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

FIRST SECTION

CASE OF DRAGOJEVIĆ v. CROATIA

(Application no. 68955/11)

JUDGMENT

STRASBOURG

15 January 2015

FINAL

15/04/2015

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

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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Dragojević v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 2 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 68955/11) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Ante Dragojević ("the applicant"), on 20 October 2011.

2. The applicant was represented by Ms J. Novak, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. Relying on Article 6 § 1 and Article 8 of the Convention, the applicant alleged that the trial bench had not been impartial, that he had been subjected to unlawful secret surveillance measures and that the evidence thus obtained had been used in the criminal proceedings against him, thereby making the proceedings unfair.

4. On 17 July 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Vela Luka.

6. He worked as a sailor on an ocean carrier for a shipping company headquartered in Croatia.

A. Investigation

7. In 2007 the police and the State Attorney's Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta*; hereinafter: "the OSCOC") investigated allegations of possible drug trafficking between Latin America and Europe via ocean carriers, involving several persons from Croatia.

8. On 23 March 2007, on the basis of a police report, the OSCOC requested an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) to authorise the use of secret surveillance measures to tap the applicant's telephone and covertly monitor him.

9. The investigating judge granted the request and on the same day issued an order for the use of secret surveillance measures. Its statement of reasons reads as follows:

> "On 23 March 2007 the OSCOC lodged a request, no. ..., for secret surveillance measures under Article 180 § 1 (1) and (3) of the Code of Criminal Procedure in respect of Ante Dragojević. The request refers to the [police] report of 2 March 2007, concerning the use of secret surveillance measures in respect of M.R., M.V., B.Ž. and I.B., alleging probable cause to believe that [Ante Dragojević] is also involved in the commission of the offence proscribed by Article 173 §§ 2 and 3 of the Criminal Code.
>
> The investigating judge considers that the request is well-founded because the investigation cannot be carried out by other means and the use of these measures in respect of Ante Dragojević is also necessary for satisfactory completion of the investigation, given that there are sufficient grounds for suspecting that he has also been involved in the commission of the offence in issue.
>
> It is therefore appropriate to temporarily limit the constitutional rights and decide as above."

10. In the course of the further investigation the OSCOC learnt that the applicant had been using another telephone number. On 25 May 2007 it asked the investigating judge to extend the use of secret surveillance measures to tap that number.

11. On the same day the investigating judge granted that request and issued an order, which contains the following statement of reasons:

> "Based on an order of this court under the above number, the secret surveillance measures provided for in Article 180 § 1 (1) and (3) of the Code of Criminal Procedure are being conducted in respect of several persons for the offence proscribed under Article 173 §§ 2 and 3 of the Criminal Code.
>
> On 25 May 2007 the OSCOC lodged a request for secret surveillance measures under Article 180 § 1 (1) and (3) of the Code of Criminal Procedure in respect of D.Š., and the secret surveillance measure under [Article 180 § 1] (1) of the above-cited provision in respect of Ante Dragojević, who was using the telephone number ... This measure was also requested in respect of another unidentified person who was using the number ... since the results of the previous use of secret surveillance measures showed that they had made contact in order to commit the offence in issue.

> The investigating judge considers that the request is well-founded because the investigation cannot be carried out by other means, so it is necessary to temporarily limit the constitutional rights and order the measures noted in the operative part of this order under points I and II.
>
> The OSCOC also asked that certain measures be terminated because they had not produced any result, and a decision was made accordingly as noted under point V of this order."

12. On 2 July 2007 the OSCOC requested that the use of secret surveillance measures be extended for a further three months.

13. The investigating judge granted the request and on the same day issued an order based on the following statement of reasons:

> "Based on an order of this court under the above number, the secret surveillance measures provided for in Article 180 § 1 (1) and (3) of the Code of Criminal Procedure are being conducted in respect of several persons for an offence proscribed under Article 173 §§ 2 and 3 of the Criminal Code.
>
> On 2 July 2007 the OSCOC lodged a request for an extension of the use of secret surveillance measures under Article 180 § 1 (1) and (3) of the Code of Criminal Procedure in respect of M.R., B.Ž. and Ante Dragojević on grounds of suspected conspiracy in drug trafficking between Latin America and Croatia. It appears, given their constant contacts, that the offence could be committed within a period of three months so it was proposed that the use of measures be extended for that period.
>
> The investigating judge considers that the request is well-founded because the investigation cannot be carried out by other means and given the circumstances of the offence it is necessary to extend the use of [secret surveillance] measures in order to achieve satisfactory completion of the investigation and obtaining of evidence.
>
> It is therefore decided accordingly as noted in the operative part of this order."

14. On 6 August 2007 the OSCOC requested the investigating judge to discontinue the use of secret surveillance measures in respect of the applicant on the grounds that the results of the investigation did not justify further secret surveillance.

15. The investigating judge granted the request and ordered the discontinuation of secret surveillance on 7 August 2007.

16. On 17 September 2007 the OSCOC made a new request for secret surveillance in respect of the applicant.

17. On the same day the investigating judge issued a secret surveillance order with the following statement of reasons:

> "By orders under the above number secret surveillance was ordered in respect of Ante Dragojević (on 23 March 2007 and discontinued on 7 August 2007), and in respect of ...
>
> On 17 September 2007 the OSCOC lodged a request for secret surveillance measures under Article 180 § 1 (1) and (3) of the Code of Criminal Procedure in respect of Ante Dragojević, B.Ž. and M.M. for a period of two months in connection with offences proscribed under Article 173 §§ 2 and 3 of the Criminal Code, and for the discontinuation of secret surveillance in respect of N.I and an unidentified person. In their request [the OSCOC] submits that the investigation shows that there is a

> possibility that these individuals could contact each other again and that they could contact N.I., who travelled to Latin America and is expected to stay there for ten months. [The OSCOC] therefore considers that by resuming the use of secret surveillance relevant information for the further investigation could be obtained. On the other hand, there has been no communication on the telephone numbers of N.I. and the unidentified person so [the OSCOC] proposes that the secret surveillance in that respect be discontinued.
>
> The investigating judge finds in the case in issue that it is necessary to temporarily limit the constitutional rights of the above-mentioned individuals since investigation by another means would not be possible. It has therefore been decided as noted under points I and II, while at the same time [certain] measures have been discontinued as noted under points III and IV of this order."

18. After further preliminary investigation, on 16 January 2009 the applicant was arrested and detained on suspicion of drug trafficking.

19. The following day the Dubrovnik Police Department (*Policijska uprava Dubrovačko-neretvanska*) lodged a criminal complaint with the Dubrovnik County State Attorney's Office (*Županijsko državno odvjetništvo u Dubrovniku*; hereinafter: the "State Attorney's Office") against the applicant and another person on charges of drug trafficking.

20. On the same day the applicant was questioned by an investigating judge of the Dubrovnik County Court (*Županijski sud u Dubrovniku*). He stressed that it was true that he worked on an ocean carrier between Latin America and Europe but denied that he had anything to do with any drug trafficking.

21. After the questioning the investigating judge opened an investigation in respect of the applicant and several other persons on suspicion of drug trafficking. The investigating judge also remanded the applicant in custody.

22. During the investigation the investigating judge questioned several witnesses and obtained the relevant results and analyses of the use of secret surveillance measures, as well as evidence obtained following a number of searches conducted during the investigation. Throughout the proceedings the applicant was remanded in custody.

B. Proceedings on indictment

23. After the completion of the investigation, on 10 March 2009 the State Attorney's Office indicted the applicant and two other persons in the Dubrovnik County Court on charges of drug trafficking. The applicant was also indicted on charges of money laundering.

24. On 11 March 2009 a three-judge panel of the Dubrovnik County Court presided over by judge Z.Č. extended the applicant's pre-trial detention under Article 102 § 1 (3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges). The relevant part of the decision in respect of the applicant reads:

> “This panel considers that the pre-trial detention under Article 102 § 1 (4) of the Code of Criminal Procedure in respect of the accused Dragojević and V. should be extended because the type and quantity of drugs which are the subject of the indictment, and the manner of commission [of the offence], indicate particularly grave circumstances of the offence for which the pre-trial detention should be extended”

25. On 13 March 2009 the applicant’s defence lawyer asked the Dubrovnik County Court for access to and a copy of the audio recordings obtained by the use of secret surveillance measures.

26. The request for access to the recordings was granted on 16 March 2009.

27. On 16 March 2009 the applicant challenged the decision on his pre-trial detention before the Supreme Court (*Vrhovni sud Republike Hrvatske*).

28. On 18 March 2009 the applicant also lodged an objection against the indictment, arguing, *inter alia*, that the results of the secret surveillance measures did not suggest that he had been involved in the offence.

29. On 30 March 2009 the Supreme Court allowed the applicant’s appeal against the detention order of 11 March 2009 (see paragraphs 24 and 27 above) on the grounds that the first-instance court had failed to state any reasons why the applicant’s detention should be extended under Article 102 § 1 (3) of the Code of Criminal Procedure (risk of reoffending). Without releasing the applicant, it therefore ordered that the matter be re-examined.

30. The Dubrovnik County Court complied with that order and on 6 April 2009 a three-judge panel of that court, presided over by Judge Z.Č., extended the applicant’s pre-trial detention under Article 102 § 1 (3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges). The relevant part of the decision reads:

> “The fact that the defendant Ante Dragojević is a reoffender, who has been sentenced by a final judgment of the Split Municipal Court no. KML-160/02 of 10 July 2003, a final judgment of the Korčula Municipal Court no. K-33/05 of 25 May 2006, and a final judgment of the Korčula Municipal Court no. K-68/07 of 10 December 2007, suggests that his previous behaviour has not been in compliance with the law and that there is therefore a risk that, if at large, he might reoffend.
>
> Accordingly, this court considers that his detention should be extended under Article 102 § 1 (3) of the Code of Criminal Procedure.
>
> Furthermore, this panel considers that the detention of Ante Dragojević should be extended under Article 102 § 1 (4) of the Code of Criminal Procedure since the type and quantity of the drug which is the subject matter of the charges and the manner of execution [of the offence] suggest that the circumstances of the offence were particularly serious and thus warrant his further detention.
>
> To be specific, cocaine is a hard drug and forty kilos of it is not an insignificant amount. Such a quantity could be distributed in a number of single doses and thus endanger the health of a number of people, particularly young people. Having regard also to the international character of the offence, and the recorded EUR 80,000 from the proceeds of the crime which surpasses the usual circumstances associated with such offences, and the criminal resolve and engagement necessary to commit the

offence charged, [the court considers] that the detention should be extended under Article 102 § 1 (4) of the Code of Criminal Procedure.”

31. On 27 April 2009 a three-judge panel of the Dubrovnik County Court dismissed the applicant’s objection against the indictment as ill-founded (see paragraph 28 above) on the grounds that there was sufficient suspicion to warrant sending the case for trial.

32. The applicant’s pre-trial detention was further extended by a three-judge panel of the Dubrovnik County Court, presided over by Judge Z.Č. on 5 June 2009, which reiterated the same reasons as in its previous decision.

33. Meanwhile, Judge Z.Č., who had presided over the panels extending the applicant’s pre-trial detention (see paragraphs 24, 30 and 32 above), assumed responsibility for the applicant’s case as president of the trial bench of the Dubrovnik County Court.

34. At hearings held on 16 and 17 June 2009 the applicant pleaded not guilty and the trial bench heard evidence from several witnesses.

35. The applicant also applied to have the results of the secret surveillance measures excluded from the case file as unlawfully obtained evidence on the grounds that the orders for their use had not been sufficiently reasoned and had thus been contrary to Articles 180a, 181 and 182 of the Code of Criminal Procedure (see paragraph 55 below).

36. In a short oral explanation and ruling out the possibility of appeal against his decision, the president of the trial bench dismissed the applicant’s request as ill-founded. The trial bench then examined the evidence obtained by secret surveillance. It also decided to obtain further evidence proposed by the prosecution and the applicant, and adjourned the hearing.

37. On 4 August 2009 a three-judge panel of the Dubrovnik County Court, composed of judges P.M., E.Č. and M.V., extended the applicant’s pre-trial detention under Article 102 § 1 (3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges) reiterating the reasons stated in the previous decisions on his detention.

38. On 25 August 2009 Judge Z.Č., referring to the Court’s case-law and the case-law of the Constitutional Court (*Ustavni sud Republike Hrvatske*), asked to withdraw from the case as president of the trial bench on the grounds that his previous involvement in the case, as president of the panels which had extended the applicant’s pre-trial detention, could raise doubts about his impartiality.

39. Following Judge Z.Č.’s request, on 26 August 2009 the President of the Dubrovnik County Court asked the Supreme Court to transfer the trial to another court since all the judges of the Criminal Division of the Dubrovnik County Court had already taken part in the applicant’s case.

40. On 9 September 2009 the Supreme Court dismissed that request on the grounds that there were no reasons to doubt the impartiality of the Dubrovnik County Court judges. It held that the mere fact that a judge had

presided over the panels extending the applicant's detention could not raise any issue of his impartiality since the questions to be decided when the detention was extended differed from those which the judge had to decide when examining the case on the merits. There were also no reasons to doubt the impartiality of Judge Z.Č. within the meaning of Article 36 § 2 of the Code of Criminal Procedure (see paragraph 55 below).

41. The applicant's detention was further extended on 1 October 2009 by a three-judge panel in which Judge Z.Č. sat as a member of the panel, relying on Article 102 § 1 (3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges) and reiterating the reasons from the previous decisions on detention.

42. At a hearing on 26 November 2009 the trial bench questioned several witnesses and the defence again sought to have the evidence obtained by secret surveillance excluded from the case file as unlawfully obtained evidence. Ruling out the possibility of appeal, the president of the trial bench dismissed the request as ill-founded. The trial bench thus examined the evidence obtained by the use of secret surveillance measures.

43. On 3 December 2009 a three-judge panel of the Dubrovnik County Court, composed of judges P.M., S.V. and M.V., extended the applicant's detention under Article 102 § 1 (3) and (4) of the Code of Criminal Procedure (risk of reoffending and gravity of charges), reiterating the reasons stated in the previous decisions.

44. At a hearing on 17 December 2009 the applicant pleaded not guilty and denied all the charges against him. The parties gave their closing statements and the trial bench concluded the hearing.

45. On 18 December 2009 the Dubrovnik County Court found the applicant guilty on charges of drug trafficking and money laundering and sentenced him to nine years' imprisonment. The judgment was based on an analysis of the applicant's defence and the statements of his co-accused, as well as on the statements of witnesses, evidence obtained through numerous searches and seizures and the use of secret surveillance measures.

46. As to the refusal to exclude the latter evidence from the case file, the Dubrovnik County Court noted:

> "The court found that the defence of the accused Ante Dragojević was unconvincing, contradictory and aimed at avoiding his criminal responsibility .... The court examined the audio recordings (CD) of the conversations between the accused and witnesses I.Ž. and M.R. after it had found that the recordings had been made pursuant to the orders of the investigating judge of the Zagreb County Court no. Kir-Us-14/07 authorising the telephone tapping. These were the reasons why the court dismissed the request made during the proceedings that these recordings be excluded from the case file as unlawfully obtained evidence. [Moreover] the court considered them to be lawful and acceptable evidence obtained pursuant to valid court decisions. This court also refused the request by the defence to examine the case files of the Rijeka County Court no. Kir-Us-1/09 and the Zagreb County Court no. Kir-Us-14/07 [concerning the use of secret surveillance], because it considered those requests irrelevant and obsolete for the same reasons referred to in the decisions concerning the

requests for exclusion of the secret surveillance recordings from the case file. As to the request that the secret surveillance orders be excluded from the case file as unlawfully obtained evidence on the grounds that they did not contain an assessment of the likelihood that the accused themselves or jointly with other persons had committed one of the offences proscribed under Article 181 of the Code of Criminal Procedure, and that they did not contain an assessment of whether the investigation could be conducted by other means, this court considers that this is not correct because the orders were sufficient and well-reasoned and eventually resulted in an indictment being lodged [against the accused]. In any event, as to the request by the defence that the secret surveillance orders be excluded from the case file as unlawfully obtained evidence, it should be noted that these are not evidence but court decisions so they cannot be excluded from the case file as unlawfully obtained evidence. And as regards the evidence obtained on the basis of these orders, this court considers that there was no breach of the Code of Criminal Procedure and therefore it does not consider them to be fruit of the poisonous tree but lawfully obtained evidence."

47. On 27 January and 3 February 2010 the applicant lodged an appeal against the first-instance judgment with the Supreme Court. He argued, *inter alia*, that the secret surveillance orders had not been properly drafted as required under the Code of Criminal Procedure given that they had not given a proper assessment of the likelihood that the offences in issue had been committed, or of the circumstances indicating that the investigation could not be conducted by other means. In his view, this had led to his unlawful surveillance and therefore any evidence thus obtained could not be used in the criminal proceedings against him. He challenged, further, the basis of the first-instance court's reasoning in its judgment, namely, the evidence obtained through secret surveillance. The applicant also requested the Supreme Court to quash the first-instance judgment and order that a retrial be held before a differently composed trial bench.

48. The Supreme Court dismissed the applicant's appeal as ill-founded and upheld the first-instance judgment on 23 September 2010. It held that all relevant facts had been sufficiently and correctly established, that the applicant had had every opportunity to participate effectively in the proceedings and that the first-instance court had given sufficient reasons for its decisions. As to the alleged unlawfulness of the applicant's secret surveillance, the Supreme Court noted:

"As regards the secret surveillance orders, contrary to what is alleged in the appeal, these impugned orders contain sufficient reasons as to <u>probable cause to believe</u> that the offence under Article 173 § 2 of the Criminal Code was committed, as well as to the fact that the investigation into this offence could not be conducted by other means and that [such investigation] would be extremely difficult, which is evident from the fact that the investigating judge did not refuse to issue the orders. In fact he issued the orders as required under Article 182 § 2 of the Code of Criminal Procedure. It follows that the appellant's allegation that the impugned orders of the investigating judge do not contain sufficient reasons, is erroneous and that they are therefore not unlawfully obtained evidence within the meaning of Article 9 § 2 of the Code of Criminal Procedure."

49. The applicant subsequently lodged a constitutional complaint with the Constitutional Court on 21 October 2010 arguing, *inter alia*, that the trial bench had lacked impartiality because of the previous involvement of Judge Z.Č. in the case; that his secret surveillance had been unlawful on account of the failure of the investigating judge to issue an order in the manner required under the relevant law; and that the use of the evidence thus obtained for his conviction had rendered the entire proceedings unfair.

50. On 25 May 2011 the Constitutional Court dismissed the applicant's constitutional complaint as ill-founded. It endorsed the reasoning of the Supreme Court with regard to the use of secret surveillance measures and the use of evidence thus obtained in the proceedings. As regards the lack of impartiality of the trial bench, the Constitutional Court observed:

> "In the case in issue, the mere fact that the president of the trial bench had on three previous occasions ... sat on a panel which extended the appellant's pre-trial detention cannot in itself be a reason for disqualifying the judge from deciding the merits of the case.
>
> There is a significant difference between the decision on detention and the decision on the guilt of the appellant. When ruling on an extension of detention, a member of a panel of judges decides only the legal issues on which the application of the procedural law concerning the so-called *causae arresti* (Article 102 of the Code of Criminal Procedure) depends. Accordingly, he or she does not assess all the legal and factual aspects of the charges. The charges will be assessed in the first-instance proceedings. However, the appellant has not advanced any reasons why Judge Z.Č.'s participation in the panel [of judges] which had extended his detention could be considered to have led him to form a previous conviction as to his guilt."

51. The decision of the Constitutional Court was served on the applicant's representative on 13 June 2011.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution

52. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010 and 85/2010) read as follows:

Article 29

> "In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

Article 35

"Everyone has a right to respect for and legal protection of his private and family life, dignity, reputation and honour."

Article 36

"Freedom and confidentiality of correspondence and all other forms of communication are guaranteed and inviolable.

Only the law may provide for restrictions necessary for the protection of national security or the conduct of criminal proceedings."

53. The relevant part of section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002) reads as follows:

Section 62

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that an individual act on the part of a State body, a body of local or regional self-government, or a legal person with public authority, concerning his or her rights and obligations or a suspicion or accusation of a criminal deed, has violated his or her human rights or fundamental freedoms or his or her right to local or regional self-government guaranteed by the Constitution (hereinafter "a constitutional right") ...

2. If another legal remedy exists in respect of the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after that remedy has been used."

2. Criminal Code

54. The relevant part of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, 27/1998, 129/2000, 51/2001, 105/2004, 84/2005, 71/2006) provides:

Title thirteen (XIII) Criminal offences against the values of international law

Abuse of Narcotic Drugs

Article 173

" ...

(2) Whoever, without authorisation, manufactures, processes, sells or offers for sale or buys for the purpose of reselling, keeps, distributes or brokers the sale and purchase of, or, in some other way and without authorisation, puts into circulation, substances or preparations which are by regulation declared to be narcotic drugs, shall be liable to a minimum sentence of three years' imprisonment."

Title twenty-one (XXI) Criminal offences against confidence in the financial sector and the economy

Money laundering

Article 279

"(1) Whoever, in the course of a banking, financial or other business enterprise, invests, accepts, exchanges or by any other means conceals the real source of money or objects or rights obtained by that money which he or she knows has been obtained as a result of a criminal offence shall be liable to between six months and five years' imprisonment ..."

3. Code of Criminal Procedure

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

Article 9

"(1) The courts' decisions in criminal proceedings cannot be based on unlawfully obtained evidence (unlawful evidence).

(2) Unlawfully obtained evidence is evidence obtained by means of a breach of the fundamental rights of the defence, the right to dignity, reputation, honour and respect for private and family life guaranteed under the Constitution, domestic law or international law, or evidence obtained in breach of the rules of criminal procedure in so far as set out in this Code, as well as any other evidence obtained unlawfully. "

Transfer of jurisdiction

Article 31

"Where the competent court, for legal or practical reasons, is unable to act, it shall inform the immediately higher court, which shall, after obtaining the opinion of the State Attorney, designate another court on its territory [as the competent court]. No appeal lies against this decision."

Disqualification

Article 36

"1. A judge or lay judge shall be disqualified from sitting in a case

(1) if he has been injured by the offence;

(2) if he is the spouse, a relative by blood, either lineal, descending or ascending, or collateral to the fourth degree, or related by affinity to the second degree, to the defendant, his counsel, the prosecutor, the injured person, their legal guardian or legal representative;

(3) if he is a legal guardian, ward, adopted child or adoptive parent, foster parent or foster child of the defendant, his counsel, the prosecutor or the injured person;

(4) if in the same criminal case he has carried out measures during the investigation, or has taken part in ruling on an objection to the indictment, or if he has taken part in

the proceedings as a prosecutor, defence counsel, legal guardian or legal representative of the injured person or the prosecutor, or if he has testified as a witness or as an expert witness;

(5) if in the same case he has taken part in adopting the decision of a lower court or in adopting a decision of the same court being challenged by means of an appeal or extraordinary remedy.

2. A judge or lay judge may be disqualified from sitting in a particular case if it has been argued and proved that there are circumstances other than those listed in the previous paragraph which call his impartiality into doubt."

Article 37

"1. A judge or lay judge, as soon as he discovers a ground for his disqualification referred to in Article 36, paragraph 1, of this Code, shall discontinue all activity in the case and report the matter to the president of the court, who shall appoint a substitute judge. ...

2. If a judge or lay judge considers that other circumstances exist which would justify his withdrawal (Article 36, paragraph 2), he shall inform the president of the court thereof."

Grounds for Ordering Detention

Section 102

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

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

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

3. special circumstances justify the suspicion that the person concerned might reoffend;

4. where the charges relate to murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion or any other offence carrying a sentence of at least twelve years' imprisonment, or where detention is justified by the *modus operandi* or other especially grave circumstances of the offence."

Special investigative measures temporarily limiting constitutional rights and freedoms

Article 180

"(1) If an investigation by other means would either not be possible or would be extremely difficult, upon a request by the State Attorney the investigating judge can, where there is probable cause to believe that an individual, acting alone or jointly with others, has committed one of the offences proscribed under Article 181 of this Code, order in respect of that individual the following measures restricting the constitutional rights of citizens:

1. telephone tapping, ...

3. covert monitoring of persons and objects ...”

Article 180a

“Recordings, documents and objects obtained under the conditions provided for in Article 180 § 1 (1), ... (3) ... and Article 182 of this Code can be used as evidence in the criminal proceedings. ...”

Article 181

“Measures under Article 180 of this Code can be ordered in respect of the following offences:

1. ... against the values of international law (Chapter XIII) ...”

Article 182

“(1) The measures under Article 180 of this Code shall be authorised by a written reasoned order of the investigating judge. The order shall be executed by the police. The order shall stipulate all relevant information about the individual concerned, the circumstances justifying the need for the measures, the time-limits within which the measures can be carried out – which must be proportionate to the legitimate aim pursued – and the scope and place of the measures. ...

(2) The measures can last for a maximum period of four months. Following a request by the State Attorney, the measures can be extended for a further three months. In the event of a disagreement between the State Attorney and the investigating judge, a decision shall be taken by a [three-judge] panel (Article 20 § 2). Where there are no grounds for further surveillance, the investigating judge shall order the discontinuation of the measures. If the State Attorney drops the charges, or if the results of the measures are not relevant for the criminal proceedings, [these results] shall be destroyed under the supervision of the investigating judge, who shall draw up a record accordingly and file it in the case file.

...

(6) If measures under Article 180 of this Code have been taken without an order of the investigating judge or contrary to Articles 180 and 182 § 2 of this Code, the evidence and information thus obtained cannot be used in the criminal proceedings.. ...”

Article 182a

“(1) The measures under Article 180 of this Code shall be executed by the police. During their execution, the police shall prepare daily reports and other documentation related to the recordings which, based on a special request, shall be forwarded to the investigating judge or the State Attorney’s Office.

(2) Upon the expiry of the use of the measures, the police shall submit a special report to the State Attorney’s Office and the investigating judge in which they shall indicate:

1. the time of the beginning and end of the use of the measure;

2. the number and nature of activities undertaken by the State officials in the execution of the measure;

3. the type and number of technical devices used;

4. the number and identity of persons in respect of whom the measure has been taken;

5. the type of the offences under Article 181 of this Code which were possibly prevented by the use of the measure;

6. a succinct analysis of the question whether the measure contributed to or achieved the aim indicated in the order for its use.”

56. On 18 December 2008 a new Code of Criminal Procedure was enacted (Official Gazette, nos. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012 and 56/2013) which, in so far as relevant to the instant case, provides no particular amendments to the use of secret surveillance measures.

B. Relevant practice

57. In its decision no. U-III-857/2008 of 1 October 2008 the Constitutional Court examined a complaint about the unlawfulness of secret surveillance orders made in the course of criminal proceedings. The Constitutional Court noted the relevant principles but dismissed the complaint for non-exhaustion of domestic remedies because the appellant had failed to complain about the alleged unlawfulness of his secret surveillance during the criminal proceedings. The relevant part of the decision reads:

“8.1. Where the secret surveillance order of the investigating judge, besides the operative part listing the measures to be conducted in respect of a person, contains nothing more in its statement of reasons than a mere statement referring to the [State Attorney’s] request for the use of secret surveillance in respect of a person ‘because there is probable cause to believe that an offence has been committed’ and that this is apparent from the [police reports], then it is clear that this breaches the constitutional guarantee of respect for private and family life under Article 35 of the Constitution, and the confidentiality of communications under Article 36 § 1 of the Constitution.

8.2. The Constitutional Court reiterates that the guarantees of personal rights can be restricted only in order to achieve an aim provided for by law which is also proportionate to the necessity of such restriction and that this should be decided by a court (see, *mutatis mutandis*, decision no. U-III-4286/2007 of 26 December 2007). Pursuant to the Code of Criminal Procedure, the impugned [secret surveillance] order should have contained (a) a valid assessment of the ‘probable cause to believe that the appellant, acting either alone or jointly with others, has committed’ one of the offences proscribed under Article 181 of the Code of Criminal Procedure, and (b) an assessment that the investigation ‘cannot be conducted by other means or would be extremely difficult’. Only such a statement of reasons guarantees that the existence of a ‘probable cause to believe’ that an offence proscribed under the law has been committed will precede the use of secret surveillance measures, that a minimum degree of probability exists that an *actual* – and not some possible – offence has been committed, and that the use of State powers will be logical and convincing and subsequently challengeable during the proceedings before the competent courts.

8.3. Where the secret surveillance order has not been justified in that way, it breaches the Code of Criminal Procedure. ...

9. However, the appellant failed to raise that complaint during the trial or in his appeal against the first-instance judgment (see paragraphs 2 and 5 above) and raised it for the first time in his constitutional complaint. Moreover, he did not use other remedies provided for in the Code of Criminal Procedure by which an accused can challenge evidence admitted in the case. ...

10. The Constitutional Court therefore finds that the appellant has failed to exhaust the relevant remedies ...”

58. The Supreme Court, in its decision no. I-Kž-61/09-3 of 3 February 2009, set out the relevant principles concerning the use of evidence allegedly unlawfully obtained by the use of secret surveillance measures in criminal proceedings, in the following terms:

“It is to be noted that the question of the use of evidence obtained by special investigative measures in criminal proceedings is regulated under Article 182 § 6 of the Code of Criminal Procedure. This provision expressly excludes the use of such evidence obtained contrary to Articles 180 and 182 § 2 of the Code of Criminal Procedure.

The submissions of the accused in support of their request for the exclusion of unlawfully obtained evidence on the grounds that the orders issued by the investigating judge (save for the one of 8 March 2008) contained no reasons and was thus *ex lege* unlawful evidence is not correct.

Specifically, an order (just like judgments and decisions) is an act of the court and in principle (unlike judgments and decisions) contains no reasons. The duty to state reasons in court orders is exceptional where search orders and orders for the use of special investigative measures limiting constitutional rights and freedoms are concerned. The requirement for the court to give reasoned orders for the use of special investigative measures limiting constitutional rights and freedoms flows from the requirement contained in Article 182 § 1 of the Code of Criminal Procedure. The lawmaker did not, however, seek to sanction conduct of the courts contrary to Article 182 § 1 of the Code of Criminal Procedure ..., Article 182 § 6 of the Code of Criminal Procedure provides that “the results [of the use of special investigative measures] cannot be used in criminal proceedings”.

It follows that the lack of reasons for the orders concerning the use of special investigative measures limiting constitutional rights and freedoms does not render the evidence thus obtained unlawful. This also follows from the wording of the part of Article 9 § 2 of the Code of Criminal Procedure which provides that unlawfully obtained evidence is evidence obtained in breach of the law on criminal procedure where such unlawfulness is <u>expressly envisaged</u> under a legal provision, which is not the case regarding conduct contrary to Article 182 § 1 of the Code of Criminal Procedure.

With regard to conduct contrary to Article 180 of the Code of Criminal Procedure, which would provide grounds for a conclusion of unlawfulness of evidence, it is to be noted that this provision is multi-layered.

Without doubt, evidence is *ex lege* unlawfully obtained if it is the result of the use of special investigative measures limiting constitutional rights and freedoms which have not been ordered by the court based on a request by the State Attorney; if the measures do not relate to an individual concerning one of the offences under Article 181 of the Code of Criminal Procedure; or if a measure other than those provided for by law is ordered.

A further condition, referred to in the decision of the Constitutional Court [no. U-III-857/2008 of 1 October 2008; see paragraph 57 above] invoked by the appellants is the requirement that the general conditions for the use of such orders have been met, namely, the existence of probable cause to believe that an individual has committed one of the offences listed under the law, with regard to which the order is issued, and that the investigation cannot be carried out by other means or that it would be extremely difficult.

It goes without saying that the investigating judge, when ruling on the request of the State Attorney, must take these general conditions into account. However, since the lack of reasons does not render the evidence obtained unlawful *ex lege*, the mere fact that an order has been issued based on a request by the State Attorney indicates that the general conditions have been met. However, if the investigating judge disagrees with the request to issue an order for the use of special investigative measures, and finds that the general conditions have not been met, he or she will request the panel under Article 20 § 2 of the Code of Criminal Procedure to rule on the matter, ...

Of course, a citizen whose constitutional rights and freedoms are thus limited, which is possible under Article 16 of the Constitution only in accordance with the law and in order to protect the rights and freedoms of others or the legal order, public morals or health, must be able to verify whether the legal conditions, including the general ones, for such limitation have been met, in order to protect his or her constitutional rights from unjustified infringement by the executive, and possibly judicial, authorities. It is therefore understandable that the accused are now challenging the lawfulness of the orders from the perspective of the general conditions for their use, which is certainly relevant for the question of the lawfulness of the evidence thus obtained. ...

Furthermore, in order that the court may issue an order for the use of special investigative measures, the request for their use must contain a statement of reasons to the effect that the investigation cannot be conducted by means other than interfering with the constitutional rights and freedoms, or that this would be extremely difficult. The very fact that the order has been issued, ..., even if, contrary to the law, it does not contain reasons, in itself implies acceptance of the arguments contained in the reasons for the request [for the use of special investigative measures].

However, fully accepting the rights of citizens to question the existence of the general conditions for issuing an order, the court being requested to exclude from the case file evidence obtained by such contested orders for the use of special investigative measures is obliged, where no reasons are stated in the order contrary to Article 182 § 1 of the Code of Criminal Procedure, to provide specific reasons with regard to the relevant questions. That court ... must carefully analyse the content of the request of the State attorney [for the use of special investigative measures] and other accompanying material and decide whether it can conclude from the request that, at the relevant time, there existed a suspicion that an individual had committed one of the offences listed under the law, and why it considers that obtaining the evidence by the use of measures interfering with the constitutional rights of citizens is necessary ...

These answers, contrary to the appeal submissions, can be given when ruling on the lawfulness of the orders issued [for the use special investigative measures] given that the orders, contrary to Article 182 § 1 of the Code of Criminal Procedure, do not contain a statement of reasons, and that the lawmaker, having regard to the provisions of Article 282 § 6 of the Code of Criminal Procedure, did not sanction it by unlawfulness of evidence obtained by the use of such defective orders. The purpose of the provision concerning unlawful evidence is not to exclude evidence in favour of persons in respect of whom there is a reasonable suspicion that they have committed an offence, but to protect citizens who are presumed innocent (until proven guilty) from illegal actions by the judicial and executive authorities where such actions are illegal to such an extent that the lawmaker expressly categorised the results as unlawfully obtained evidence."

59. More recently, in its decision no. I-Kž-437/13-4 of 21 August 2013, the Supreme Court interpreted the requirements of Article 180 § 1 of the Code of Criminal Procedure in the following manner:

"The statement of reasons of the impugned decision states that all orders authorising or extending secret surveillance measures ... contain the opinion that there is a probable cause to believe that the offence has been committed and that the investigation cannot be conducted by other means or would be extremely difficult. Such a statement, without specifying the circumstances which indicate that there is probable cause to believe [that an offence has been committed] and a mere [statutory] statement that the investigation cannot be conducted by other means and that it would be extremely difficult, without giving reasons in the decision, make the decision incomprehensible and contradictory ... Moreover, the impugned decision lacks relevant and sufficient reasons regarding a probable cause to believe that the accused has committed an offence proscribed under Article 181 of the Code of Criminal Procedure. It is also necessary to state the reason why the investigation cannot be conducted or would be extremely difficult to conduct by other means, as provided by Article 180 § 1 of the Code of Criminal Procedure."

60. The Constitutional Court, in its decision no. U-III-2781/2010 of 9 January 2014, accepted the position of the Supreme Court in decision no. I-Kž-61/09-3 of 3 February 2009 (see paragraph 58 above), noting that:

"The impugned orders, pursuant to the relevant provisions of the Code of Criminal Procedure, should have contained: (a) a valid assessment of the 'probable cause to believe that (the appellant) alone or jointly with others participated' in one of the offences listed under Article 181 of the Code of Criminal Procedure: and (b) an assessment that an investigation in respect of the offences 'by other means would either not be possible or would be extremely difficult".

The Constitutional Court has assessed the relevant part of the judgment of the Supreme Court and finds that the Supreme Court correctly applied the relevant provisions of the Code of Criminal Procedure by holding that, if the orders for the use of special investigative measures do not contain reasons, they can, under certain conditions, be reasoned in the first-instance judgment or the decision concerning the request for the exclusion of unlawfully obtained evidence."

61. In several decisions, nos. U-III-535/1996, U-III-1781/2004, U-III-4879/2012 and U-III-2745/2013, the Constitutional Court declared inadmissible constitutional complaints against the dismissal of objections against indictments on the grounds that those were not individual acts against which a constitutional complaint could be lodged. Similarly, in cases nos. U-III-2716/2012, U-III-2783/2012, U-III-423/2013 and U-III-1317/2014 the Constitutional Court held that a constitutional complaint could not be lodged against a decision confirming the indictment. It also

held, in cases nos. U-III-621/2005 and U-III-4921/2013, that a constitutional complaint could not be lodged directly against an indictment.

III. RELEVANT INTERNATIONAL MATERIAL

62. The relevant part of the Recommendation Rec(2005)10 of the Committee of Ministers to member States on “special investigative techniques” in relation to serious crimes including acts of terrorism of 10 April 2005 reads:

“Chapter I – Definitions and scope

For the purpose of this Recommendation, “special investigation techniques” means techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.

For the purpose of this Recommendation, “competent authorities” means judicial, prosecuting and investigating authorities involved in deciding, supervising or using special investigation techniques in accordance with national legislation.

Chapter II – Use of special investigation techniques at national level

a. General principles

1. Member states should, in accordance with the requirements of the European Convention on Human Rights (ETS No. 5), define in their national legislation the circumstances in which, and the conditions under which, the competent authorities are empowered to resort to the use of special investigation techniques.

2. Member states should take appropriate legislative measures to allow, in accordance with paragraph 1, the use of special investigation techniques with a view to making them available to their competent authorities to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution.

3. Member states should take appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review.

b. Conditions of use

4. Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals.

5. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured. In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation technique used should be made.

> 6. Member states should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.
>
> 7. Member states should, in principle, take appropriate legislative measures to permit the production of evidence gained from the use of special investigation techniques before courts. Procedural rules governing the production and admissibility of such evidence shall safeguard the rights of the accused to a fair trial."

63. Article 23 of the Council of Europe's Criminal Law Convention on Corruption (ETS no. 173, 27 January 1999) provides that each party is to adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, to enable it to facilitate the gathering of evidence in this sphere.

The explanatory report on the Convention further specifies that "special investigative techniques" may include the use of undercover agents, wiretapping, interception of telecommunications and access to computer systems.

Article 35 states that the Convention does not affect the rights and undertakings deriving from international multilateral conventions concerning special matters.

64. Article 4 of the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141, 8 November 1990) provides that each party should consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto.

65. The use of special investigative techniques, such as controlled deliveries in the context of illicit trafficking in narcotic drugs, is also provided for in Article 73 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, signed in Schengen on 19 June 1990.

66. The use of special investigative techniques, including electronic or other forms of surveillance and undercover operations, is also envisaged in Article 20 of the United Nations Convention against Transnational Organized Crime (A/RES/55/25) of 8 January 2001.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

67. The applicant complained that the secret surveillance of his telephone conversations had been in violation of the guarantees of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

68. The Government pointed out that the applicant had been under secret surveillance between 23 March and 7 August 2007 and subsequently from 17 September 2007, and that he had learnt this when the indictment had been lodged on 10 March 2009. Accordingly, in the Government's view, the six-month time-limit had started running from that time and there had been no reason for the applicant to wait for the outcome of the criminal proceedings. Furthermore, the Government pointed out that in his constitutional complaint the applicant had not expressly relied on the provisions of Article 8 of the Convention and Article 35 of the Constitution. He had only complained about the alleged unlawfulness of the secret surveillance orders and the use of their results in the criminal proceedings against him.

69. The applicant stressed that throughout the criminal proceedings at the domestic level he had argued before all levels of domestic jurisdiction that his secret surveillance had been unlawful. That had been the only way of allowing him to raise the complaint before the Constitutional Court. Thus, by complaining in substance of a violation of his rights guaranteed under Article 8 of the Convention before the Constitutional Court, and by waiting for a decision of that court, he had properly exhausted the domestic remedies and brought his complaint before the Court within the six-month time-limit.

2. The Court's assessment

70. The Court reiterates that the requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such a correlation (see *Hatjianastasiou v. Greece*, no. 12945/87, Commission decision of 4 April 1990, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts)).

71. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to

inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. In this regard, the Court has already held that in order to comply with the principle of subsidiarity, before bringing complaints against Croatia to the Court applicants are in principle required to afford the Croatian Constitutional Court the opportunity to remedy their situation (see *Orlić v. Croatia*, no. 48833/07, § 46, 21 June 2011; *Čamovski v. Croatia*, no. 38280/10, § 27, 23 October 2012; *Bajić v. Croatia*, no. 41108/10, § 66, 13 November 2012; *Remetin v. Croatia*, no. 29525/10, § 81, 11 December 2012; *Tarbuk v. Croatia*, no. 31360/10, § 29, 11 December 2012; *Damjanac v. Croatia*, no. 52943/10, § 70, 24 October 2013; and *Šimecki v. Croatia*, no. 15253/10, § 29, 30 April 2014).

72. The Court notes that the use of secret surveillance measures giving rise to the case in issue was ordered in the context of the criminal investigation which eventually led to the applicant's criminal prosecution in the competent courts. Throughout the criminal proceedings before the competent courts the applicant argued that his secret surveillance had been contrary to the relevant domestic law (see paragraphs 35, 42 and 47 above) and he raised the same complaint before the Constitutional Court in his constitutional complaint against the final judgment of the criminal courts (see paragraph 49 above). Indeed, the Court notes, given the Constitutional Court's practice of declaring any constitutional complaint against an indictment inadmissible (see paragraph 61 above), that it was the only way for the applicant to bring his complaints about the alleged unlawful use of secret surveillance before the Constitutional Court, as required under the Court's case-law (see paragraph 71 above; and *Blaj v. Romania*, no. 36259/04, § 118, 8 April 2014). The Court cannot therefore accept the Government's argument that the six-month time-limit started running from the moment when the applicant learned that the indictment had been lodged.

73. Furthermore, the Court considers that the applicant, having raised the issue in substance in his constitutional complaint, did raise before the domestic courts the complaint which he has submitted to the Court (see, by contrast, *Mađer v. Croatia*, no. 56185/07, § 137, 21 June 2011, and *Merot d.o.o. and Storitve Tir d.o.o. v. Croatia* (dec.), nos. 29426/08 and 29737/08, §§ 35 and 36 10 December 2013). The applicant thereby provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely of putting right the violations alleged against them (see *Lelas*, cited above, § 51; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 144-46, ECHR 2010; *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010; *Bjedov v. Croatia*, no. 42150/09, § 48, 29 May 2012; and *Tarbuk v. Croatia*, no. 31360/10, § 32, 11 December 2012). The Court also notes that the decision of the Constitutional Court was served on the applicant's

representative on 13 June 2011 (see paragraph 51 above) and that the applicant lodged his complaint with the Court on 20 October 2011.

74. Against the above background, the Court rejects the Government's objection.

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

B. Merits

1. The parties' submissions

76. The applicant contended that his secret surveillance had been unlawful because it had been based on orders of the investigating judge issued contrary to the relevant domestic law and the case-law of the higher domestic courts. Those orders of the investigating judge had contained no assessment of the likelihood that an offence had been committed and that the investigation into that offence could not be conducted by other, less intrusive, means. At the same time the relevant domestic law provided for judicial control of secret surveillance measures and required the judicial authority to examine the reasons put forward by the prosecuting authorities before issuing the secret surveillance orders. The statutory requirement for a reasoned order was necessary as a form of effective judicial control of measures interfering with the fundamental rights of an individual.

77. The Government accepted that there had been interference with the applicant's rights under Article 8 of the Convention. However, they considered that such interference had been justified. In particular, the secret surveillance orders had been based on Article 180 of the Code of Criminal Procedure and had been issued and supervised by an investigating judge pursuant to reasoned and substantiated requests from the OSCOC which the investigating judge had accepted as such. Moreover, such interference had pursued the legitimate aim of investigating and prosecuting crime and had been proportionate to the circumstances and gravity of the offence at issue.

2. The Court's assessment

(a) General principles

78. The Court reiterates that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8. Their monitoring amounts to an interference with the exercise of one's rights under Article 8 (see *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82).

79. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see, amongst many others, *Kvasnica v. Slovakia*, no. 72094/01, § 77, 9 June 2009).

80. The expression "in accordance with the law" under Article 8 § 2 in general requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law (see, for example, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176-A).

81. In particular, in the context of secret measures of surveillance as the interception of communications, the requirement of legal "foreseeability" cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret the risks of arbitrariness are evident. Thus, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see, for example, *Malone*, cited above, § 67; *Huvig v. France*, 24 April 1990, § 29, Series A no. 176-B; *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 93, ECHR 2006 XI; and *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009).

82. The Court has also stressed the need for safeguards in this connection (see *Kvasnica*, cited above, § 79). In particular, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Bykov*, cited above, § 78, and *Blaj*, cited above, § 128).

83. Furthermore, in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist guarantees against abuse which are adequate and effective. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise

them, and the kind of remedy provided by the national law (see *Klass and Others v. Germany*, 6 September 1978, § 50, Series A no. 28; *Weber and Saravia*, cited above, § 106; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, § 77, 28 June 2007; and *Kennedy v. the United Kingdom*, no. 26839/05, § 153, 18 May 2010).

84. This in particular bears significance as to the question whether an interference was "necessary in a democratic society" in pursuit of a legitimate aim, since the Court has held that powers to instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions (see *Kennedy*, cited above, § 153). In assessing the existence and extent of such necessity the Contracting States enjoy a certain margin of appreciation but this margin is subject to European supervision. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society". In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded (see *Kvasnica,* cited above, § 80; and *Kennedy,* cited above, § 154).

(b) Application of these principles to the present case

(i) Whether there was an interference

85. The Court notes that it is not in dispute between the parties that by tapping the applicant's telephone and covertly monitoring him there was an interference with his right to respect for "private life" and "correspondence", guaranteed under Article 8 of the Convention. The Court sees no reason to hold otherwise (see, for example, *Malone*, cited above, § 54; *Khan v. the United Kingdom*, no. 35394/97, § 25, ECHR 2000-V; and *Drakšas v. Lithuania*, no. 36662/04, §§ 52-53, 31 July 2012).

(ii) Whether the interference was justified

86. The Court observes that in the instant case the applicant did not complain in general about the existence of legislation allowing measures of covert surveillance. The basis of his complaint was a specific instance of such surveillance which took place in connection with criminal proceedings against him. As the Court must first ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant domestic law in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction (see *Kruslin*, cited above, § 32). Nevertheless, in cases arising from individual applications, the Court must

as a rule focus its attention not on the law as such but on the manner in which it was applied to the applicant in the particular circumstances (see *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 48, 8 March 2011).

87. In this connection the Court notes that the applicant was subjected to the measures of secret surveillance on the basis of Article 180 § 1 (1) of the Code of Criminal Procedure (see paragraph 55 above). It follows that the applicant's covert surveillance had a basis in the relevant domestic law, the accessibility of which does not raise any problem in the instant case (see *Kruslin*, cited above, §§ 29-30)

88. The applicant's complaints are primarily focused not on the lack of legal basis in the relevant domestic law but on the failure of the investigating judge to comply with the procedures envisaged by law, in particular those related to an effective assessment as to whether the use of secret surveillance was necessary and justified in the particular case, as required under Article 182 § 1 of the Code of Criminal Procedure (see paragraphs 55 and 70 above).

89. Thus the central question for the Court to determine is whether the relevant domestic law, including the way in which it was interpreted by the domestic courts, indicated with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities, and in particular whether the domestic system of secret surveillance, as applied by the domestic authorities, afforded adequate safeguards against various possible abuses (compare *Malone*, cited above, § 70; *Kruslin*, cited above, §§ 35-36; *Huvig*, cited above, §§ 34-35; and *Kopp v. Switzerland*, 25 March 1998, §§ 66-75, *Reports of Judgments and Decisions* 1998-II). Since the existence of adequate safeguards against abuse is a matter closely related to the question whether the "necessity" test was complied with in this case, the Court will address both the requirement that the interference be "in accordance with the law" and that it be "necessary" (see *Kvasnica*, cited above, §§ 83-84).

90. The Court notes that, on the face of it, the relevant domestic law clearly provides that for any secret surveillance measures in the context of criminal proceedings to be lawful, they must be ordered by an investigating judge upon a request by the State Attorney (see paragraph 55 above; Article 182 of the Code of Criminal Procedure). The statutory preconditions for issuing a secret surveillance order are the existence of a probable cause to believe that an individual alone, or jointly with others, has committed one of the offences proscribed by law (see paragraph 55 above; Article 181 of the Code of Criminal Procedure), and that an investigation in respect of the offences in issue is either not possible or would be extremely difficult (see paragraph 55 above; Article 180 § 1 of the Code of Criminal Procedure).

91. The domestic law also expressly provides that the investigating judge's order authorising the use of secret surveillance must be in written form and must contain a statement of reasons specifying: information

concerning the person in respect of whom the measures are carried out, relevant circumstances justifying the need for secret surveillance measures, the time-limits in which the measures can be carried out – which must be proportionate to the legitimate aim pursued – and the scope of the measures (see paragraph 55 above; Article 182 § 1 of the Code of Criminal Procedure).

92. The domestic law thereby provides for prior authorisation of the use of secret surveillance measures which must be sufficiently thorough and capable of demonstrating that the statutory conditions for the use of secret surveillance have been met and that the use of such measures is necessary and proportionate in the given circumstances. Strictly speaking, every individual under the jurisdiction of the Croatian authorities, when relying on these provisions of the relevant domestic law, should be confident that the powers of secret surveillance will be subjected to prior judicial scrutiny and carried out only on the basis of a detailed judicial order properly stipulating the necessity and proportionality of any such measure.

93. The importance of the prior judicial scrutiny and reasoning of the secret surveillance orders was emphasised in the decision of the Constitutional Court no. U-III-857/2008 of 1 October 2008. In particular, it explained that only a detailed statement of reasons in the secret surveillance orders "guarantees that the existence of a 'probable cause to believe' that an offence proscribed under the law has been committed will precede the use of secret surveillance measures, that a minimum degree of probability exists that an actual – and not some possible – offence has been committed, and that the use of State powers will be logical and convincing and subsequently challengeable during the proceedings before the competent courts". In the absence of this, according to the Constitutional Court, a secret surveillance order will breach the Code of Criminal Procedure (see paragraph 57 above).

94. In this connection the Court has also emphasised that verification by the authority empowered to authorise the use of secret surveillance, *inter alia*, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, committing or having committed certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration (see *Klass and Others*, cited above, § 51). It is therefore important that the authorising authority – the investigating judge in the instant case – determines whether there is compelling justification for authorising measures of secret surveillance (compare *Iordachi and Others v. Moldova*, no. 25198/02, § 51, 10 February 2009).

95. In the instant case the four secret surveillance orders issued by the investigating judge of the Zagreb County Court in respect of the applicant

were essentially based only on a statement referring to the existence of the OSCOC's request for the use of secret surveillance and the statutory phrase that "the investigation could not be conducted by other means or that it would be extremely difficult" (see paragraphs 9, 11, 13 and 17 above). No actual details were provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences had been committed and that the investigation could not be conducted by other, less intrusive, means.

96. Although that apparently conflicted with the requirements of the relevant domestic law and the above-cited case-law of the Constitutional Court (see paragraphs 55 and 93 above), it appears to have been approved through the practice of the Supreme Court and later endorsed by the Constitutional Court. In particular, the Supreme Court held, dealing with the matter in the context of the admissibility of evidence, which is a different matter under the Convention (see paragraph 99 below), that a lack of reasons in the secret surveillance orders, contrary to Article 182 § 1 of the Code of Criminal Procedure, could be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the proceedings by the court being requested to exclude the evidence thus obtained from the case file (see paragraph 58 above). This appears to be accepted by the Constitutional Court, which, in its decision no. U-III-2781/2010 of 9 January 2014, held that if the secret surveillance orders did not contain reasons, under certain conditions reasons could be stated in the first-instance judgment or the decision concerning the request for exclusion of unlawfully obtained evidence (see paragraph 60 above).

97. It follows from the foregoing that whereas the Code of Criminal Procedure expressly envisaged prior judicial scrutiny and detailed reasons when authorising secret surveillance orders, in order for such measures to be put in place, the national courts introduced the possibility of retrospective justification of their use, even where the statutory requirement of prior judicial scrutiny and detailed reasons in the authorisation was not complied with. In an area as sensitive as the use of secret surveillance, which is tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions, the Court has difficulty in accepting this situation created by the national courts. It suggests that the practice in the administration of law, which is in itself not sufficiently clear given the two contradictory positions adopted by both the Constitutional Court and the Supreme Court (see paragraphs 93 and 96, and 57-61 above), conflicts with the clear wording of the legislation limiting the exercise of the discretion conferred on the public authorities in the use of covert surveillance (compare *Kopp*, cited above, § 73; and *Kvasnica*, cited above, § 87).

98. Moreover, the Court considers that in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of

the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law.

99. This is particularly true in cases where the only effective possibility for an individual subjected to covert surveillance in the context of criminal proceedings is to challenge the lawfulness of the use of such measures before the criminal courts during the criminal proceedings against him or her (see paragraph 72 above). The Court has already held that although the courts could, in the criminal proceedings, consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint (see *Khan*, cited above, § 44; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 86, ECHR 2001-IX; and *Goranova-Karaeneva*, cited above, § 59).

100. This can accordingly be observed in the present case, where the competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant's Article 8 rights (see paragraphs 46 and 48 above). At the same time, the Government have not provided any information on remedies – such as an application for a declaratory judgment or an action for damages – which may become available to a person in the applicant's situation (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 102).

101. Against the above background, the Court finds that the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirements of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society".

102. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

103. The applicant complained of the lack of impartiality of the trial bench and the use of evidence obtained by secret surveillance in the criminal proceedings against him. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads:

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

A. Alleged lack of impartiality of the trial bench

1. Admissibility

(a) The parties' submissions

104. The Government submitted that during the proceedings the applicant had never complained about the composition of the trial bench nor had he ever requested that Judge Z.Č. be disqualified from sitting in the case. Moreover, he had not alleged a lack of impartiality of the trial bench in his appeal but only in the constitutional complaint. Thus, in the Government's view, it could not be said that the alleged lack of impartiality of Judge Z.Č. had affected the applicant's right to a fair trial.

105. The applicant pointed out that, in view of the Supreme Court's decision dismissing the request of the President of the Dubrovnik County Court for the proceedings to be transferred to another court on account of the previous involvement of the judges of that court in the case (see paragraph 40 above), any possibility of complaining about the trial bench's lack of impartiality had been purely theoretical and would not have yielded any result in practice.

(b) The Court's assessment

106. The Court notes that after Judge Z.Č. had expressed his concerns about an appearance of his impartiality in the applicant's case to the President of the Dubrovnik County Court and asked to withdraw from the case (see paragraph 38 above), the latter requested permission from the Supreme Court to have the proceedings transferred to another court since all the judges of the Dubrovnik County Court had already been involved in the applicant's case at earlier stages of the proceedings (see paragraph 39 above). However, the Supreme Court dismissed that request as it did not see any reason to doubt the impartiality of the Dubrovnik County Court judges.

107. In such circumstances any other complaint by the applicant about the composition of the trial bench or a lack of impartiality of the Dubrovnik County Court judges would have been theoretical and illusory, whereas the Convention is intended to guarantee rights which are practical and effective

(see, amongst many other authorities, *Erkapić v. Croatia*, no. 51198/08, § 78, 25 April 2013).

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

2. *Merits*

(a) The parties' submissions

109. The applicant pointed out that during the proceedings the president of the trial bench, Judge Z.Č., had, of his own motion, expressed concerns about the appearance of his impartiality as he had previously taken part in the proceedings extending the applicant's pre-trial detention. Referring to the case-law of the Court and the relevant domestic practices, he had submitted that there were ascertainable facts raising doubts as to his impartiality. In the applicant's view, this meant that the judge had lacked impartiality in terms of the subjective aspect of the Court's relevant test and, in any event, that the trial bench had lacked objective impartiality as this had been sufficient evidence to raise legitimate doubts as to the lack of Judge Z.Č.'s impartiality. Moreover, the President of the Dubrovnik County Court had shared the concerns expressed by Judge Z.Č. and had therefore requested the Supreme Court to transfer the proceedings to another court, but the Supreme Court had dismissed that request.

110. The Government submitted that the applicant had failed to rebut the presumption of Judge Z.Č.'s impartiality in terms of the subjective aspect of the Court's relevant test as the judge had never expressed any personal bias or prejudice in the applicant's case. As to the objective test of impartiality, the Government considered that the mere participation of a judge at previous stages of the proceedings could not in itself raise any doubts as to his or her lack of impartiality. It was true that during the proceedings Judge Z.Č. had asked to withdraw from the case, but he had merely relied on his interpretation of the relevant domestic requirements without providing concrete grounds for the possible appearance of a lack of impartiality on his part. The final decision concerning his request had been given by the Supreme Court, which had examined the request for transfer of the proceedings to another court submitted by the President of the Dubrovnik County Court. The Supreme Court had explained that the fact that a judge had ordered pre-trial detention could not affect his or her impartiality as such a decision did not concern the same issues that the judge had to decide when examining the case on the merits. In the Government's view, this interpretation had followed the relevant practice of the Court and the Constitutional Court. The applicant had thus misconstrued the request of Judge Z.Č. to withdraw from the case as that request had merely referred to

the relevant practice on the matter and not any concrete circumstances of the case.

(b) The Court's assessment

(i) General principles

111. The Court reiterates that Article 6 § 1 of the Convention requires a court to be impartial. Impartiality denotes the absence of prejudice or bias. According to the Court's case-law, there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1. The first test (subjective) consists in seeking to determine the personal conviction of a particular judge in a given case. The personal impartiality of a judge must be presumed until there is proof to the contrary. As to the second test (objective), it means determining whether, quite apart from the personal conduct of a judge, there are ascertainable facts which may raise doubts as to his/her impartiality (see, for example, *Padovani v. Italy*, 26 February 1993, § 26, Series A no. 257-B; *Gautrin and Others v. France*, 20 May 1998, § 58, *Reports* 1998-III).

112. The Court notes that in the vast majority of cases raising impartiality issues it has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III).

113. The Court also emphasises that in this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII; and *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009).

114. In cases where a judge presiding over the trial has already dealt with the case at an earlier stage of the proceedings and has given various decisions in respect of the applicant at the pre-trial stage – including decisions on continued detention – the Court has observed that, in general, one of the roles of the trial judge is to manage the proceedings with a view

to ensuring the proper administration of justice. It is perfectly normal that a judge may consider and dismiss an application for release lodged by a detained defendant. In doing so the judge is required, under both the Convention and the domestic law, to establish the existence of a "reasonable suspicion" against the defendant. The mere fact that a trial judge has already taken pre-trial decisions in the case, including decisions relating to detention, cannot in itself justify fears as to his impartiality; only special circumstances may warrant a different conclusion (see *Hauschildt v. Denmark*, 24 May 1989, § 51, Series A no. 154; *Sainte-Marie v. France*, no. 12981/87, § 32, 16 December 1992; and *Romenskiy v. Russia*, no. 22875/02, § 27, 13 June 2013). What matters is the extent and nature of the pre-trial measures taken by the judge (see *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255-A).

115. Any misgivings which the accused may occasion in these instances are understandable but cannot in themselves be treated as objectively justified. Indeed, the questions which the judge has to answer when taking decisions on continuing detention are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether there are prima facie grounds for the suspicion against an accused of having committed an offence; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and formal finding of guilt are not to be treated as being the same (see *Jasiński v. Poland*, no. 30865/96, § 55, 20 December 2005).

(ii) Application of these principles to the present case

116. The Court notes that during the proceedings in the applicant's case his pre-trial detention was extended four times by a three-judge panel of the Dubrovnik County Court in which Judge Z.Č., who later assumed responsibility for the applicant's case as the president of the trial bench, took part as either the president or member of the panel (see paragraphs 24, 30, 32 and 41 above). The applicant's detention was extended on the grounds of a risk of reoffending and the gravity of the charges.

117. The assessment of those grounds involved an analysis of all the relevant circumstances of the offence, the manner of its commission and the gravity of specific elements of the charges such as the necessary criminal resolve and engagement in the commission of the offence (see paragraphs 24 and 30 above). However, in the assessment, the judges referred only to the offence as "the subject matter of the charges", which did not convey their conviction that the applicant had committed the offences in question and cannot be considered tantamount to a finding of guilt (compare *Jasiński*, cited above, § 56, and, by contrast, *Romenskiy*, cited above, § 28).

118. Similarly, the Court does not consider that the reference to the particular circumstances of the charges, indicating the gravity of the offences and the applicant's previous convictions, could be seen as going beyond what should be regarded as an objective and reasonable evaluation of the situation for the purposes of deciding the question of his pre-trial detention. These elements played a role in the assessment of the grounds for ordering pre-trial detention under the relevant domestic law and, as such, had to be reviewed by Judge Z.Č. from the point of view of justification for the applicant's continued detention. However, they could not be seen as indicating any preconceived view of the applicant's guilt or sentence which should be imposed on him (see *Jasiński*, cited above, § 56).

119. The Court therefore considers that the mere fact that Judge Z.Č. sat as a member of the three-judge panel of the Dubrovnik County Court which extended the applicant's detention does not raise an issue of lack of impartiality under the Convention.

120. The Court notes, however, that during the proceedings, owing to his previous involvement in the case, Judge Z.Č., of his own motion, sought leave from the President of the Dubrovnik County Court to withdraw from the case as president of the trial bench (see paragraph 38 above). Leave was granted by the President of the Dubrovnik County Court, who, relying on the same grounds, asked the Supreme Court to transfer the proceedings to another court (see paragraph 39 above) because all the judges of the Criminal Division of that court had already taken part in the proceedings. However, leave was refused by the Supreme Court on the grounds that there were no reasons to doubt the impartiality of the Dubrovnik County Court judges. It explained that the mere fact that a judge had presided over the panels extending the applicant's detention could not raise any issue of his impartiality since the questions to be decided when the detention was extended differed from those which the judge had to decide when examining the case on the merits (see paragraph 40 above).

121. Whereas this situation could have raised certain misgivings on the part of the applicant, the Court notes that, in his request, Judge Z.Č. did not refer to any specific reason for his withdrawal but requested leave to withdraw as a merely precautionary measure (see paragraph 38 above). Moreover, in dismissing the request the Supreme Court gave sufficient and relevant reasons for its decision, which were compatible with the Court's case-law (see paragraph 120 above, and, by contrast, *Rudnichenko v. Ukraine*, no. 2775/07, §§ 116-18, 11 July 2013).

122. In view of the foregoing, the Court finds that the applicant's misgivings about the impartiality of the judge presiding over his trial cannot be regarded as objectively justified.

123. There has accordingly been no violation of Article 6 § 1 of the Convention.

B. Use of evidence obtained by secret surveillance in the proceedings

1. Admissibility

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

2. Merits

(a) The parties' submissions

125. The applicant contended that he had not had a fair trial because the trial bench had admitted in evidence the recordings unlawfully obtained by virtue of the secret surveillance orders and had based its decisions on that evidence. This had been contrary to the relevant rules on admissibility of evidence under the Code of Criminal Procedure which had rendered his trial unfair.

126. The Government submitted that during the proceedings the applicant had had every possibility to examine the recordings obtained by secret surveillance and to oppose their use as evidence. Indeed, he had challenged the lawfulness of such evidence and had asked that they be excluded from the case file. The domestic courts had dismissed his request and provided sufficient reasons for their decisions.

(b) The Court's assessment

(i) General principles

127. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see, amongst many others, *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV).

128. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where

a violation of another Convention right is concerned, the nature of the violation found (see *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

129. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, amongst many others, *Bykov*, cited above, § 90).

130. As regards, in particular, the examination of the nature of the Convention violation found, the Court observes that in several cases it has found the use of covert listening devices to be in breach of Article 8 since such interference was not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of a particular case conflict with the requirements of fairness guaranteed by Article 6 § 1 (see *Khan*, cited above, §§ 25-28; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 37-38, ECHR 2001-IX; and *Bykov*, cited above, §§ 94-105).

(ii) Application of these principles to the present case

131. The Court notes at the outset that the applicant did not put forward any argument disputing the reliability of the information obtained by secret surveillance measures but limited his objection exclusively to the formal use of such information as evidence during the proceedings (compare *Khan*, cited above, § 38; *P.G. and J.H.*, cited above, § 79; and *Bykov*, cited above, § 95).

132. He also had an effective opportunity to challenge the authenticity of the evidence and oppose its use and used that opportunity during the proceedings before the first-instance court (see paragraphs 35 and 42 above), and in his appeal (see paragraph 47 above) and constitutional complaint (see paragraph 49 above). The domestic courts examined his arguments on the merits and provided reasons for their decisions (see paragraphs 46, 48 and 50 above). The fact that the applicant was unsuccessful at each step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use (see *Schenk*, cited above, § 47, and *Khan*, cited above, § 38).

133. The Court further notes that the impugned evidence was not the only evidence on which the conviction was based (compare *Schenk*, cited

above, § 48). When convicting the applicant the Dubrovnik County Court took into account the applicant's statements and the statements of his co-accused and examined them against the statements of other witnesses and evidence obtained by numerous searches and seizures (see paragraph 45 above).

134. Against the above background, the Court considers that there is nothing to substantiate the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary (see *Bykov*, cited above, § 98). In conclusion, the Court finds that the use of the impugned recordings in evidence did not as such deprive the applicant of a fair trial.

135. There has accordingly been no violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

136. Article 41 of the Convention provides:

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

A. Damage

137. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

138. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

139. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

140. The applicant also claimed 16,493.75 Croatian kunas for the costs and expenses incurred before the Court.

141. The Government considered the applicant's claim unsubstantiated and unfounded.

142. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,160 plus any tax that may be chargeable, covering costs for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the lack of impartiality of the trial bench;

4. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the use of evidence obtained by secret surveillance in the criminal proceedings against the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas, at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,160 (two thousand one hundred sixty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President