

## APPLICATION OF CONVENTION LAW WHEN EXPLAINING GROUNDS FOR CUSTODY: EUROPEAN STANDARDS AND BH ATTAINMENT

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***Abstract:** Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides protection in sense that no one may be arbitrarily deprived of their liberty. The first paragraph of Article 5 sets out the general principle, followed by the exhaustive list of exceptions, which represent the permissible methods of deprivation of liberty. This is an exhaustive list that must be interpreted narrowly. Only in this way there is a consistency with the objective of Article 5, to ensure that no one will be arbitrarily deprived of their liberty. Paragraphs 2, 3 and 4 are generally procedural in nature, because they specify the conditions of arrest and detention, and the modalities of pronouncement and denial of their legality. Paragraph 5 provides the right to compensation in case Article 5 is violated. The rights defined by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, by their content, are included in the fundamental rights protected by this Convention, immediately after the right to life. The Constitutional Court of Bosnia and Herzegovina has emphasized in several of its decisions that the right to personal freedom and security is one of the most important human rights, and that Article 5 of this Convention provides protection that no one should be arbitrarily deprived of their liberty. The paper gives an overview of the reasons for the ordering and extending detention in the practice of the Constitutional Court of Bosnia and Herzegovina and the European Court of Human Rights. Relevant examples from the practice of special reasons for determining detention, the grounds on which they were challenged before the Constitutional Court of Bosnia and Herzegovina, were selected. It has been shown that the “lawfulness” of the detention does not require a legal judgment, but only that the detention must be in accordance with the domestic law, the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms.*

***Keywords:** custody, deprivation of freedom, the Constitution of Bosnia and Herzegovina, the European Convention for the protection of human rights and fundamental freedoms, Constitutional Court of Bosnia and Herzegovina, the European Court of human rights.*

## Introductory considerations

The right to liberty and security refers essentially to arbitrary detention. Exceptions to the prohibition of deprivation of liberty are given in Article 5 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup>, which lists the cases where deprivation of liberty is permitted. The European Court of Human Rights<sup>6</sup> in *Austin and Others v. The United Kingdom*<sup>7</sup>, citing its earlier case-law, pointed out that in order to determine whether a person is “deprived of his liberty” within the meaning of Article 5 paragraph 1 of the Convention, the starting point must be his specific situation, and a set of criteria such as the type, duration, effects or manner of implementation of the measure in question must be taken into account. Between deprivation and restriction of liberty, within the meaning of Article 2 of Protocol No. 4 to the Convention, there is only a difference in degree or intensity, not in nature or substance.<sup>8</sup>

In addition, the Court considers that the condition, having regard to the “type” and “manner” of implementation of the “measure in question”, allows the Court to take into account the specific context and circumstances of the restriction of liberty into the cell.<sup>9</sup>

The context in which the measure is taken is in fact an important factor to consider as it is common in modern societies for situations to occur in which the public may be required to submit restrictions on freedom of movement or freedom in the public interest. Article 5 of the Convention is derived from the two most concise provisions of the Universal Declaration of Human Rights - Article 3 (“Everyone has the right to life, liberty and security of person”) and Article 9 (“No one shall be arbitrarily arrested, detained or

expelled”). The provisions of Article 5 are elaborated in detail, and in some parts somewhat archaic, with their recommendations relating to “mentally disturbed persons” and “vagrants”. In contrast, the concise text of the Universal Declaration of Human Rights remains usable and unsurpassed. The Charter of Fundamental Rights of the European Union returns to a simple wording, reproducing the first sentence of Article 5 of the Convention: “Everyone has the right to liberty and security of person.” to have the same meaning and area of regulation as Article 5 of the European Convention. It is consistent with the case law of the European Court of Justice that persons detained after a first instance conviction, whether or not they have previously been detained, find themselves in a situation prescribed by Article 5 paragraph 1 (a) of the Convention and not as prescribed by Article 5 paragraph 1 (c) of the Convention. Namely, Article 5 paragraph 1 (a) of the Convention provides for the possibility of “lawful deprivation of liberty after a conviction”, where the phrase “conviction” cannot be interpreted restrictively, ie only as referring to a final judgment. Furthermore, Article 5 paragraph 1 (a) requires a causal link, and not just a chronological one, between the conviction and detention on that ground.<sup>10</sup>

## 2. Physical freedom and ways of using it

The right to liberty proclaimed in Article 5 refers to physical liberty. The purpose of this is protection against arbitrary deprivation of liberty in the classical sense of the word relating to imprisonment. This does not only apply to “mere restrictions” on freedom of movement - a right contained in Article 2 of Protocol 4 to the Convention.<sup>11</sup> However, the difference between restrictions on

<sup>5</sup> Hereinafter: the Convention.

<sup>6</sup> Hereinafter: the European Court.

<sup>7</sup> See, European Court, no. 39692/09, 40713/09 and 41008/09, of 15 March 2012, paragraph 57 and 59.

<sup>8</sup> See *Engel and Others v. The Netherlands*, 8 June 1976, paragraph 59, Series A no. 22, then *Guzzardi v. Italy*, 6 November 1980, paragraph 71, Series A no. 39 and recent judgment, *Medvedyev and Others v.*

*France* [GC], No. 3394/03, paragraph 73, ECHR 2010.

<sup>9</sup> See, e.g., *Engel et al.*, Cited, paragraph 59.

<sup>10</sup> See, European Court of Justice, *Van Droogenbroeck v. Belgium*, judgment of 25 April 1983, Series A no. 63, paragraph 35.

<sup>11</sup> *Engel and Others v. the Netherlands*, 8 June 1976, paragraph 58, Series A no. 22; *Creangă v. Romania* [CG], no.29226/03, paragraph 92, 23 February 2012;

movement serious enough to fall under Article 5 paragraph 1 rather than under Article 2 of Protocol No. 4 is degree or intensity, not nature or substance.<sup>12</sup>

Classifying them is not an easy task in those cases where drawing a border is a matter of pure opinion.<sup>13</sup> For example, people who have been stopped by the police for a search that lasts no less than 30 minutes are still deprived of their liberty. They would be subject to arrest, detention and criminal charges if they refused. In making a decision, "the starting point must be its specific situation and the statement must be made from the full range of criteria such as type, duration, effect and behavior in the application of the measure in question."<sup>14</sup> The European Court is not bound by the legal characteristics given in the situation by the domestic authorities and makes its own assessment of the matter.<sup>15</sup> Deprivation of liberty, in accordance with the meaning of Article 5 paragraph 1, has both an objective and a subjective dimension. It is objective to the extent that a person is limited in the length of time which is not negligible. It is subjective that a person does not agree to such a restriction.<sup>16</sup> The assessment of objective factors will take into account the existence of the possibility to leave the limited area, the degree of supervision and control over the person, his or her isolation and the admissibility of social contacts. If the facts indicate deprivation of liberty, the relatively short duration of deprivation does not affect the conclusion. For example, police powers to stop and search indicate a deprivation of liberty despite the short duration of the measure.

Gillan and Quinton v. the United Kingdom, no. 4158/05, paragraph 56, ECHR 2010 (extracts).

<sup>12</sup> Guzzardi v. Italy, 6 November 1980, paragraph 93, Series A no. 39; Rantsev v. Cyprus and Russia, no. 25965/04, paragraph 314, ECHR 2010 (extracts); Stanev v. Bulgaria [GC], no. 36760/06, paragraph 115, ECHR 2012.

<sup>13</sup> Guzzardi v. Italy, 6 November 1980, paragraph 93, Series A no. 39; Ashingdane v. the United Kingdom, 28 May 1985, paragraph 41, Series A no. 93.

<sup>14</sup> Engel and Others v. the Netherlands, 8 June 1976, paragraph 58-59, Series A no. 22; Gillan and Quinton v. the United Kingdom, no. 4158/05, 56, ECHR 2010 (extracts); Guzzardi v. Italy, 6 November 1980, paragraph 92, Series A no. 39; Medvedyev and Others

## 2.1. Person security and positive bonds

Using words taken from Article 3 of the Universal Declaration of Human Rights, Article 5 protects the "freedom and security of the person" individually. The case law of the Convention bodies was focused almost exclusively on freedom and there is no clear or autonomous meaning for the protection of persons. In earlier practice, the Commission on Human Rights noted that just because "freedom" and "security" are closely linked does not mean that the term security is useless.<sup>17</sup> The European Court of Human Rights deals with acts of individuals involving deprivation of liberty, for example in cases of trafficking in human beings, but without reference to the notion of security of the person.<sup>18</sup> Article 5 imposes a positive obligation on the state to take measures to enable the effective protection of vulnerable persons, including reasonable steps, to prevent deprivation of liberty of which the authorities are aware or should be aware. A positive bond also deals with cases of disappearance.

## 2.2. Legality

The notion of lawfulness is fundamental to Article 5. The introductory part of Article 5 sets the condition that any deprivation of liberty should be in accordance with the procedure prescribed by law. Each of the paragraphs of this article uses the word lawful. When the words "lawfulness" and

v. France [GC], no. 3394/03, paragraph 76, ECHR 2010

<sup>15</sup> H.L. v. the United Kingdom, no. 4550899, 90, ECHR 2004-IX; H.M. v. Switzerland, no. 39187/98, paragraph 30, 48, ECHR 2002-1.

<sup>16</sup> Storck v. Germany, no. 61603/00, paragraph 74, ECHR 2005-V; Stanev v. Bulgaria [GC], no. 36760/06, paragraph 117, ECHR 2012.

<sup>17</sup> Gunaratna v. Sri Lanka, no. 1432/2005, UN Doc. CCPR/C/95/D/1432/2005, paragraph 8.4; Chongewe v. Zambia, no. 821/1998, UN Doc. CCPR/C/79/821/1998, para. 5.4

<sup>18</sup> Rantsev v. Cyprus and Russia, no. 25965/04, paragraph 319-321, ECHR 2010. (extracts).

“legality” are used, the Convention basically refers to national law. It imposes an obligation to comply with substantive and procedural rules in domestic law.

Various violations of national law are considered unlawful detention and violation of the right to liberty. National authorities will be respected in the interpretation and application of their own law. Because non-compliance with national law constitutes a violation of the Convention, the European Court has the right to consider whether national law has been complied with. In addition, in assessing the lawfulness of deprivation of liberty, the European Court of Justice is limited to the declaration and conscious purpose of a particular arrest or detention, but also considers the actual intent and purpose behind it. The starting point for determining legality is the existence of a court order. Sometimes a detention order is considered unlawful by a higher court, in accordance with national law, but this does not mean that it is necessary to establish that there have been deficiencies in the domestic proceedings of national courts if the detention itself is not contrary to Article 577. large and obvious irregularity, detention will be contrary to Article 578.

It is not enough for the state to act in accordance with national law - in order to comply with Article 5. Article 5 further requires that any deprivation of liberty should be consistent with the purpose of protecting the individual from arbitrariness<sup>79</sup>. This requires an assessment, regardless of whether the domestic law is in conformity with the Convention, which includes the general principles expressed or implied therein. This applies in particular to the principle of legal certainty in deprivation of liberty<sup>80</sup>. Legal certainty means that the law governing the conditions of deprivation of liberty is accessible, clearly defined and enforceable<sup>81</sup>. Problems of legal certainty

often manifest themselves when the authorities themselves cannot agree on how legal provisions are interpreted and applied.

### 2.3. Arbitrariness

The protection of the individual from arbitrariness is the basic purpose of Article 5 of the Convention. Arbitrary detention cannot be compatible with Article 582. The term arbitrary in this context extends beyond the lack of harmonization of national law. As a consequence, deprivation of liberty lawful under domestic law may nevertheless be arbitrary and thus contrary to the Convention.<sup>19</sup> Detention will be considered arbitrary where there is an element of "negligence", bad faith or fraud by the authorities, even if national law has been observed in a technical sense.<sup>20</sup> Also, the detention order and its execution or implication must be genuinely consistent with the purpose of the restrictions set forth in paragraphs 1 of Article 585. There must also be a link between the grounds justifying detention and the place and conditions of detention.<sup>21</sup> The necessity of detention is a factor in the assessment of arbitrariness. Even if national law is complied with, fulfilling the test of legality in the circumstances of the case, deprivation of liberty must be necessary.<sup>22</sup> In several cases, including the refusal of provisional release on the basis of a public order, the European Court found that there had been a violation of Article 5 paragraph 1 for lack of any reason for the decision.<sup>23</sup> The assessment of arbitrariness depends on the reason for deprivation of liberty.<sup>24</sup>

<sup>19</sup> *Mooren v. Germany* [GC], no. 11364/03, paragraph 77, 9 July 2009; *Saadi v. the United Kingdom* [GC], no. 13229/03, paragraph 67-68, ECHR 2008

<sup>20</sup> *Saadi v. the United Kingdom* [GC], no. 13229/03, paragraph 69, ECHR 2008; *Bozano v. France*, 18 December 1986, Series A no. III.

<sup>21</sup> *Saadi v. the United Kingdom* [GC], no. 13229/03, paragraph 6, ECHR 2008

<sup>22</sup> *Klishun v. Ukraine*, no. 30671/04, paragraph 89, 23 February 2012,

<sup>23</sup> *Pantea v. Romania*, no. 33343/96, paragraph 222-223, ECHR 2003-VI.

<sup>24</sup> *Pantea v. Romania*, no. 33343/96, paragraph 222-223, ECHR 2003-VI.

## 2.4. Grounds for detention (Article 5 paragraph 1 of the Convention)

After stating the principle that everyone has the right to liberty and security of person, Article 5 paragraph 1 prescribes that deprivation of liberty may be allowed in accordance with the procedure prescribed by law in six situations, listed in point. a) -f). The list of permissible grounds is exhaustive,<sup>25</sup> and deprivation of liberty will not be lawful if it does not fall within one of those grounds. The list of permissible reasons must be interpreted restrictively<sup>26</sup>. Even detention of a very short duration falls within the scope of Article 5 paragraph 1.<sup>27</sup> Categories are not mutually exclusive. There is no reason why more than one basis cannot be applied to the same situation at any one time. The purpose and character of detention may change over time so that one ground ceases to be relevant and the other takes its place<sup>28</sup>.

## 3. Explanation of the reasons for ordering and extending detention

In its practice, the Constitutional Court of Bosnia and Herzegovina<sup>29</sup> often reminds that the justification of imposing and extending a detention measure is assessed in view of the circumstances of the specific case and its specificity. Extension of a measure of detention will be justified if there are real reasons that indicate the existence of a general (public) interest that is so important and significant that, despite the presumption of innocence, it prevails over the principle of respect for individual freedom.<sup>30</sup> The obligation of the judiciary is to examine all the reasons "for" and "against" and, in this

regard, to give reasons and explanations.<sup>31</sup> Namely, when the law prescribes a presumption regarding the circumstances important for the basis for continuous detention, the existence of concrete facts that exceed the rule on respecting the freedom of the individual - must be convincingly shown<sup>32</sup>. taking into account the specific circumstances of a particular case requiring continued detention, constitutes a violation of Article 5 paragraph 3 of the Convention.<sup>32</sup>.

The Constitutional Court points out that the assessment of the lawfulness of deprivation of liberty in terms of Article II / 3d) of the BiH Constitution and Article 5 of the Convention is based on the views of regular courts on the existence of legal elements for ordering or extending detention. In this context, the Constitutional Court notes that the case law of the European Court clearly states that the meaning of the term "legality" in Article 5 paragraph 4 of the Convention is identical to that in paragraph 1, and that the lawfulness of arrest or detention must be considered not only in domestic law but and the text of the Convention itself, the principles contained in the text of this Convention and the limitations prescribed in paragraph 1 of Article 5. Under paragraph 4 of Article 5, an arrested or detained person has the right to review the lawfulness of his arrest and detention. are, in accordance with the Convention, of key importance for the lawfulness of deprivation of liberty. This means, as the European Court concluded in the Brogan case,<sup>33</sup> that the applicants had to have access to a remedy on the basis of which the competent judicial authority would review not only the procedural guarantees prescribed by domestic law but also the

<sup>25</sup> Labita v. Italy [GC], no. 26772/95, paragraph 170, ECHR 2000-IV; Quinn v. France, 22 March 1995, paragraph 42, Series A no. 311

<sup>26</sup> Engel and Others v. the Netherlands, 8 June 1976, paragraph 58, Series A no. 22; Amuur v. France, 25 June 1996, § 42, Reports of Judgments and Decisions 1996-111.

<sup>27</sup> Murray v. the United Kingdom [GC], 28 October 1994, paragraph 49, Series A no. 300-A; Guenat v. Switzerland, no. 24722/94, Commission decision of 10 April 1995, DR 81-A, p. 130.

<sup>28</sup> McVeigh and Others v. the United Kingdom, nos 8022/77, 8025/77, and 8027/77, Commission report of 18 March 1981, paragraph 163.

<sup>29</sup> Hereinafter: the Constitutional Court.

<sup>30</sup> See Buzadji v. Moldova, judgment of 5 July 2016, paragraph 90.

<sup>31</sup> See, European Court, Ilijkov v. Bulgaria, no. 33977/96, paragraph 84, in fine, 26 July 2001.

<sup>32</sup> See European Court, Sulaoja v. Estonia, application no. 55939/00, paragraph 64, 15<sup>th</sup> February 2005; Tsarenko v. Russia, application no. 5235/09, paragraph 70, 3<sup>rd</sup> of March 2011 and Trifković v. Croatia, judgment of 6<sup>th</sup> of November 2012, paragraph 125.

<sup>33</sup> See European Court, Brogan v. The United Kingdom, application no. 11209 / 84m 11234/84, 11266/84 and 11386/85 of 30 May 1989.

grounds for reasonable suspicion of arrest and legitimacy. the goal to be achieved by arrest and detention.

### 3.1. Existence of reasonable suspicion for ordering detention

According to the case law of the European Court, the reasonable suspicion on which an arrest must be based constitutes an essential element of the protection against arbitrary arrest and deprivation of liberty provided for in Article 5 paragraph 1 (c) of the Convention. A well-founded suspicion that a criminal offense has been committed requires the existence of some facts or information that would convince an objective observer that it is possible that the person in question committed the criminal offense.<sup>34</sup> At the same time, the Constitutional Court points out that at the time of ordering detention, it does not have to be established with certainty that the criminal offense was actually committed, and its nature does not have to be determined. Finally, according to Article 5 paragraph 1 of the Convention, the lawfulness of detention is assessed on the basis of domestic law, ie it must have a legal basis in domestic law, provided that the deprivation of liberty is in accordance with the purpose of Article 5 of this Convention protected from arbitrariness.<sup>35</sup> In case AP 3321/17<sup>36</sup>, the Constitutional Court, referring to the relevant case law of the European Court in *Ilijkov against Bulgaria*<sup>37</sup> and *Nikolov against Bulgaria*<sup>38</sup> stated that “completely ignoring the appellant’s allegations of reasonable doubt, the Cantonal Court failed to examine the basic condition sine qua non-determination, ie extension of the detention measure - a well-founded suspicion, which the appellant problematized

in the appeal and rightly expected to receive an answer to that allegation. The Constitutional Court recalls that reasonable suspicion is an obligatory element for deciding on the ordering or extension of detention, regardless of the stage of the proceedings, which must be examined. Also, as stated, Article 5 (paragraphs 1, 3 and 4) of the Convention imposes obligations to verify the “lawfulness” of detention at any stage of the proceedings, which includes the question of the existence of reasonable doubt as a fundamental element of judicial review of the lawfulness of a measure. detention and which must be reviewed even when rebutted during the main trial...”. In view of the above, the Constitutional Court concluded that there had been a violation of the appellant’s right to liberty and security of the person under Article 5 paragraph 1 (c), paragraph 3 and 4 of the Convention. Konvencije.

### 3.2. Danger of escape

The risk of absconding must be assessed in the light of a number of relevant factors that may confirm the existence of the danger of absconding or make it so weak that it cannot justify detention for the duration of the trial.<sup>39</sup> This danger must be assessed in relation to factors concerning the character of the person concerned, his morals, home, occupation, property, family ties and all other types of ties with the country in which he is being tried. The expectation of a heavier sentence and the weight of evidence may be relevant, but this is not decisive and the possibility of obtaining guarantees can be used to neutralize the risk of escape<sup>40</sup>. The Constitutional Court also reminds that in its case-law it has pointed out that the fact that an appellant has dual citizenship and property in a neighboring state cannot per se

<sup>34</sup> See European Court, *Fox, Campbell and Hartley v. The United Kingdom*, judgment of 30 August 1990, Series A no. 182 paragraph 32; *O’Hara v. The United Kingdom*, judgment of 16 October 2001, Reports of Judgments and Decisions 2001-X, paragraph 34 and *Stepuleac v. Moldova*, judgment of 6 November 2007, application no. 8207/06, paragraph 68.

<sup>35</sup> See Constitutional Court, Decision on Admissibility and Merits, No. AP 5842/10 of 20 April 2011, available on the website of the Constitutional Court [www.ustavisud.ba](http://www.ustavisud.ba).

<sup>36</sup> See Constitutional Court, Decision on Admissibility and Merits No. AP 3321/17 of 11 October 2017, available on the website [www.ustavisud.ba](http://www.ustavisud.ba), pages 35-43.

<sup>37</sup> See the judgment of the European Court, application no. 33977/96, of July 2001

<sup>38</sup> European Court, Application No. 31195/95, decision of 25 March 1999.

<sup>39</sup> See European Court, *Yağcı and Sargın v. Turkey*, 8 June 1995, paragraph 52, Series A no. 319-A.

<sup>40</sup> See European Court, *Neumeister v. Austria*, 27 June 1968, paragraph 10, Series A no. 8.

be a valid and justifiable reason on which the courts may conclude that there are circumstances "Nor, because of this fact, can any suspect who holds the citizenship of a neighboring state, and the property in it, automatically be considered to be in fear of fleeing from justice in Bosnia and Herzegovina."<sup>41</sup>. Namely, such a situation, as a generally real danger of evasion of justice, can be blamed on the authorities of Bosnia and Herzegovina for not taking appropriate measures and concluding appropriate interstate agreements on the basis of which it would not be possible to avoid justice and move from one state to another<sup>42</sup>. The fact that a person does not have a registered permanent residence does not in itself lead to the conclusion that there is a danger of escape.<sup>43</sup>

### 3.3. Impact on witnesses

According to the case law of the European Court, the danger of obstructing a criminal investigation cannot be invoked in abstract, but such a conclusion must be substantiated by relevant evidence<sup>44</sup>. In addition, the Constitutional Court has clearly stated in its practice that "only the existence of presumptions it is not enough, because the court cannot only assume such a possibility, but must have arguments that there are some objective circumstances or concrete and reasoned actions and procedures that would be a valid legal basis for ordering detention in a particular case."<sup>45</sup>

A great contribution to the movement of rights and freedoms in the direction of the European Convention, when it comes to the right to liberty and security of person in general, was made in the case AP 6/08, which referred to the issue of concretization of detention reasons. The Constitutional Court could not accept the arguments that the reasons for detention on the grounds of

collision danger in this particular case were justified by concretized facts, which show that the appellant personally or indirectly tried to influence witnesses or possible accomplices. Namely, the mere existence of presumptions that such appellant's conduct would be possible is not sufficient, because the court cannot only presume such a possibility, but must have arguments that there are some objective circumstances or concrete and reasoned actions and procedures that would be a valid legal basis for detention. in the present case. The Prosecutor's Office of Bosnia and Herzegovina did not propose or present any evidence in this regard, but based its proposal exclusively on the assumptions accepted by the Court of Bosnia and Herzegovina, but did not properly explain the specific danger that threatens witnesses. The fact is that in this case they are victims or family members of victims of a very serious and delicate crime, but this fact alone is not, as already mentioned, sufficient to meet the standards of Article 5 paragraph 3 of the Convention, but the reasons for detention they must be viewed in the light of specific circumstances, and one of these circumstances is the fact that witnesses who feel discomfort and insecurity have already been given certain protection measures. In doing so, the Court of Bosnia and Herzegovina essentially shifted the burden of proof to the appellant, contrary to the rules of Article 5 of the Convention, according to which detention is an exceptional measure restricting the right to liberty, which is allowed only in cases specified in that article and under strictly defined conditions. In decision No. AP 2210/17 of 18 July 2017, the Constitutional Court emphasized that the regular court is obliged to take all actions within its jurisdiction in order to eliminate the possible possibility that the accused may influence witnesses or accomplices in the further course of the proceedings. not to constantly repeat that this danger exists until he does

<sup>41</sup> See Constitutional Court, Decision on Admissibility and Merits, No. AP 1150/10 of 14 May 2010, item 48, published in the Official Gazette of BiH No. 27/11.

<sup>42</sup> See Constitutional Court, Decision on Admissibility, AP 3512/08 of 29 April 2009, item 18.

<sup>43</sup> See European Court, *Soulaja v. Estonia*, judgment of 15 February 2005, paragraph 64.

<sup>44</sup> See, European Court, *Becciev v. Moldova*, judgment of 4 October 2005, application no. 9190/03, paragraph 59.

<sup>45</sup> See Constitutional Court, Decision on Admissibility and Merits, No. AP 6/08 of 13 May 2008, item 38, published in the Official Gazette of BiH No. 49/08.

nothing, although he has a legally prescribed possibility - to eliminate that danger. Therefore, the regular court, after the opening of the main trial, is obliged to take actions that would eliminate the potential danger of influencing witnesses from the appellant, since that danger existed even before the confirmation of the indictment.

### 3.4. Danger of re-offending

The danger of re-offending, if convincingly established, may prompt judicial authorities to place and leave a suspect in custody to prevent attempts to commit further offenses. However, it is necessary, among other conditions, that the danger be probable and that the measure be appropriate in the light of the circumstances of the case, in particular the past and the particularities of the person concerned<sup>46</sup>. At the same time, the European Court considers it acceptable to give importance to circumstances such as undertaking illicit activities over a long period of time, great harm caused to victims and propensity to commit criminal offenses<sup>47</sup>. Finally, the gravity of the offense cannot in itself serve as a justification for long periods of detention.<sup>48</sup>

In the case of the Constitutional Court AP 3134/17 the only "special circumstance" (if it is assumed that the objective condition required is met - the amount of the threatened penalty for the criminal offense for which the appellant is charged) is the fact that it is a "prolonged criminal offense of receiving a gift or other forms of benefit". Namely, there is nothing else in the first-instance decision that would determine or characterize the "special circumstances" necessary for ordering detention in accordance with the provision of Article 146, paragraph 1, item c) of the said Law. Namely, although the determination of these "special circumstances" is within the jurisdiction of the regular courts, the reasoning of the first instance decision does not state that there is

any concrete evidence or circumstances that lead to the conclusion that the appellant would repeat the crimes by releasing them. and only brought into connection with the fact that he is charged with the protracted offense of receiving gifts or other forms of benefit.

In the case number AP 654/18 of 13 March 2018, having in mind that this is a relatively young person who continuously and in a relatively short period of time committed a certain number of misdemeanors for which he was punished, the Constitutional Court concludes that it is not unreasonable to conclude that the imposed misdemeanor sanctions did not have an educational effect on the appellant to stop violating traffic regulations, so that there is a well-founded fear that, in case he is released, he could commit a new crime. Also, the Constitutional Court notes that the appellant expressed a tendency to violate the regulations governing the field of traffic which are in the function of ensuring the safety and security of all traffic participants, which is an indisputable public interest which, regardless of the presumption of innocence, prevails over . Finally, with regard to the appellant's contention that these were "minor offenses", the Constitutional Court recalls that, according to the case law of the European Court and the Constitutional Court, even the smallest traffic offense constitutes a "criminal offense" within the meaning of Article 6 of the Convention.

### 3.5. Fear of being threatened with a crime

In the case of the Constitutional Court No. AP 2441/15, the Constitutional Court emphasized that the subjective feeling of fear in a protected witness was not objectified by any other evidence, but that it was only a matter of the court's assumptions. The Constitutional Court also had in mind the fact that at the time of passing the disputed decisions on detention, the indictment

<sup>46</sup> See European Court, *Clooth v. Belgium*, 12 December 1991, paragraph 40, series A, no. 225 and *Paradysz v. France*, application no. 17020/05, paragraph 71, dated 29 October 2009.

<sup>47</sup> See, European Court of Justice, *Matznetter v. Austria*, judgment of 10 November 1969, paragraph 9.

<sup>48</sup> See European Court, *Ilijkov v. Bulgaria*, application no. 33977/96, paragraphs 80-81, 26 July 2001; *Michta v. Poland*, application no. 13425/02, paragraph 49, 4 May 2006, and *Gulyayeva v. Russia*, application no. 67413/01, paragraph 186, 1 April 2010.



against the appellant was confirmed, that in the meantime the protected witness to whom the threat was made was heard and that a first instance verdict was even rendered. Therefore, the Constitutional Court found that the existence of "special circumstances justifying the fear that he would commit the criminal offense he threatens" had not been proven, which violated the appellant's right under Article 5 paragraph 1 item c) and paragraph 3 of the Convention.

### **3.6. Public interest (need to protect the interest of citizens)**

In decisions no. AP 3210/15 and AP 2930/15, which challenged the decisions of the regular courts ordering detention, *inter alia*, found a violation of the appellants' right to liberty and security in the context of the application of the special detention ground under Article 146 paragraph 1 (d) of the Criminal Code procedure of the Federation of Bosnia and Herzegovina based on its decisions on the case law of the European Court, Recommendation (C / M Rec 2006) 13 of the Committee of Ministers of the Council of Europe on detention, conditions of detention and protection mechanisms against abuse referred to by the appellant in the case 3210/15 and on the August 2008 Report of the OSCE Mission to Bosnia and Herzegovina entitled "Law and Practice in the Application of Measures of Restriction of Liberty: Justification of Detention Measures in Bosnia and Herzegovina". Thus, the Constitutional Court in the cited cases, among other things, reminded that the mere existence of a presumption and abstract allegation that the release of the suspect could lead to a real threat to public order - is not enough, but must specify the specific circumstances which, as such, they undoubtedly indicate that this will happen<sup>49</sup>. In the cited decisions, the Constitutional Court also reminded of the position of the European Court that certain criminal offenses, due to their special gravity and public reaction to them, can cause social

unrest, and that this may justify detention for at least some time. However, in the opinion of the European Court, this ground can be considered relevant and sufficient only if it is based on facts from which it clearly follows that the release of the suspect would indeed disturb public order. Finally, detention will only be lawful if public order is still really threatened. Extension of detention cannot be used as an anticipation of imprisonment<sup>50</sup>. In addition, the Constitutional Court recalled in its cited decisions the position of the Committee of Ministers of the Council of Europe expressed in the Recommendation that this ground can be used as a justification for detention only if there is substantial evidence of a response to a serious crime such as murder. Only the occurrence of an exceptional situation can make detention necessary.

### **4. Article 5 paragraph 3 of the European Convention**

Article 5 paragraph 3 of the Convention requires the judiciary to review all matters relating to detention, and to take a decision on detention with reference to objective criteria provided by law. The use of the same reasons, ie stereotypical formulations in decisions on extension of detention, without taking into account the specific circumstances of the specific case that requires continuous detention - is a violation of Article 5 paragraph 3 of the Convention<sup>51</sup>. When deciding on the fulfillment of the conditions for the extension of the detention measure - the regular court evaluates the circumstances that exist at the time of the decision. Therefore, there is no obstacle for the regular court to invoke the same reasons and circumstances as in the previous decision, if they still exist and it is important to make a decision on fulfilling certain conditions for extending the detention measure, so in such a situation one cannot speak about stereotypical formulations and

<sup>49</sup> See, European Court, decision of 14 September 2009 in *Makarov v. Russia*, application no. 15217/07.

<sup>50</sup> See, European Court, *Letellier v. France*, judgment of 26 June 1991, paragraph 51 and *I.A. v. France*, judgment of 23 September 1998, paragraph 104.

<sup>51</sup> See, European Court of Justice, *Sulaoja v. Estonia*, Application No. 55939/00, paragraph 64, 15 February 2005; *Tsarenko v. Russia*, application no. 5235/09, paragraph 70, 3 March 2011 and *Trifković v. Croatia*, judgment of 6 November 2012, paragraph 125.

the use of the same reasons<sup>52</sup>. The second segment of Article 5 paragraph 3 of the European Convention proclaims not only the rule that the accused be brought to trial within a reasonable time or granted provisional release pending trial, but also the rule that release may be conditional on guarantees that the accused will appear at the court<sup>53</sup>. Namely, until the verdict, the accused must be presumed innocent, and the purpose of the provision under consideration is basically to request that he be released on parole after further detention ceases to be justified<sup>54</sup>. Furthermore, the justification of detention is assessed in the light of the circumstances of the particular case and its specificity. The extension of a measure of detention will be justified if there are real reasons that indicate the existence of a general (public) interest that is so important and significant that, despite the presumption of innocence, it prevails over the principle of respect for individual freedom<sup>55</sup>. Therefore, it is the duty of the domestic courts, with due regard to the principle of the presumption of innocence, to consider all facts in favor or against the existence of any important public interest justifying a derogation from Article 5 and to establish them in their decisions on release applications<sup>56</sup>.

### 5. Article 5 paragraph 4 of the European Convention

Detention must be ordered in accordance with national law, ie Article 5 paragraph 4 of the Convention guarantees the right "of anyone deprived of liberty by arrest or detention" - to initiate proceedings to examine the lawfulness of his detention and to release him if detention is unlawful. Furthermore, the cited provision does not

impose an obligation on the courts to respond to every argument stated in the appeal when examining the appeal against the decision on detention. The guarantees of the cited article will be deprived of their essence if the court, relying on domestic law and practice, can treat as irrelevant or ignore the specific facts pointed out in the appeal, which are such as to call into question the existence of conditions essential for "legality". - within the meaning of the Convention, with regard to deprivation of freedom<sup>57</sup>. Finally, in the case of a decision of a higher court, it is sufficient that the reasoning of the decision contains agreement with the determination of the lower or judicial court by the higher court incorporating or referring to the reasons and reasoning of the lower court or otherwise indicating that it agrees with them<sup>58</sup>. Article 5 paragraph 4 of the Convention guarantees that a person deprived of his liberty must have access to a "court" that could examine the lawfulness of both the initial deprivation of liberty and the extension of that measure. According to the case law of the European Court, a key element of this obligation is that the lawfulness of deprivation of liberty must be supervised by a court, but it does not have to be "a classic court integrated into the standard judicial machinery of the state"<sup>59</sup>. However, it must be a body with a "judicial character". In order to have a "judicial character", that body must be "independent of the executive and the parties to the proceedings"<sup>60</sup>, and must have the authority to make a binding decision that may lead to the release of the person. This body must, in addition, provide "procedural guarantees appropriate to the specific type of deprivation of liberty", which are not "significantly less" than guarantees in criminal proceedings, when deprivation of liberty results in long-

<sup>52</sup> See, inter alia, the Constitutional Court, Decision on Admissibility and Merits, No. AP4135 / 17 of 6 December 2017, paragraph 44, available at [www.ustavisud.ba](http://www.ustavisud.ba).

<sup>53</sup> See, European Court, G.K. v. Poland, judgment of 20 January 2004, paragraph 85.

<sup>54</sup> See, European Court of Justice, Vrenčev v. Serbia, judgment of 23 September 2008, paragraph 71.

<sup>55</sup> See Buzadji v. Moldova, judgment of 5 July 2016, paragraph 90.

<sup>56</sup> See, European Court of Justice, Weinsztal v. Poland, judgment of 30 May 2006, paragraph 50.

<sup>57</sup> See European Court, Nikolova v. Bulgaria [GC], no. 31195/96, paragraph 61, ECHR 1999-II.

<sup>58</sup> See European Court, Garcia Ruiz v. Spain, 1999-I, 31 EHR 589 GC.

<sup>59</sup> See, European Court of Justice, Weeks v. The United Kingdom, judgment of 2 March 1987, Series A no. 114, paragraph 61.

<sup>60</sup> See, European Court of Justice, De Wilde, Ooms and Versyp v. Belgium, judgment of 18 November 1971, Series A no. 12, paragraph 76 and 77.

term imprisonment. It is clear from the case law of the European Court, supported by the Constitutional Court, that although Article 5 of the Convention does not impose an obligation on a judge hearing detention to deal with every argument contained in the applicant's submission, the arrested or detained person has the right to review arrests and detentions in proceedings which will review both procedural and material conditions which, in accordance with the European Convention, are crucial to the lawfulness of deprivation of liberty. This means, as the European Court concluded in the Brogan case<sup>61</sup>, that the applicants had to have access to a remedy on the basis of which the competent judicial authority would review not only the procedural guarantees prescribed by domestic law but also the grounds for reasonable suspicion of arrest and keep in detention.

#### **6. Detention related to the imposition of prohibitive measures**

When deciding, the judicial authority must be aware that deprivation of liberty is contrary to the right to security as a basic human right - *ultima ratio*, and that prohibitive measures must be used if the goal can be achieved<sup>62</sup>. In that sense, the Constitutional Court notes in case AP 1279/18 of 23 April 2018 that the first instance court did not consider the appellant's proposal for imposing prohibitive measures at all, and that the Cantonal Court, deciding on the appellant's appellate allegations in that direction - concluded that the appellant's proposal was not sufficiently concretized, pointing out that "there is nothing special to comment on" regarding these allegations. Therefore, having in mind that the regular courts did not state the reasons whether and why they considered that in the circumstances of the specific case the purpose of successful criminal proceedings could not be achieved by milder measures than detention, the Constitutional Court concludes that the right was violated in this part as well. the appellant to lawful detention

guaranteed by Article 5 paragraph 1 (c) and paragraph 3 of the Convention.

#### **7. Conclusion**

The right to liberty and security is of particular importance in a democratic society characterized by the rule of law. This implies, *inter alia*, the existence of an effective judicial system that provides effective protection in the event of a violation of this right. On the other hand, the rule of law also means the possibility of derogating from the right to liberty and security, whereby a person deprived of liberty or detained must have adequate guarantees to protect his right. The case law of the Constitutional Court shows that domestic courts often render decisions in which, with reference to the relevant provisions of the criminal procedure code applicable in Bosnia and Herzegovina, they "justify" a derogation from the right to liberty and security which cannot be assessed as complying with standards of deprivation of liberty from Article II / 3d) of the Constitution of Bosnia and Herzegovina and Article 5 of the Convention. Therefore, it is necessary that court practice, and especially the highest courts, pay due attention to all aspects of the lawfulness of deprivation of liberty, because deviation from the right to liberty and security is subject to assessment not only by the Constitutional Court but also by the European Court. It is of special importance that the Constitutional Court in its previous practice has adopted the position that, given the temporal nature of the decision on ordering or extending detention, in a situation where it finds that deprivation of liberty of appellants by the contested decision of the regular court resulted in violation of freedom and security of the person, but that at the time of the Constitutional Court's decision the deprivation of liberty according to the impugned decisions had expired - sufficient to establish a violation of the constitutional right and to point out the omissions made in the procedure of ordering detention. Therefore, in the present case the Constitutional Court finds only a declaratory

<sup>61</sup> See European Court of Justice, Brogan v. The United Kingdom, application no. 11209/84, 11234/84, 11266/84 and 11386/85 of 30 June 1989.

<sup>62</sup> See, *mutatis mutandis*, European Court, Stögmüller v. Austria, judgment of 10 November 1969, Series A no. 9, paragraph 15.

violation in relation to the challenged decision, emphasizing that the regular court, when ordering and extending detention, must ensure the guarantees given by the provisions of Article II / 3d) of the Bosnia and Herzegovina Constitution and Article 5 of the Convention.

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