injuries.

The above-described manner in which the offences were committed shows an exceptionally high degree of brutality, ruthlessness, unscrupulousness and cruelty, which surpasses by far the usual manner of committing such crimes and represents an offence committed under particularly grave circumstances which necessitates the defendants' remaining in custody under Article 102 paragraph 1(4) of the Code of Criminal Procedure, as correctly found and explained by the first-instance court in the decision referred to.

The defendant's arguments that there was no proof that he had committed the criminal offences at issue are not decisive for deciding on his further detention, because for such a decision the relevant degree of reasonable suspicion suffices, and that suspicion is shown in the indictment.

In considering [the reasons for] detention, this panel does not assess evidence and its probative value – that assessment is made by the trial court at the end of the trial.

Contrary to the allegations of the appeal, the extension of his detention on the grounds under Article 102 paragraph 1(4) of the Code of Criminal Procedure contravenes neither the Croatian Constitution nor the Convention. Unlike the aim of the grounds for detention under Article 102 paragraph 1(1,2 and 3) of the Code of Criminal Procedure, the aim of the ground for detention under Article 102 paragraph 1(4) of the Code of Criminal Procedure is not to remove threats to the efficient and unobstructed conduct of the criminal proceedings but is preventive, intended to prevent the release of individuals who have committed criminal offences such that their release would diminish the reputation of and trust in the justice system by the public. Article 5 of the Convention gives only examples of the grounds for detention (*exempli gratia*) and these grounds are not exclusive (*numerus clausus*). Therefore, Article 102 paragraph 1(4) does not contravene the said provision of the Convention. Other security measures under Article 90 of the Code of Criminal Procedure, in view of their essence and character, could not fulfil the same purpose as detention.

The applicant's needs as regards medical care may be satisfied with medical treatment in prison, in view of the nature of his illness, and exceptionally by out-patient treatment."

45. On 27 May 2008 the applicant again asked for his detention to be lifted on health grounds.

46. On 29 May 2008 the Constitutional Court declared the applicant's constitutional complaint against the Supreme Court's decision of 10 December 2007 inadmissible on the grounds that meanwhile a fresh decision extending the applicant's detention had been adopted by the Rijeka County Court on 8 February 2008 and that therefore the original decision was no longer in effect.

47. On 10 June 2008 the applicant's request of 27 May 2008 was dismissed by the Rijeka County Court on the grounds that the applicant's health did not require treatment outside prison. The relevant part of the decision reads:

"As regards the health of the first defendant Željko Šuput ... this panel finds that for now the treatment it requires is not incompatible with his detention. The medical documentation of 29 May 2007 shows that a haematoma which developed ... in the brain, is slowly diminishing. The neurosurgeons did not recommend surgery but only further supervision and rest. The next examination ... is scheduled for the end of June. His health is expected to become stable."

48. On 18 July 2008 the Rijeka County Court extended the applicant's detention on the grounds of the gravity of the charges.

49. On 3 October 2008, after finding the applicant guilty of war crimes against prisoners of war, the Rijeka County Court lifted his detention. The applicant was released the same day. A security measure of withdrawal of his passport and prohibition on leaving his place of residence was applied. The relevant part of the decision lifting the applicant's detention reads:

"... there is no ground for further detention of the defendant because the same purpose may be achieved by the use of a preventive measure of prohibition on leaving his place of residence and obligation to report periodically to the Korenica Police Station as well as temporary seizure of his passport."

4. The applicant's medical treatment during his detention

50. The applicant's medical record shows that before his arrest he was suffering from discopathy of the lumbar spinal area.

51. He was seen by the prison doctor on 10 August 2007 for severe pain in the lumbar area of the spine and the left leg. He was diagnosed with lumboischialgia (chronic neck pain), and prescribed painkillers and rest. At his next examination on 27 August 2007 the doctor noted that the pain was decreasing and the same therapy was prescribed. On further examinations by the prison doctor on 30 August, 18, 19, 20, 21 24 and 28 September 2007 it was noted that the applicant was still suffering pain and he was prescribed various painkillers.

52. On 3 October 2007 the doctor recommended that the applicant be seen by an orthopedic specialist. On 10 October 2007 the applicant stated that he wanted to see a specialist at his own expense at a hospital of his choice. On 11 October 2007 a trial judge in the applicant's case before the Rijeka County Court allowed the request and a visit to a clinic was scheduled for 16 October 2007.

53. At the beginning of November 2007 the applicant was sent for an X-ray examination of his spine.

54. On 21 January 2008 the applicant asked permission to undergo a computer tomography of his spine in a private clinic. The request was

allowed on 21 January 2008 by the trial judge and the visit to the clinic was scheduled for 25 January 2008.

55. On 8 February 2008 the trial judge allowed the applicant a specialist examination at the expense of the Rijeka County Court.

56. On 11 February 2008 the trial judge allowed the applicant's treatment in the Zagreb Prison Hospital (ZPH) at the expense of the Rijeka County Court. The applicant stayed in the ZPH from 22 February to 6 March 2002. He was diagnosed with disc protrusion and surgery on his spine was scheduled for 28 March 2008.

57. On 10 March 2008 the Rijeka Prison doctor submitted a report on the applicant's health to the Rijeka County Court. She stated that he was suffering from disc protrusion and that surgery was scheduled for 2 April 2008 at a civilian hospital - the Dubrava Hospital in Zagreb (*Klinički bolnički centar Dubrava*). She further noted that he had been taking painkillers for a long time and recommended that he rest every hour because he was not able to sit for a long period in the same position.

58. At a hearing held in the Rijeka County Court on 10 March 2008 an independent medical expert recommended that a fifteen-minute break be taken every hour during the hearing on account of the applicant's health problems.

59. On 26 March 2008 the trial judge allowed the applicant's hospitalisation in the Dubrava Hospital in Zagreb for him to undergo surgery on his spine on 1 April 2008.

60. On 29 March 2008 the applicant was admitted to the ZPH. On 9 April 2008 he was transferred to Dubrava Hospital where he underwent surgery on his spine on 14 April 2008. On 17 April he was returned to the ZPH.

61. After the surgery the applicant developed a haematoma in the cerebellum. He underwent physiotherapy. A number of laboratory tests were carried out as well as several brain nuclear magnetic resonances, computer tomography of his spine and head, X-ray of his mouth cavity and electrocardiography. He was seen by an oral surgeon, neurologist, physiologist, ophthalmologist and a psychologist. A neurosurgeon examined him on 19 and 23 May 10 and 11 June 2008.

62. On 27 June 2008 he was returned to Rijeka Prison.

63. At a hearing held on 30 June 2008 in the Rijeka County Court, the trial judge asked for an opinion from a medical expert. On 14 July 2008 an independent medical expert, who saw the applicant on 10 July 2008, submitted his opinion, stating that the applicant's health was not incompatible with his ability to attend and follow the criminal trial against him. He further recommended a brain examination at the end of July or beginning of August, an examination by a neurosurgeon and physiotherapy.

II. RELEVANT DOMESTIC LAW

64. Section 122 of the Basic Criminal Code (*Osnovni krivični zakon*, Official Gazette no. 31/1993) reads as follows:

War Crimes against Prisoners of War

Whoever, in violation of the rules of international law, orders the killing, torture or inhuman treatment of prisoners of war, including biological, medical or other scientific experiments, the removal of tissue or organs for transplantation, or the causing of great suffering or injury to their physical integrity or health; or compels a prisoner of war to serve in the forces of a hostile power, or deprives a prisoner of war of the right to a fair trial; or commits any of the foregoing acts, shall be sentenced to not less than five years' imprisonment or up to twenty years' imprisonment.

65. The relevant part of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003) provides as follows:

Preventive Measures

Article 90

“(1) Where the conditions for ordering detention under Article 102 of this Code have been fulfilled, and where the same purpose may be achieved by other preventive measures under this Article, the court shall order that one or more preventive measures are to be applied ...

(2) Preventive measures are:

- 1) prohibition on leaving one's place of residence;
- 2) prohibition on being in a certain place or area;
- 3) obligation on the defendant to report periodically to a certain person or a State body;
- 4) prohibition on access to a certain person or on establishing or maintaining contact with a certain person;
- 5) prohibition on undertaking a certain business activity;
- 6) temporary seizure of a passport or other document necessary for crossing the State border;
- 7) temporary seizure of a driving licence.

...”

8. General Provisions on Detention

Section 101

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

(2) Detention 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, a court shall take into consideration the proportionality between the gravity of the offence, the sentence which ... may be expected to be imposed, and the need to order and determine the duration of detention.

(4) Judicial authorities conducting criminal proceedings shall proceed with particular urgency when the defendant is in detention and shall review *ex officio* whether the grounds and legal conditions for detention have ceased to exist, in which case detention shall immediately be lifted.”

9. Grounds for Ordering Detention

Section 102

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

1. where there are circumstances which show that there is a risk that [the defendant] will abscond [is in hiding or his or her identity cannot be established etc.);

...

4. where the charges 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, or where detention is justified by the *modus operandi* or other especially grave circumstances of the offence.”

66. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette nos. 128/1999 and 190/2003) read as follows:

COMPLAINTS

Section 15

“(1) Inmates shall have the right to complain about an act or decision of a prison employee.

(2) Complaints shall be lodged orally or in writing with a prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison

Administration. Written complaints addressed to a judge responsible for the execution of sentences or the Head Office of the Prison Administration shall be submitted in an envelope which the prison authorities may not open ...”

HEALTH PROTECTION

Section 103

“(1) Inmates shall be provided with medical treatment and proper care of their physical and mental health...”

OBLIGATORY MEDICAL EXAMINATION

Section 104

“ ...

(2) A doctor shall examine a sick or injured inmate ... and undertake all measures necessary to prevent or cure the illness and to prevent deterioration of the inmate’s health.”

SPECIALIST EXAMINATION

Section 107

“(1) An inmate has the right to seek a specialist examination if such an examination has not been ordered by a prison doctor.

...”

TEMPORARY RELEASE

Grounds for temporary release

...

(2) Temporary release may be allowed on the following grounds:

1) to an inmate suffering from a serious acute illness or whose chronic illness worsens and where his or her medical treatment is not possible in prison.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

67. The applicant complained of the conditions of his detention and in particular that he had not received adequate medical care in prison.

He relied on Article 3 of the Convention, which reads:

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

68. The Government argued that the applicant had failed to exhaust all available domestic remedies because he had not specifically complained to a judge responsible for the execution of sentences of a lack of adequate medical care in prison.

69. They further argued that the applicant had received adequate medical treatment and that all recommendations by various specialists had been followed.

70. The applicant claimed that he had not received adequate medical care while in detention.

71. The Court does not have to address all issues raised by the Government, since the application is in any event inadmissible for the following reasons.

72. The Court notes firstly that the applicant, who was detained from December 2006 to October 2008, indeed suffered from various conditions, such as discopathy of the lumbar spinal area, back and neck pain and disc protrusion. However, detention in such conditions does not in itself constitute treatment contrary to Article 3.

73. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment. Under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are

adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 93-94, ECHR 2000-XI; *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI; and *Mathew v. the Netherlands*, no. 24919/03, § 175, ECHR 2005-IX).

74. As to the present case the Court notes that the applicant complained that while incarcerated he had not been provided with adequate medical care, and had sought release on health grounds. However, in his submissions to the Court he did not specify what treatment had been denied him and what precisely was the treatment he needed.

75. The documents submitted show that the applicant's health was continuously monitored by a prison doctor and that his requests to be examined by a specialist in a private clinic were allowed. Further to this, he was hospitalised in the ZPH whenever recommended. Surgery on his spine was carried out in a regular hospital, namely the Dubrava General Hospital in Zagreb, after which the applicant underwent physiotherapy and was monitored by various specialists, such as a neurologist, neurosurgeon and orthopediologist. All recommendations by specialist physicians were followed. Further to this, the independent medical experts who examined the applicant for the purposes of the criminal trial against him found that his health was not incompatible with detention.

76. In these circumstances the Court finds that the applicant was provided with adequate medical treatment during his detention.

77. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

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

78. The applicant further complained of the duration of his detention and submitted that the reasons relied on by the national courts for ordering and extending his detention had been insufficient and inadequate throughout his detention. He relied on Article 5 § 3 of the Convention which reads:

Article 5 § 3

“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. Admissibility

79. The Government invited the Court to reject the application on the ground that the applicant had failed to exhaust domestic remedies as required under Article 35 § 1 of the Convention.

80. The Government submitted that the applicant had not lodged another constitutional complaint to the Constitutional Court. They observed that he had previously lodged such a complaint against the decision by the Supreme Court of 27 February 2008 upholding the Rijeka County Court decision of 8 February 2008, which had extended the applicant's detention. However, the applicant's detention had been extended by further decisions of the Rijeka County Court, in respect of which the applicant should have lodged another constitutional complaint.

81. Having regard to the fact that the applicant's detention continued after the Constitutional Court's decision of 29 May 2008, lodging another constitutional complaint would have had reasonable prospects of success since it would have enabled the Constitutional Court to examine the length of the applicant's further detention.

82. The applicant contested that argument. He argued that it was not justified to demand another constitutional complaint when his previous complaint had been declared inadmissible.

83. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-IV). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances.

84. The Court accepts that in principle a constitutional complaint under section 62 of the Constitutional Court Act is an effective remedy in respect of decisions ordering and extending detention, which has to be used in the context of complaints about the length of detention.

85. In the present case, the applicant made normal use of this remedy against the decision of the Supreme Court of 10 December 2007. The Constitutional Court declared this complaint inadmissible on the grounds that meanwhile a fresh decision on the applicant's detention had been adopted.

86. It follows that the applicant has raised the issue of the length of and grounds for his detention before the competent domestic authorities, thereby offering them the opportunity of preventing or putting right the violation alleged.

87. However, seeing that his constitutional complaint had failed, the Court considers it understandable that the applicant did not lodge a further constitutional complaint, as this would overstretch the duties incumbent on an applicant pursuant to Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Unión Alimentaria Sanders S.A. v. Spain*, judgment of 7 July 1989, Series A no. 157, p. 13-14, § 35; *Ullrich v. Austria*,

no. 66956/01, § 29, 21 October 2004; and *Antonić-Tomasović v. Croatia*, no. 5208/03, § 33, 10 November 2005).

88. The Court, therefore, concludes that the applicant has complied with his obligation to exhaust domestic remedies. The Government's objection must therefore be dismissed.

89. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

90. The applicant argued that the grounds for ordering and extending his detention had been insufficient.

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

92. The Government also argued that, owing to the gravity of the charges against the applicant, his release could have caused public disorder. They explained that the applicant had been charged with war crimes against the civilian population and prisoners of war allegedly committed in Korenica, the town where he had lived prior to his arrest and that the case had been very sensitive for the population of that town.

93. 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.

2. The Court's assessment

(a) Grounds for detention

94. 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).

95. The Court notes that the applicant in the present case was detained between 4 December 2006 and 3 October 2008. His detention thus lasted one year, nine months and twenty-nine days.

(i) Period between 4 December 2006 and 23 November 2007

96. In the period between 4 December 2006 and 23 November 2007, during investigation and the initial stages of the trial, the national courts, in addition to the nature of the crimes allegedly committed, justified the applicant’s detention by a reasonable suspicion that he had committed the criminal offences and the danger of absconding.

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

97. 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. Bulgarie*, no. 73481/01, § 55, 13 November 2008).

98. In the present case the Court accepts that the applicant’s arrest and his initial detention were justified by a reasonable suspicion that he committed the criminal offence of war crimes against the civilian population.

(β) Danger of absconding

99. The Court reiterates that such a danger cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see *Neumeister v. Austria*, 27 June 1968, p. 39, § 10, Series A no. 8, and *Letellier*, cited above, § 43).

100. In the present case the national courts gave reasons why in their opinion there was a danger of absconding. They explained that the applicant, after having allegedly committed the crimes he was indicted for, had lived for a long time in Serbia and had connections in that State. In view of the background of the criminal proceedings against the applicant, and that they concerned allegations of war crimes against prisoners of war in which both States were implicated, the Court accepts that the danger of absconding was a relevant and sufficient reason for ordering and extending the applicant’s detention in the period from 5 December 2006 to 23 November 2007.

(ii) Period between 23 November 2007 and 3 October 2008

101. The Court notes that in their decisions extending the applicant's detention for a period of ten months and ten days between 23 November 2007 and 3 October 2008 when the applicant was released, the national courts cited only the gravity and nature of the offences and the severity of the likely penalty.

102. At this juncture the Court reiterates that a court decision extending detention on such grounds 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* 1998-VII). The Court will now examine whether in the particular circumstances of the present case there existed serious public interests considerations which outweighed the right to liberty.

103. The Court's assessment in that respect shall as a starting point have 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 modalities of the crime or other particularly serious circumstances of the offence.

104. The Court has 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*, no. 33977/96, § 84, 26 July 2001; and *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005.)

105. 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 in that manner in respect of the applicant. The applicant was charged with a number of very serious individual offences, amounting to war crimes against the civilian population. It was alleged that on many occasions in the period between 15 October 1991 and end of April 1992 he had inflicted various forms of ill-treatment on prisoners of war, who were all civilians, by, for example, kicking them, beating them with wooden sticks, rods and chains on the head and body, and also by administering electric shocks until they lost consciousness, all of which resulted in numerous and grave injuries. 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 liable to 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.

106. The Court has held that although the gravity of the offence and the severity of the sentence faced are relevant elements in the assessment of the need of detention, such need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view (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).

107. In this respect the Court reiterates that the ground for his extended detention, relied on by the national courts, was not the gravity of the offence *in abstracto*, but 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 26 February 2007 and 21 May 2008. The national courts, when extending the applicant's detention did not use some pre-existing template or formalistic and abstract language (see, *a contrario*, *Fırat v. Turkey*, no. 37291/04, § 15, 30 June 2009). They explained in detail what were the exact charges held against the applicant and repeatedly stressed the nature of the offences, namely war crimes against the prisoners of war, allegedly committed in a prolonged period of time and causing severe and lasting consequences to the victims. In this connection the Court cannot completely ignore the argument put forward by the Government that the majority of the alleged victims lived in the same place as the applicant.

108. 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 nature of the charges held against the applicant, relied on by the authorities, in the specific circumstances of the present case, had a particular relevance (see, by way of comparison, *Dudek v. Poland*, no. 633/03, § 38, 4 May 2006; and *Getoš-Magdić v. Croatia*, no. 56305/08, § 86, 2 December 2010).

109. The Court reiterates in this respect also the case of *Miernicki* (see *Miernicki v. Poland*, no. 10847/02, § 62, 27 October 2009) where it 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 *Bak 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 he had allegedly committed over a longer period of time in an exceptionally cruel manner bears significance.

110. 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 about ten months and the fact that charges against the applicant concerned the criminal offence of war crimes against the civilian population, and included very serious allegations of inflicting cruel forms of ill-treatment on a number of civilians taken as prisoners, the Court considers that the particular seriousness discloses the presence of such public interest considerations that it could be accepted as a relevant and sufficient ground for the applicant's detention in the period from 23 November 2007 to 3 October 2008 (see, by way of comparison the above-cited *Dudek* judgment, §§ 37 and 38; and *Getoš-Magdić*, cited above, § 91).

(b) Conduct of the proceedings

111. 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. The Court 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).

112. The Court notes that the investigation commenced on 4 December 2006 and was concluded by the end of January 2007, thus lasting for less than two months, in which period the investigation judge heard evidence from a large number of witnesses and compiled a voluminous case file. The applicant was committed to trial on 31 January 2007 and the trial ended with his conviction on 3 October 2008, when the applicant was also released. The actual trial thus lasted one year, eight months and four days.

113. The Court further notes that the first hearings were scheduled for July 2007. The Court accepts 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 accepts that the fact that the first hearings were scheduled for July 2007, about five months after the indictment had been lodged, appears reasonable in the circumstances. These hearings were adjourned at the request of the applicant's defence counsel, since the applicant had appointed new defence counsel shortly before the beginning of the hearings. The Court therefore accepts that the adjournment of the July hearings was attributable to the applicant and benefited his defence rights.

114. The first hearings were held at the beginning of September 2007 and after that further hearings were held at regular intervals (in January, March, July, September and October 2008). The Court also accepts that

certain delays in the trial proceedings were caused by the applicant's illness and surgery in April 2008 which, apart from the surgery itself, also included preparation for the surgery and post-surgical treatment in the period between 8 March and 16 September 2008 (see above, paragraphs 24-26).

115. In the Court's view, the conduct of the criminal proceedings by the national authorities complied with the requirements of efficiency, and therefore the domestic authorities cannot be criticised for failure to observe "special diligence" in the handling of the applicant's case.

116. In sum, the Court considers that there has been no violation of Article 5 § 3 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

117. The applicant further complained under Articles 6 and 13 of the Convention that the criminal proceedings against him had been unfair and that there was no effective remedy in that connection.

118. The Court notes that the criminal proceedings against the applicant are still pending and that therefore any complaint as to their unfairness as well as to the existence of an effective remedy in that respect is premature.

119. It follows that the complaint under Article 6 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies and that the complaint under Article 13 of the Convention is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3(a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the grounds for and duration of the applicant's detention admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been no violation of Article 5 § 3 of the Convention;

Done in English, and notified in writing on 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President

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

A.K.

S.N.

DISSENTING OPINION OF JUDGE NICOLAOU

I very much regret that I am unable to share the view taken by my learned colleagues that there has been no violation of Article 5 § 3.

The legal issue in the present case is essentially whether Article 102 § 1 (4) of the Code of Criminal Procedure could provide sufficient legal basis for detention during the pre-trial period. An affirmative answer was given by a majority judgment in the case of *Getoš-Magdić v. Croatia*, no. 56305/08, §§ 80-96, 2 December 2010, where it was accordingly found that there was no violation of Article 5 § 3 of the Convention. A separate dissenting opinion of judges Rozakis, Malinverni and Nicolaou found otherwise, on the ground that detention on the stated basis was inconsistent with the Court's case-law. The main part of the reasoning is contained in the following excerpt (at p.30):

“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 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”.

While, therefore, precedent must be respected, there is a choice to be made when one is confronted with divergence. In my opinion the case of *Getoš-Magdić v. Croatia* (cited above) in no way diminishes the force of a mass of case-law going in the opposite direction; and it is to the principles it establishes that I must adhere. This, in my view, can only be expressed by a dissenting opinion, not a concurring one which would imply acceptance of *Getoš-Magdić v. Croatia* as binding authority.