

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the appeal of **V. K.** in case no. **AP 2009/08**, at its session held on 9 July 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **V. K.** against the Decision of the Court of Bosnia and Herzegovina No. X-KR-05/119 of 16 July 2008 and the Decision of the Court of Bosnia and Herzegovina No. X-KR-05/155 of 27 June 2008, as well as due to the refusal of the competent authorities to ensure that appropriate medical care is provided for the appellant, is hereby dismissed as ill-founded with respect to Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The appeal of **V. K.** filed due to the refusal of the competent authorities to provide him with appropriate medical care is rejected as inadmissible with respect to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the grounds that it is incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official*

REASONING

I. Introduction

1. On 3 July 2008, V. K. from Bijeljina ("the appellant") who is represented by Mr. Predrag Radulović, the lawyer practicing in Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") due to the refusal of the competent authorities to provide him with appropriate medical care on which he was informed by way of the letter of the Court of Bosnia and Herzegovina ("the Court of BiH") No. X-KR-05/155 of 28 April 2008. Afterwards, on 28 August 2008, through his defence counsel Mr. Duško Panić, the lawyer practicing in Doboj, the appellant lodged a new appeal against the Decision of the Court of Bosnia and Herzegovina No. X-KR-05/119 of 16 July 2008 and the Decision of the Court of Bosnia and Herzegovina No: X-KR-05/155 of 27 June 2008, whereby the issuance of an interim measure was sought in order to suspend the enforcement of the custody measure until the completion of the proceedings which is conducted upon the appeal.

II. Procedure before the Constitutional Court

2. By its Decision No. AP 2617/08 of 28 October 2008 the Constitutional Court dismissed as ill-founded the appellant's request for issuance of an interim measure.

3. Given that the Constitutional Court received two appeals falling within its jurisdiction and that these two appeals concern the same factual and legal basis, the Constitutional Court, pursuant to Article 31(1) of the Rules of the Constitutional Court, adopted a decision on merging these two cases in respect of which single proceedings will be conducted and a single decision will be adopted to be registered as AP 2009/08. Appeal No. AP 2009/08 and Appeal No. 2619/08 have been merged.

4. Having regard to Article 22(1) and (2) of the Rules of the Constitutional Court, on 10 July 2008 and on 2 September 2008, the Court of BiH and the BiH Prosecutor's Office ("the Prosecutor's Office") were requested to submit their replies to the appeal.

5. The Court of BiH submitted its reply to the appeal on 17 September 2008 and the BiH Prosecutor's Office did so on 22 September 2008.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the appeal was communicated to the appellant on 11 March 2010.

III. Facts of the Case

7. The facts of the case, as they appear from the appellant's assertions and the documents submitted to the Constitutional Court may be summarized as follows:

Facts in Case AP 2009/08

8. On 3 March 2008, the Prosecutor's Office raised an Indictment No. KT-RZ -23/08, which was confirmed by the Court of BiH on 3 March 2008. The indictment was issued due to a criminal offence of Organising a Group of People and Instigating the Perpetration of Genocide, Crimes against Humanity and War Crimes under Article 176(2) in conjunction with paragraph 1 and paragraph 4 of the same article of the Criminal Code of Bosnia and Herzegovina ("the CC of BiH"), a criminal offence of crime against humanity under Article 172 paragraph 2 item h) in conjunction with items a), b), e),f), and k) in conjunction with Article 176(2) in conjunction with paragraphs 1 and 4 of the CC of BiH, and all the above in conjunction with Article 180 paragraphs 1 and 2 and Article 29 of the CC of BiH).

9. By Decision of the Court of BiH No. X-KR-05/155 of 7 December 2007, the appellant was ordered into custody which, based on the mentioned decision, may last no longer than a month, i.e. until 6 January 2008 or pending a new decision of the court.

10. As to the decision whereby the appellant was ordered into custody and considering his poor health, which is the result of the Parkinson's disease, the defence counsel for the appellant requested from the Court of BiH to inform him about the appellant's health condition.

11. By its letter No. X-KR-05/155 of 28 April 2008 the Court of BiH informed the defence counsel for the appellant that the expert medical team, in charge of the analysis and giving an opinion, inspected the entire medical documentation of the appellant, visited him and conducted the medical examination in a prison ward and after that offered its findings and opinion according to which the appellant is not in need of a hospital treatment.

Facts in Case AP 2617/08

12. The preliminary proceedings judge of the Section I for War Crimes of the Court of BiH, while acting upon the motion of the Prosecutor's Office for determination of custody, issued a Decision No. X-KR-05/155 of 7 December 2007 whereby the appellant was ordered into custody on the grounds stipulated under Article 132 paragraph 1, items a), b) and d) of the CPC of BiH. According to the mentioned decision, the ordered measure, as it is further stated, may last until 6 January 2008, 20:20 hrs, or until a new decision of the court is adopted. In the reasoning for the decision whereby the appellant was ordered into custody the Court of BiH noted that the Prosecutor's Office suggested this measure on the basis of the existence of a reasonable suspicion that the appellant, as a member of the Crisis Staff and Chief of the Ključ Public Security Station, planned, incited, aided and took part in the persecution of non-Serb population in the territory of the

Ključ Municipality, whereby it would be considered that he committed a criminal offence of crime against humanity under Article 172 of the CC of BiH. In the motion of the Prosecutor's Office it is further stated that, as stated by the Court of BiH, that the reasonable suspicion arises from the extensive material documentation completed by the Prosecutor's Office. The Court of BiH held a hearing on 7 December 2007 with regards to the motion of the Prosecutor's Office for ordering a custody measure and the appellant and his defence counsel were given a possibility to offer their opinions about the motion for ordering custody.

13. After considering the motion of the Prosecutor's Office and the opinions of the appellant (his defence), the Preliminary Proceedings Judge of the Court of BiH ordered a measure of custody and in the reasons for this decision the Court stated that in the course of ordering custody the conditions provided for under the CPC of BiH have been met, namely one general condition and one of the special requirements for ordering custody and the court also stated that it was not possible to apply a less severe measure. Namely, a general condition for pronouncing custody measure is, as further stated, the existence of a reasonable suspicion that the criminal offence was committed. In the instant case the existence of a reasonable suspicion that the appellant committed the criminal offence he is charged with arises from the evidence (the statements of witnesses and substantive evidence), which, together with the motion for ordering custody, was submitted to the Prosecutor's Office. As to the special grounds for ordering custody, the Court of BiH referred to the grounds under Article 132 paragraph 1 items a), b) and d) of the CPC BiH, as follows: a) a real danger that the suspect may flee; b) a justified fear to believe that suspect will destroy, conceal, alter or falsify the evidence or that he will hinder the inquiry by influencing witnesses; d) the manner of commission or the consequence of the criminal offence. In the instant case the Court of BiH considered that there is a real risk of the suspect's flight due to the fact that the appellant submitted an application for obtaining the citizenship of the Republic of Serbia, that he has residence in Bijeljina and given the vicinity of his place of residence with the border of the Republic of Serbia there is a justified fear that he may flee. As to the grounds under Article 132 item b), the Court of BiH considered the fact that the investigation is being conducted against several persons, that during the period of time when the criminal offence had been committed the appellant was very active in his community and if he is released he would have a chance to make contact with the accomplices and accessories and thus jeopardise the conduct of the proceedings. In deciding whether there is a ground for ordering custody stipulated under Article 132, paragraph 1 item d) of the CPC of BiH, the Court of BiH, starting from the existence of general condition which is reflected in the severity

of the imposed punishment, has specifically considered the manner of commission and the consequence of the criminal offence as the release of the appellant would cause uncertainty among the citizens as stated by the Court. After establishing that there are grounds for ordering custody as set forth under Article 132 paragraph 1 items a), b) and d) of the CPC of BiH, the Court of BiH also considered the possibility whether the same aim may be achieved by applying some other measure. By thorough analysis of the circumstances of the instant case, the Court of BiH, as stated in the reasoning, came to an irrefutable conclusion that there are objective grounds justifying the issuance of the most severe measure, i.e. the measure of custody, in this phase of the criminal proceedings.

14. While deciding the appeal lodged against the decision on ordering custody, by its Decision No. X-KRN-05/155 of 13 December 2007, the Trial Panel partially granted the appellant's complaint and modified the Decision of the Court of BiH No. X-KRN-05/155 by ordering the appellant into custody on the basis of Article 132, paragraph 1, items a) and b), which may last no longer than a month, i.e. until 6 January 2008 or until a new decision of the court is adopted. After considering the challenged decisions within the scope of the allegations stated in the complaint, the Court of BiH pointed out that the defence counsel for the appellant does not challenge the grounds for the suspicion which arose from the proper assessment of evidence, which is a general condition for ordering a measure of custody. The Court of BiH confirmed the correctness and lawfulness of the challenged decision with respect to the pre-trial custody grounds related in the provision of Article 132, paragraph 1, items a) and b), while, when it comes to the allegations relating to item d) of the mentioned article, the Court concluded that the complaint is well-founded since the facts and circumstances stated in the challenged decision do not constitute the real facts indicating that it is necessary to order custody on such grounds. The Panel of the Court of BiH confirmed the correctness of the conclusion from the challenged decision wherein it is stated that there is a need for ordering custody and not some other less severe measure because there are objective grounds for issuance of that measure.

15. While acting upon the motion of the Prosecutor's Office for the extension of custody, the Section I for War Crimes of the Court of BiH issued Decision No. X-KRN-05/155 of 4 January 2008 whereby the appellant's custody was extended for additional two months, i.e. until 4 March 2008 or until a new decision of the court is adopted. It is stated in the reasoning for the decision that on 4 January 2008, upon the motion of the Prosecutor's Office, a hearing had been scheduled at which the appellant and his defence counsels were given a possibility for giving an opinion about the motion of the Prosecutor's Office. On that occasion the defence counsel for the appellant

challenged that arguments presented by the Prosecutor's Office and the appellant also addressed the court in person and pointed out that he was against the motion for extension of custody because of his serious medical condition. The appellant, inter alia, stated that he was suffering from the Parkinson's disease and requested the court to allow a comprehensive examination for his medical condition. After considering the motion of the Prosecutor's Office and opinion of the defence the Court of BiH issued a decision on extension of custody finding that there are still general and special custody grounds from Article 131 paragraph 1 and Article 132 paragraph 1, items a) and b) of the CPC of BiH. While considering the allegations about the appellant's serious health condition the Court of BiH pointed out that until the day of the issuance of the decision whereby the appellants' custody was extended, no valid medical documentation attesting to his health condition was received.

16. The Appellate Panel of the Court of BiH, while deciding the appellant's complaint lodged against the decision on extension of custody, issued a Decision No. X-KRN-05/155 of 30 January 2008 whereby the complaint was dismissed as ill-founded. In the reasons for the decision it is stated that the complaint had challenged the conclusion of the court with respect to the sustainability of the custody grounds under Article 132 paragraph 1 items a) and b) and suggested that the measure of custody be replaced with a less severe measure. The Appellate Panel of the Court of BiH, as stated in the reasons for the challenged decision, accepted the arguments presented in the challenged decision both with respect the conclusion concerning the general condition for ordering custody, which means the existence of a reasonable suspicion, and with respect to special custody grounds under Article 132 paragraph 1 items a) and b) of the CPC of BiH. The Appellate Panel of the Court of BiH entirely accepted the arguments of the Trial Panel of the Court of BiH with respect to further justification of custody on the mentioned grounds (the risk of flight and the risk of influencing the witnesses).

17. While deciding the motion for the extension of custody, which was submitted by the Prosecutor's Office, the Court of BiH, by its Decision No. X-KRN-05/155 of 4 March 2008, extended the appellant's custody until the completion of the main trial but not later than three years counting from the day of the issuance of the mentioned decision. In the enacting clause of the decision it is stated that the control of the justification of custody is conducted every two months counting from the day of the issuance of the last decision. In the reasoning for the decision it is stated that on 4 March 2008 the hearing was held at which the parties and the defence counsel for the appellant were given an opportunity to offer their opinions about the motion for the extension of

custody and on that occasion the appellant stated that the existence of a reasonable suspicion was established in the course of the confirmation of indictment No. KT-RZ-23/08 of 3 March 2008, but he was against the motion for the extension of custody for the reasons stated in the provision of Article 132, paragraph 1, items a) and b). In the opinion of the court, the justification for the extension of the custody against the appellant lies not only in the fact that there are general and special conditions for custody but also in the fact that he became aware of the gravity of the accusations against him that are reflected in the scope and complexity of the criminal offence and in the severity of the imposed punishment, which indicated that if he is realised he may make contact with the accomplices and accessories and thus jeopardize the further conduct of the proceedings.

18. Pursuant to the Decision of the Court of BiH No. X-KRN-05/155 of 28 March 2008 the appellant's complaint against the decision of 4 March 2008 was dismissed as ill-founded. With reference to the lodged complaint, the Court of BiH had scheduled the hearing at which the parties and the defence counsel for the appellant were given a chance to present their arguments from the complaint in detail. After the allegations of the complaint and the reply to the complaint had been considered, including the opinion of the parties and defence counsels, the Panel of the Court of BiH dismissed the complaint as ill-founded since the defence counsel for the appellant did not challenge the existence of the reasonable suspicion as a general condition for ordering custody. The grounds for suspicion are contained in the fact that on 4 March 2008 the Indictment No. KT-RZ-23/08 of 3 March 2008 was confirmed. In the reasoning for the decision, the Court of BiH referred to the same grounds as those stated in the decision of 4 March 2008.

19. In the procedure of controlling whether it is justified to order custody the Court of BiH issued a Decision No. X-KRN-05/155 of 29 April 2008, whereby it is established that there are still the circumstances indicating that it is justified to keep the appellant in custody on the grounds stipulated under Article 132 paragraph 1, items a) and b) of the CPC of BiH. In the reasons for the decision it is stated that the circumstances with respect to the grounds for which the custody is ordered against the appellant and then extended did not change in any way.

20. While deciding the appellant's complaint against Decision No. X-KRN-05/155 of 29 April 2008, the Appellate Panel of the Court of BiH issued the Decision No. X-KRN-05/155 of 19 May 2008 whereby the complaint was dismissed as ill-founded. In the reasons for the decision it is stated that the reasons for the complaint are ill-founded and that the Panel of this Court shares the opinion and agrees with the reasons of the court of first instance with respect to the risk of negative

influence of the appellant on the quality of evidentiary proceedings if he is released, particularly when it comes to the risk of possible indirect or direct influence on the witnesses.

21. In the procedure of reviewing the justification of custody for the appellant the Court of BiH issued the Decision No. X-KRN-05/155 of 27 June 2008 whereby it was established that there are still the circumstances present indicating that it is justified to keep the appellant in the custody on the grounds stipulated under Article 132 paragraph 1 item a) of the CPC of BiH. In the reasons for the decision it is stated that the circumstances with respect to the grounds for which the custody is ordered against the appellant and then extended did not change in any way. In the reasoning for the decision the Court of BiH stated that the status conference on the justification of further custody in the instant case was held on 20 June 2008 and after that the Trial Panel found that the circumstances that may justify keeping the appellant in custody based on Article 132 paragraph 1 item b) of the CPC of BiH have changed. The Court of BiH considers that the existence of a reasonable suspicion, as a general condition for the existence of custody measure, arises from the fact that the Indictment of the Prosecutor's Office of BiH No. KT-RZ-23/08 of 3 March 2008 was confirmed. The Court further stated that a special custody ground, which is provided for under Article 132 paragraph 1 item a) of the CPC of BiH - the risk of the suspect's flight, is not, in itself, a sufficient reason for keeping the appellant in custody, but that circumstance should be considered in the context of all facts. The facts considered by the court in the course of issuing the challenged decision are reflected in the appellant's strong ties with the neighbouring country, the Republic of Serbia, in his submission of the application for obtaining the citizenship of that country and in his being a high-ranking official during the incriminated period of time. There is also a fact that he maintained the intensive contacts with the leadership of the military and civilian authorities of the Republic of Serbia. On the other hand, the Panel of the Court of BiH is of the opinion that the circumstances justifying the keeping of the appellant in custody on the grounds under Article 132 paragraph 1 item b) of the CPC of BiH ceased to exist as there are no specific circumstances indicating that the appellant would influence the witnesses if released.

22. In deciding the complaints of the Prosecutor's Office and appellant against the Decision of the Court of BiH No. X-KR-05/155 of 27 June 2008, the Appellate Panel of the Court of BiH, by its Decision No. X-KR-05/119 of 16 July 2008, dismissed the appellant's complaint as ill-founded while the complaint of the Prosecutor's Office of BiH was granted in a manner that it was established that there are still the circumstances indicating that it is justified to keep the appellant in custody on the grounds provided for under Article 132 paragraph 1 items a) and b) of the CPC of

BiH, which means both items are applicable. The Appellate Panel of the Court of BiH considers that, in respect of the general and special custody ground under Article 132 paragraph 1 item a) of the CPC of BiH, the first instance court gave a clear and logical reasoning, but it failed to give the same reasoning with respect to a special custody ground under Article 132 paragraph 1 item b) of the CPC of BiH. The Appellate Panel of the Court of BiH considers that the court of first instance failed to reason the further lack of particular circumstances which would definitely indicate that the appellant would not obstruct the proceeding by his influence on the witnesses. Taking into account that case-file shows that the appellant was holding the office of the Minister in the RS Government and the office of the Head of the Cabinet in the Office of the Prime Minister in the RS Government, and given that the criminal proceedings are being conducted against several accomplices, the Panel of the Court considers that particular circumstances still exist indicating that by his stay at liberty the appellant would obstruct the proceedings by influencing the witnesses and accessories, which was the reason for the court to modify that part of the decision of the first instance court.

23. In the procedure of reviewing the justification of custody for the appellant the Court of BiH issued the Decision No. X-KRN-05/119 of 27 August 2008 whereby it was established that there are still the circumstances present indicating that it is justified to keep the appellant in the custody on the grounds stipulated under Article 132 paragraph 1 items a) and b) of the CPC of BiH.

24. While deciding the appellant's complaint against the decision of 27 August 2008, the Appellate Panel of the Court of BiH issued the Decision No. X-KRN-05/119 of 12 September 2008 whereby the appellant's complaint was dismissed as ill-founded.

IV. Appeal

a) Statements from the appeal

25. In his appeal the appellant alleges that, due to the refusal of the competent authorities to offer proper medical care for his poor health, his right to prohibition on torture, inhuman and degrading treatment or punishment and the right to a fair trial under Article II(3)(b) and (e) of the Constitution of Bosnia and Herzegovina and Articles 3 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") were violated. With respect to the violation of the mentioned rights, the appellant alleges his seriously deteriorated health condition for which he necessitates treatment in an adequate institution. He stated that custody itself is not an adequate institution, that it affects the progressive advancement of the Parkinson's disease and deterioration of his physical and mental condition.

26. In addition, the appellant challenges the decisions of the Court of BiH which were adopted in the procedure of review of the justification of custody dated 27 June and 16 July 2008, whereby it was established that the circumstances indicating that it is justified to continue keeping the appellant in custody still exist. As to the challenged decisions, the appellant alleges a violation of the right to liberty and security of persons under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention stating that the mentioned decisions lack clear and reasoned arguments provided for under Article 132 paragraph 1 items a) and b) of the CPC of BiH. The appellant is of the opinion that in the instant case, apart from a reasonable suspicion which is a general condition for ordering custody measure, there was no single special ground for ordering the extension of custody upon the confirmation of the indictment and the commencement of the main trial. He considers that the Court of BiH failed to concretise special conditions for ordering custody out of which at least one condition should be cumulatively applicable along with the general condition in order to determine a custody measure. In this regard, the appellant pointed out that the challenged decisions are not based on the grounds relating to the decisive facts since in this regard the grounds relating to the risk of flight were lacking, neither were any evidence presented that he was on the run or that he attempted to run away. Also, neither were other special grounds, due to the so-called risk of collusion, justified by the concrete facts. That is to say that the appellant is of the opinion that the Prosecutor's Office failed to offer the concrete facts, and the Court failed to establish them, that the appellant attempted, either directly or indirectly, to influence the witnesses or prospective accomplices. Also, he considers that the Court of BiH, contrary to the law, refused to use a possibility for achieving the same procedural aim by less severe measure, i.e. by issuing a measure prohibiting the appellant to abandon his place of residence. In his appeal the appellant does not challenge the fact that the Court of BiH properly established that there was a reasonable suspicion that he committed a criminal offence he is charged with. However, the mentioned reason, in itself, is not sufficient for ordering the most severe measure of custody without the existence of special or concrete reasons. He considers that the Court of BiH had the grounds to substitute the custody measure with the measure of banning him to leave the place of residence.

b) Reply to the Appeal

27. In its reply to the appeal of 6 August 2008, the Court of BiH pointed out that the examination of the appellant's health condition was carried out for several times and that, according to the findings of the members of the judicial experts team, the conclusion was made that the appellant is not in need of hospital treatment and that, given his current condition, he is able to

follow the course of the judicial proceedings. Moreover, the experts stated that the appellant's Parkinson's disease is in the advanced stage and that he is not able to engage in activities that require heavy physical effort but that he is able to follow the course of the proceedings. Given a large number of the medical findings and opinions from several specialists, the Panel of the Court of BiH took a position that it is necessary to subject the appellant to a final expert examination at the Neurological Clinic of the Clinical Centre of the Sarajevo University. As to the alleged violation of the right to liberty and security of person, the Court of BiH noted that the appeal is ill-founded given that the opinion, which is presented in the decisions, is based on the relevant provisions of the CPC of BiH with regards to justification of continuing to keep the appellant in custody. As it is further stated, the Court considered the possibility of ordering less severe measures. However, through the thorough examination of all facts, the Court found that there are still objective circumstances justifying the keeping of the appellant in custody. The Court of BiH suggested that the appeal be dismissed as ill-founded.

28. In its reply to the appeal the Prosecutor's Office noted that the appeal is ill-founded as in the course of the issuance of the challenged decisions a conclusion was drawn that a general ground for ordering custody exist, as do special grounds. Moreover, the appellant does not complain against the decision on ordering and extending the custody in the investigation phase, neither does he complain against the decision on the extension of custody after the indictment was confirmed, but he complains against the decision whereby it was established that there are still circumstances which indicate that it is justified to continue keeping the appellant in custody. Given the mentioned facts, a conclusion follows that, as further stated, the custody for the appellant was ordered in accordance with the provisions of the CPC of BiH, in which case his rights were fully respected in the proceedings of ordering, extending and reviewing the custody.

V. Relevant Law

29. **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, Nos. 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08 and 12/09), **in the relevant part, reads:**

Article 13

(1) The suspect or accused shall be entitled to be brought before the Court in the shortest reasonable time period and to be tried without delay.

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- (2) *The Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings.*
- (3) *The duration of custody must be reduced to the shortest necessary time.*

Article 132

- (1) *If there is a grounded suspicion that a person has committed a criminal offence, custody may be ordered against him:*
- a) if he hides or if other circumstances exist that suggest a possibility of flight;*
 - b) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices;*
 - c) if particular circumstances justify a fear that he will repeat the criminal offence or complete the criminal offence or commit a threatened criminal offence, and for such criminal offences a prison sentence of five (3) years may be pronounced or more;*
 - d) if the criminal offence is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offence requires that custody be ordered for the reason of public or property security. If the criminal offence concerned is the criminal offence of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened.*
- (2) *In a case of Item b), Paragraph 1 of this Article, custody shall be cancelled once the evidence for which the custody was ordered has been secured.*

Article 137

- (1) *After the confirmation of indictment, custody may be ordered, extended or terminated. The review of justification of the custody shall be carried out upon the expiration of each two (2) month period following the date of issuance of the most recent decision on custody. The appeal against this decision shall not stay its execution.*
- (2) *After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than:*
- a) one year in the case of a criminal offence for which a punishment of imprisonment for a term up to five years is prescribed;*
 - b) one year and six months in the case of a criminal offence for which a punishment of imprisonment for a term up to ten years is prescribed;*

c) two years in the case of a criminal offence for which a punishment of imprisonment for a term exceeding ten years may be imposed, but not the long-term imprisonment;

d) three years in the case of a criminal offence for which a punishment of long-term imprisonment is prescribed.

(3) If, during the period referred to in Paragraph 2 of this Article, no first instance verdict is pronounced, the custody shall be terminated and the accused released.

VI. Admissibility

30. Pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

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

a) Admissibility with respect to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention

32. In examining the part of the appeal submitted due to the refusal of the competent authorities to offer the appropriate medical treatment to the appellant, the Constitutional Court referred to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(4)(9) of the Rules of the Constitutional Court.

Article VI(3)(b) of the Constitution of Bosnia and Herzegovina reads as follows:

(1) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 16(4)(9) of the Rules of the Constitutional Court reads as follows:

4) An appeal shall also be inadmissible in any of the following cases:

*9) the appeal is *ratione materiae* incompatible with the Constitution;*

33. The appellant considers that his right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention was violated by the refusal of the competent authorities to offer him appropriate medical treatment,

about which he was informed upon receiving the decision of the Court of BiH No. X-KR-05/155 of 28 April 2008, and by the rejection of his request for hospital treatment.

34. In examining the admissibility of this part of the appeal, the Constitutional Court recalls that establishing whether Article 6 of the European Convention is applicable it is necessary to answer the question whether the refusal of the competent authorities to offer appropriate medical treatment and the request for hospital treatment raises an issue within the meaning of Article 6 of the European Convention, in other words whether in this way “it was established that the criminal accusation against the appellant was justified”. In this connection, the Constitutional Court notes that the refusal of the competent authorities to offer appropriate medical treatment to the appellant including his request for the hospital treatment in no way constitutes the establishing of a criminal accusation against the appellant, which, more precisely, means that Article 6 of the European Convention is not applicable and for this reason this part of the appeal is incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

35. In view of the provision of Article 16(4)(9) of the Rules of the Constitutional Court, according to which the appeal will be rejected as inadmissible if it is incompatible *ratione materiae* with the Constitution, the Constitutional Court decided as set out in the enacting clause of this decision.

b) Admissibility with regards to Article II(3)(b) and Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Articles 3 and 5 paragraph 3 of the European Convention

36. In the instant case the subject of challenge of this part of the appeal, with regards to the right under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, is the opinion of the competent authorities about the manner of medical treatment for the appellant, which concerns his health condition and which resulted in the refusal of the appellant’s request for hospital treatment. Due to the fact that his request for hospital treatment was rejected the appellant complains about the conditions in the prison ward and considers that the quoted provisions of the Constitution of Bosnia and Herzegovina and European Convention have been violated. The appellant states that due to the conditions in the prison ward his capability of maintaining the balance is reduced, that he is not psychologically and physically capable to cooperate with his defence counsel and that due to the consequences caused by the Parkinson’s;

disease his life activities are reduced to the bare minimum. In this connection, the Constitutional Court considers that the appellant, except for the appeal, does not have any other available legal remedy whereby he would complain against the conditions in the prison when it comes to the refusal of his request for hospital treatment.

37. As to the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention, the appellant pointed out that there are no other effective legal remedies available under law against the Decision of the Court of BiH No. X-KR-05/119 of 16 July 2008, which was issued in the procedure of review of the justification of custody. Furthermore, the challenged decision was issued on 16 July 2008 and the appeal was filed on 28 August 2008, which means within the time-limit of 60 days as stipulated by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also fulfils the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as it is not manifestly (*prima facie*) ill-founded nor are there any other formal reasons rendering the appeal inadmissible.

38. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1)(2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the respective appeal meets the admissibility requirements.

VII. Merits

39. The appellant considers that due to the conditions in the prison ward and the rejection of his request for hospital treatment, his right under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention was violated. The appellant challenges the decision of the Court of BiH whereby the custody measure was ordered and then extended, alleging that by those decisions his right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention was violated.

40. Article II (3)(b) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and freedoms referred to in paragraph 2 above; these include:

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

41. Article 3 of the European Convention reads:

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

42. Article II(3)(d) of the Constitution of Bosnia and Herzegovina in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

d) The rights to liberty and security of person.

43. Article 5 of the European Convention, in its relevant part, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

c. 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 or fleeing after having done so;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and 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 right of a person not to be subjected to torture or to inhumane or degrading treatment or punishment

44. The Constitutional Court notes that Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention safeguards one of the “absolute rights” and the states are never to derogate from this right and the aim of the protection provided for under this article is to prevent or render impossible or sanction the actions causing torture, inhumane or degrading treatment or punishment which the state authorities or individuals acting on their behalf undertake against some persons. The issue is about a positive obligation of state according to the European Convention, in other words the issue is about the obligation of the state authorities to undertake steps or measures to protect the rights of individuals in accordance with the European Convention.

45. In this connection, the Constitutional Court refers to the jurisprudence of the European Court of Human Rights (see, the European Court of Human Rights, judgment *Milenko Toth vs. Croatia*, Application No. 64674/01 of 9 July 2002), according to which, as to Article 3 of the European Convention, when it comes to the appellant’s complaints about the medical treatment in the prison

ward, a standard of evidence “beyond a reasonable doubt” was adopted and such evidence may also arise from a number of sufficiently strong, explicit and concurrent conclusions.

46. While taking, as a starting point, the positive obligation of state to effectively examine the instant case according to Article 3 of the European Convention, the Constitutional Court observes that the Court of BiH, while acting upon the appellant’s request for being provided with a necessary medical treatment in an appropriate medical institution, issued several orders to conduct the medical expert examination of the appellant’s health condition and those orders were complied with and the members of medical team from different specialties conducted this examination. Namely, the neuropsychiatry expert examination was conducted, including the expert examination by the members of the team of judicial medical experts consisting of the specialist in internal medicine, the specialist in neuropsychiatry, the specialist in forensic psychiatry and then the cardiac and neurological examinations were also conducted. In its findings and opinion of 2 July 2008, which is also based on the internist examination conducted in the Clinical Centre of the University in Sarajevo by the medical team working in the CCU Sarajevo, the team of judicial experts offered the finding in which it is stated that the appellant is capable to attend the trial after taking his morning therapy and this finding was offered upon the inquiry of the Court of BiH. Furthermore, upon the appellant’s request, the neuropsychiatric examination was conducted in the prison ward by the specialist in neuropsychiatry from Belgrade, who inspected the existing medical documentation and concluded that the Parkinson’s disease is in the advanced stage and that the appellant is not able to engage in activities requiring heavy physiological and physical effort and he prescribed a new therapy.

47. Taking into account the fact that from the very beginning the Panel of the Court of BiH examined the appellant’s statements about his health condition and about his need for hospital treatment in detail and conscientiously, and that a number of medical expert examinations and medical check-ups of the appellant’s condition were conducted by a number of medical experts in different fields, which resulted in the opinion of the independent experts that the appellant is able to follow the course of the trial and that it is not necessary to admit him to an appropriate medical institution. Therefore, the Constitutional Court considers that the positive obligation of state has been fulfilled through the competent Court of BiH and that the standards within the meaning of the requirements under Article 3 of the European Convention have been met.

48. In view of the aforementioned, the Constitutional Court considers that by the refusal of the appellant's request for treatment in hospital, his right under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention was not violated.

b) Right to liberty and security of person

49. As to the instant case, the appellant is of the opinion that by the challenged decisions, which were issued in the procedure of review of the justification of custody for the appellant, his right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention was violated. In this connection, in a number of its decisions, the Constitutional Court noted that the right to liberty and security of person is considered to be one of the most important human rights and that Article 5 of the European Convention provides protection so that no one may be arbitrarily deprived of liberty. The arbitrariness in deprivation of liberty is to be primarily assessed with regards to the compliance with procedural requirements of law applied in the instant case and that is the CPC of BiH, which has to be adjusted to the standards under the European Convention.

50. Foremost, the Constitutional Court notes that the provision of Article 5 paragraph 3 of the European Convention requires that if a person is going to be deprived of liberty it should be done in accordance with Article 5 paragraph 1 c) of the European Convention, in other words this provision requires that the deprivation of liberty be "lawful" within the meaning of the mentioned article and it includes both the procedural and substantive protection of the persons concerned. The European Court of Human Rights concluded that compliance with Article 5 paragraph 3 of the European Convention requires that the national judicial authorities examine all issues pertaining to custody and that a decision on custody be issued by referring to objective criteria stipulated under law. In view of the aforementioned, the existence of reasonable suspicion that a person who is deprived of liberty committed a criminal offence he is charged with is a *condition sine qua non* when it comes to ordering or extending the custody. However, after certain period of time that is not sufficient and an assessment must be made whether sufficient and relevant grounds exist for ordering custody (see, the European Court of Human Rights, *Trzaska vs. Poland*, Judgment of 11 July 2000, Application No. 25792/94, paragraph 63). Pursuant to the further opinion of the Court of Human Rights, justification of custody also depends on the circumstances of the case at hand, which must be of such nature to indicate that there is general (public) interest justifying, with due regard to the

principle of the presumption of innocence, a departure from the rule of respect for individual liberty.

51. In the instant case the appellant does not challenge the fact that decision on ordering him into custody is based on a reasonable suspicion that he committed the criminal offence he is charged with, since the Court of BiH confirmed the indictment on 3 March 2008. Therefore, the Constitutional Court will not deal with this issue. However, the appellant challenges the existence of special grounds for ordering and extending custody, stating that the Court of BiH, in its decision on ordering custody, failed to concretise and render objective the grounds for custody. In this connection, the Constitutional Court notes that the appellant was ordered into custody in the investigation phase on the grounds provided under Article 132 paragraph 1, items a), b) and d) of the CPC of BiH due to the existence of particular circumstances indicating that there is justified fear that he may flee, destroy, conceal or alter the evidence and that he may obstruct the criminal proceedings by influencing the witnesses (the risk of collusion) and due to the extraordinary circumstances requiring ordering of custody if the issue is about a criminal offence for which a punishment of 10 years imprisonment may be pronounced or even a more severe punishment, which means if the issue is about a criminal offence of particular gravity given the manner in which it was committed or the circumstances of the criminal offence in question and if the release of the appellant would result in posing a real threat against the public peace and order.

52. Further, the Constitutional Court notes that the Court of BiH, by partially granting the appellant's complaint, modified the decision on ordering custody dated 7 December 2007 in a manner that the appellant was ordered into custody on the ground under Article 132 paragraph 1, items a) and b) of the CPC of BiH, considering that there are the circumstances indicating that the appellant may flee and that, if he is released, he may influence the witnesses and make contact with the accomplices and accessories. After the indictment had been confirmed on 3 March 2008, the custody for the appellant was extended to last until the completion of the main trial but not longer than three years from the day of the issuance of the mentioned decision, in which case the provision under Article 132 paragraph 1, items a) and b) the CPC of BiH have been applied. All other subsequent decisions which were issued in the procedure of review of the justification of custody for the appellant are based, apart from the general grounds, on the special pre-trial custody grounds provided for under Article 132 paragraph 1, items a) and b) of the CPC of BiH. As to the grounds under item a) of the quoted article, the Court of BiH found that in the case at hand there was a justified fear that the appellant may flee if he is released. The Court gained this belief after

considering the fact that the appellant was holding very important offices during the past period and that he was professionally engaged in the practice of law – a lawyer, that he has numerous contacts with the people in the Republic of Serbia and that upon being informed that he is charged with a serious criminal offence for which a punishment of long-term imprisonment may be pronounced, the situation has significantly changed, and therefore, all of the aforementioned constitutes, in the court's opinion, a strong motive for the appellant to leave BiH and move to the Republic of Serbia and thus become inaccessible to the judicial authorities of BiH. Further, by the inspection of the act of the Prosecutor's Office, the Court of BiH established that the appellant submitted the application for obtaining the citizenship of the Republic of Serbia. A mere fact that currently the appellant has no dual citizenship does not mean that he would not hide himself. However, after the indictment had been confirmed, the situation considerably changed as the appellant became aware of the gravity of the offence he is charged with. In the opinion of the court, all these circumstances taken together indicate that there is a justified fear that the appellant, if released, may obstruct the criminal proceedings by fleeing or hiding himself. Therefore, the conclusion was drawn that the requirement for ordering custody has been met in accordance with Article 132 paragraph 1, item a) of the CPC of BiH. As to the grounds provided for under Article 132 paragraph 1, item b) of the CPC of BiH which concern a justified fear that the appellant, if released, may destroy, conceal or alter the evidence and obstruct the criminal proceedings by influencing the witnesses, the Court of BiH primarily considered the fact that the investigation is being conducted against several persons. Those persons are, as it is stated in the reasoning for the decision, inaccessible to the prosecution authorities and the appellant, during the incriminated period of time and after the war, was socially active in his community and politically engaged and he also enjoyed a huge legal and real power in the territory of the municipality of Ključ which made him one of the most influential persons in the said municipality. During the war and war conflicts the appellant built an enviable career and such kind of influence may, in the opinion of the Court of BiH, jeopardise the interests of the victims of the appellant's activity, i.e. the witnesses who may, due to the feeling of insecurity, reject the cooperation with the prosecution authorities. The Court also considered the fact that the Prosecutor's Office is in the phase of interrogation of witnesses who were subordinated to the appellant during the incriminated period of time, including other witnesses concerning the interrogation of whom the decision was issued during the period when the appellant was in custody so that he cannot influence the witnesses and obstruct the investigation. The Court also considered the fact that the issue was about the criminal offence of war crime in the commission of which a

large number of accomplices took part, including a number of accessories among whom is Stojan Župljanin, who was the immediate supervisor to the appellant during the incriminated period of time and who is at large trying to avoid the prosecution before the International Criminal Tribunal in The Hague. In the court's opinion, all of the circumstances indicate that there is a justified fear that the appellant, if released, may influence the witnesses, which means that the requirement for ordering custody under Article 132 paragraph 1, item b) of the CPC of BiH has been met. The Court of BiH also considered the possibility for ordering some other measure to ensure the presence of the appellant at trial within the meaning of Article 131 paragraph 1 of the CPC, which is in compliance with its obligation not to apply more severe measures if the same aim may be achieved by a less severe measure, but it found that there are objective grounds justifying ordering of custody and only that measure may ensure that the successful and unimpeded criminal proceedings are conducted.

53. Having regard to the afore mentioned, the Constitutional Court notes that the Court of BiH explicitly indicated that there are circumstances and reasons for which it is not possible to accomplish all objectives of the criminal proceedings conducted against the appellant by ordering the appellant not to abandon his place of residence instead of ordering him into custody. Namely, the Court of BiH explicitly invoked the grounds for extension of custody and those circumstances, in the instant case, indicate that there is a general interest justifying a departure from the principle of respect for individual liberty. The Constitutional Court holds that the appellant's custody was determined and extended by judicial authority, which is in compliance with Article 5 paragraph 3 of the European Convention that "Everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power". The Constitutional Court finds that the circumstances of the instant case indicate that there exists an important general interest which prevails over the principle of respect for the right to liberty of individual. Therefore, the Constitutional Court considers that the appellant's allegations about the violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention are ill-founded.

54. In view of the aforesaid, the Constitutional Court considers that the challenged decisions did not violate the appellant's right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention.

VIII. Conclusion

55. The Constitutional Court concludes that there is no a violation of Article II(3)(b) and Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 3 and Article 5 paragraph

3 of the European Convention, as the manner of the fulfilment of the positive obligation of the State, through the competent Court of BiH, which had undertaken all necessary measures to examine the health condition of the appellant, has satisfied the standards within the meaning of the requirements under Article 3 of the European Convention and as the custody for the appellant was extended due to a justified fear that he may flee and that he may, if released, influence the witnesses and accomplices and due to the circumstances which undoubtedly indicate that there is a serious risk that the flight of the appellant and his prohibited influence on the witnesses will occur.

56. Pursuant to Article 16(4)(9) and Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause.

57. According to article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Prof. Dr. Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina