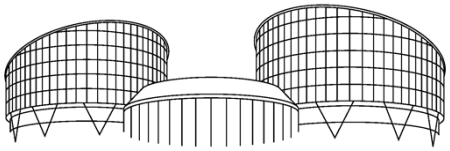

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SVETINA v. SLOVENIA

(Application no. 38059/13)

JUDGMENT

STRASBOURG

22 May 2018

FINAL

22/08/2018

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Svetina v. Slovenia,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Iulia Motoc,
Carlo Ranzoni,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 27 March 2018,

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

PROCEDURE

1. The case originated in an application (no. 38059/13) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Matjaž Svetina, on 5 June 2013.

2. The applicant was represented by Mr B. Gvozdić, a lawyer practising in Sežana. The Slovenian Government ("the Government") were represented by their Agent, Mr L. Bembič, State Attorney.

3. The applicant alleged that Articles 6 and 8 of the Convention had been breached on account of the examinations of two mobile telephones in the course of the criminal proceedings.

4. On 25 August 2015 the aforementioned complaints were communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1982 and lives in Koper.

A. Circumstances of X's death and preliminary police inquiry

6. After going missing on 4 November 2007, X was found dead near the local Komen-Branik road, close to the town of Komen, on the morning of 5 November 2007. He had been repeatedly stabbed and cut with a knife and then run over by a car. The police were called to the scene, as were the district state prosecutor and the duty investigating judge.

7. On examining the crime scene, X's mobile telephone was found in his car. The incoming and outgoing calls and the text messages sent to and from X's telephone number were checked by police officers at the scene. It appeared from the telephone records that on 4 November 2007 X had communicated only with a person using a certain telephone number, from which a message of an explicitly sexual nature had also been sent to X. After the telephone directory was checked it was established, presumably by the police, that the telephone in question belonged to a woman who happened to be the applicant's grandmother, with whom, as established on the basis of the official records, the applicant lived. Furthermore, having been informed that X's mobile telephone had been found, the district state prosecutor requested the duty investigating judge to order the S company – the mobile network operator in question – to produce records of telephone calls made and text messages sent from the telephone.

8. On the same day (5 November 2007) the investigating judge of the Koper District Court issued an order for a search of X's home and ordered the S company to provide data concerning communication undertaken via X's mobile telephone. The S company on the same day submitted to the Koper District Court a disk containing X's telephone records.

9. On the morning of 6 November 2007 the police stopped the applicant's car and subjected him to a so-called "security check" (*varnostni pregled*), finding a knife (allegedly bearing traces of what could be blood) and a mobile telephone in the applicant's pocket. After examining his telephone they established that he had used the aforementioned telephone number from which the aforementioned calls had been made and the aforementioned message sent to X. They seized these objects and arrested the applicant.

10. On the same day (6 November 2007), relying mostly on information found in X's and the applicant's telephones pointing to a link between X and the applicant, the investigating judge issued a search order in respect of the applicant's home and the cars he was using. The state prosecutor furthermore requested that a court order for the obtaining of the applicant's comprehensive telephone records be issued.

11. On 7 November 2007 the investigating judge issued an order that the M company – a mobile network operator – provide data concerning the applicant's mobile telephone record. The M company provided a disk containing the requested data on the same day.

12. In the course of the preliminary inquiry, the investigating judge ordered a post-mortem examination of X, a DNA analysis and a comparison of biological traces found on the applicant's clothes and other objects seized during the home search with those found on X's body. She also ordered a medical examination of the applicant with a view to establishing any injuries.

13. The applicant, represented by counsel, was heard on 8 November 2017 and was subsequently detained on remand.

B. Judicial criminal investigation against the applicant and the indictment

14. On 16 November 2007 the investigating judge opened a judicial criminal investigation against the applicant in respect of the criminal offence of aggravated murder. She, *inter alia*: ordered that a reconstruction be carried out at the crime scene; appointed a psychiatrist and a psychologist to examine the applicant and prepare opinions; ordered forensic experts in vehicle science and car crash investigations to prepare reports on specific aspects of the case; and again ordered that the M company and the S company provide traffic data relating to X's and the applicant's telephones. She also examined a number of witnesses.

15. On 29 November 2007 the applicant was, at his request, heard by the investigating judge, to whom he admitted to running over X, but submitted that this had merely been an accident.

16. On 24 December 2007 the state prosecutor filed an indictment for aggravated murder against the applicant, alleging that he had killed X by stabbing him thirteen times and cutting him at least nine times on his head, neck, chest and other parts of the body and running over him in his car.

C. Trial

17. Following his unsuccessful objection to the indictment, the applicant was put on trial for aggravated murder. A number of hearings were held at which witnesses, experts and evidentiary material were examined and various expert reports ordered and subsequently read out.

18. On 10 June 2008 the Koper District Court found the applicant guilty as charged and sentenced him to thirteen years in prison.

19. On 12 December 2008 the Koper Higher Court, after an appeal by the applicant, quashed the first-instance judgment, finding that the lower court had failed to clarify the facts surrounding a possible shoe imprint on the victim's back, which could have indicated the presence of a third person at the scene of the crime. The case was remitted to the Koper District Court for fresh examination.

20. In the retrial proceedings, several hearings were held and the applicant lodged an application for the exclusion of all evidence from (i) the records of the crime-scene investigation until (ii) the records of the last hearing in the first set of proceedings, on the grounds that that evidence had allegedly been tainted by the unlawful examinations of his and X's telephones. He argued that the examinations of his and X's telephones had violated his and X's rights under Article 37 of the Constitution (see paragraph 32 above) and that the relevant court orders had been issued a week too late. He also requested that the police officers who had subjected him to a security check (see paragraph 9 above) and arrested him be examined in this connection. Both requests were refused by the court.

21. On 4 September 2009 the Koper District Court convicted the applicant for the aggravated murder of X and sentenced him to twelve years' imprisonment. In view of (i) the expert opinions regarding the shoe traces on X's back which had led to the conclusion that the presence of another person at the crime scene prior to X's death could not be excluded, and (ii) the fact that the knife with which X had been stabbed and cut had not been found, the Koper District Court held that there was insufficient proof that the applicant had stabbed and cut X. However, the court found on the basis of the forensic medical evidence that X had still been alive before he had been run over by the car and that the injuries to X's chest, spine and aorta, which had been the direct cause of his death, had been caused by the applicant having intentionally run him over with his car. It further found it proven on the basis of the evidence at the scene – such as (i) a piece of rubber tube belonging to the applicant's car, (ii) the applicant's biological traces found on X's body, (iii) X's biological traces found on, *inter alia*, the applicant's clothing (which was blood-stained) and on the outside of the applicant's car – that the applicant had been beyond doubt at the crime scene and had had contact with X. Referring, in particular, to the findings of the experts in vehicle science, who had performed reconstructions at the scene testing the applicant's versions of events, the court discounted the possibility that the applicant had run over X by accident. The court furthermore found that the applicant and X had known each other, which was confirmed by the applicant's statements as well as by telephone records and witness testimony. Lastly, the court referred to the telephone records, together with other evidence such as medical evidence and X's petrol bill, when elaborating on the time of death, finding that it had undoubtedly occurred on 4 November 2007 – probably sometime after 6.24 p.m., when the last (missed) call from X's telephone had been recorded on the applicant's telephone.

22. As regards the procedural decisions taken during the proceedings the court gave the following explanation:

- It refused a request lodged by the applicant for access to the police notes on the examination of his telephone because it would have been unlawful to include in the file evidence obtained without a court order.

- In view of the foregoing conclusion that the examination of the applicant's telephone could have not been admitted to the file, the court refused as unnecessary a request by the applicant for the examination of the officers who had seized the applicant's telephone (see paragraph 20 above).

- As regards the exclusion of evidence (see paragraph 20 above) the court explained that the applicant had become a subject of investigation following the examination of the data in X's telephone, which had not interfered with the applicant's rights under Article 37 of the Constitution (see paragraph 32 below). It further noted that the examination of the applicant's telephone had amounted to a violation of the said provision but carried no evidentiary weight, as at that point the police had already obtained the necessary information from X's telephone. In addition, the court noted that the results of this examination had not been included in the file and had not been relied on by the court.

D. Appeals

23. On 9 November 2009 the applicant appealed, complaining, *inter alia*, that the judgment had violated his defence rights. In particular, he alleged that the district court should have excluded all evidence from the file because it had been based on the police's examinations of X's and his own mobile telephone without the necessary court order. He further stated as follows:

> "It is irrelevant that the police, by [their] unlawful interference with [X]'s mobile telephone, did not directly violate the appellant's right under Article 37 of the Constitution ["Privacy of correspondence and other means of communication"], because the fact remains that the police obtained that evidence (data from [X]'s mobile telephone) without a court order – that is to say unlawfully."

24. The applicant moreover argued that the examination of X's telephone alone had not adduced enough evidence to arrest the applicant and that that had been possible only after the applicant's telephone had been examined. Thus, in his view, the impugned judgment should not have concluded that the examination of his telephone had had insignificant evidentiary value.

25. On 27 January 2010 the Koper Higher Court allowed the applicant's appeal in part and reduced his sentence to nine years in prison. The court agreed with the applicant that the act of which he had been convicted – that is to say running over X with his car – did not in itself constitute murder with aggravating factors (that is to say aggravated murder), as the first-instance court had not proved that X had sustained severe physical pain or psychological suffering. However, all the other applicant's complaints,

including the one regarding the unlawful examinations of his and X's mobile telephones, were dismissed.

26. As regards the examination of X's telephone the higher court found that, regardless of whether the police officers had examined X's telephone before the issuance of the court order, what was crucial was that they had received the court order for the telephone records to be produced before they had identified and located the applicant. Therefore, the examination of X's mobile telephone, which had constituted an urgent step in the police inquiry, had not been conducted in violation of his constitutionally guaranteed right to protection of the privacy of communication. As regards the examination of the applicant's mobile telephone, the higher court agreed with the lower court that "the examination of the applicant's telephone [had been] ... unconstitutional, but this violation had not been important in the evidentiary sense". The higher court also upheld the lower court's decision not to obtain from the police their notes on the examination of the applicant's telephone.

27. On 8 April 2010 the applicant lodged an appeal on points of law, complaining of, *inter alia*, the allegedly unlawful examinations of X's and the applicant's telephones and reiterating the arguments he had put forward in his appeal (see paragraphs 23 and 24 above). In particular, he argued that the police had obtained crucial evidence – that is to say the message with explicitly sexual content – when examining X's telephone without having a court order to do so, and that his arrest had been based on a subsequent unlawful examination of his telephone.

28. On 22 December 2011 the Supreme Court dismissed the applicant's appeal on points of law. Firstly, as regards the police examination of X's mobile telephone, the Supreme Court pointed out that the applicant had not even argued that the examination of X's telephone had directly violated his own right to privacy. While not excluding the possibility that the examination of a deceased's person's telephone might impinge upon the most intimate spheres of his or her dignity, it considered that in the case at hand it had not interfered with X's right to privacy, as personality rights ceased at death. Neither had, in the Supreme Court's view, the applicant's own constitutionally guaranteed privacy rights been interfered with, as the examination had not revealed his identity. Moreover, the district state prosecutor and the duty investigating judge had been present at the scene of the crime when the police had discovered the telephone in X's car, and the applicant had been arrested only after the court order for the examination of X's telephone had been issued. The Supreme Court concluded that the police's examination of X's mobile telephone had not interfered with the applicant's right to privacy and that the impugned examination had not been causally related to the incriminating evidence.

29. Secondly, with regard to the police's examination of the applicant's mobile telephone, the Supreme Court noted that it had been undertaken

without a court order and referred to the Koper Higher Court's finding that the examination had been unconstitutional. However, in the Supreme Court's view, the information on whether the text message with sexual content had been sent from the applicant's telephone would have inevitably been discovered, either (i) by means of a simple call to the number from which the message had been sent, (ii) by checking the applicant's telephone's SIM card (for which, in the Supreme Court's view, no court order would have been necessary), or (iii) on the basis of a court order, which had in point of fact later been issued. In view of this conclusion, the Supreme Court considered that, regardless of the fact that the police had examined the applicant's telephone without a court order, the identification of the applicant's mobile telephone number as the one from which the text message in question had been sent did not constitute inadmissible evidence that should have been excluded from the case file.

E. Constitutional complaint

30. The applicant lodged a constitutional complaint, reiterating the allegations made in his previous appeals. Relying on Article 37 (see paragraph 32 below) the applicant argued that the examinations of his and X's telephone had been unlawful and that the examination of his telephone had violated the aforementioned provision, as well as Article 8 of the Convention. Relying on Article 15 of the Constitution (again, see paragraph 32 below), the applicant argued that the lower courts should have excluded the evidence obtained unlawfully. In particular, as regards the examination of X's telephone, the applicant argued that he "had not sought redress for the violation of X's right to privacy (mental integrity) and freedom of communication as he had not been entitled to do so [... but rather] had exclusively pointed out that the violation had occurred and the [trial] court had based its decision [to convict the applicant] on the consequences of that violation ..." In this connection he, referring to X's "right to piety" (*pravica do pietete*), disputed the Supreme Court's view that X's right to privacy had ceased with his death and pointed out that a court order had been nevertheless subsequently issued. With regard to the Supreme Court's finding that the evidence in question would have been inevitably discovered, the applicant argued that the domestic law contained a strict rule requiring the exclusion of all evidence obtained by means violating human rights ("the domestic exclusionary rule"). He furthermore argued that there had been a violation of Article 29 (see paragraph 32 below) of the Constitution because the first-instance court refused to obtain from the police their notes on the examination of his telephone.

31. On 28 January 2013 the Constitutional Court decided not to accept the applicant's constitutional complaint for consideration, pursuant to section 55b(2) of the Constitutional Court Act (see paragraph 37 below).

II. RELEVANT DOMESTIC LAW

A. The Constitution

32. The Constitution of the Republic of Slovenia (Official Gazette nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06), provides, in so far as relevant, as follows:

Article 15

(Exercise and Limitation of Rights)

"Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution.

The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary owing to the particular nature of an individual right or freedom.

Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution.

Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed. ..."

Article 26

(Right to Compensation)

"Everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such a function or activity within a state or local community authority or as a bearer of public authority.

Any person suffering damage also has the right to claim, in accordance with the law, compensation directly from the person or authority that caused such damage."

Article 29

(Legal Guarantees in Criminal Proceedings)

"Anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the following rights:

...

the right to present all evidence to his benefit; ..."

Article 37

(Protection of the Privacy of Correspondence and Other Means of Communication)

"The privacy of correspondence and other means of communication shall be guaranteed.

Only a law may prescribe that on the basis of a court order the protection of the privacy of correspondence and other means of communication and the inviolability of personal privacy be suspended for a set time where this is necessary for the institution or conduct of criminal proceedings or for reasons of national security."

B. Criminal Procedure Act

33. Section 18 of the Criminal Procedure Act (Official Gazette no. 8/06), as applicable at the material time, provided:

"(1) The right of a court and the State bodies who participate in criminal proceedings to establish whether a certain fact is established or not is not bound or constrained by any formal rules of evidence.

(2) [Such a] court should not base its judgment on evidence obtained in violation of the human rights and fundamental freedoms guaranteed by the Constitution, or on evidence obtained in violation of the criminal-procedure rules which pursuant to this law could not be relied on by a court, or obtained on the basis of such impermissible evidence."

34. A judgment based on inadmissible evidence could be challenged on appeal on the grounds of a substantial violation of provisions of the criminal procedure. In this connection, Section 371 of the CPA provides as follows:

"(1) A substantial violation of the provisions of criminal procedure shall be deemed to exist:

...

(8) if the judgment relies on evidence which was obtained by a violation of human rights and fundamental freedoms guaranteed by the Constitution, or evidence that it should not have relied on, in accordance with the provisions of the present Act, or evidence which was obtained on the basis of such impermissible evidence; ..."

35. Moreover, Section 149b, in the chapter regulating measures to be taken by the police during a preliminary inquiry, provides:

"(1) If there are grounds for suspecting that a criminal offence for which a perpetrator is prosecuted *ex officio* has been committed, is being committed or is being prepared or organised, and information on communications using electronic communications networks needs to be obtained in order to uncover this criminal offence or the perpetrator thereof, the investigating judge may, at the request of the state prosecutor adducing reasonable grounds, order the operator of the electronic communications network to furnish him with information on the participants and the circumstances and facts of electronic communications, such as: the number or other form of identification of users of electronic communications services; the type, date, time and duration of the call or other form of electronic communications service; the quantity of data transmitted; and the place where the electronic communications service was performed.

(2) The request and order must be in written form and must contain information that allows the means of electronic communication to be identified, an indication of reasonable grounds, the time period for which the information is required and other important circumstances that dictate use of the measure.

(3) If there are grounds for suspecting that a criminal offence for which the perpetrator [thereof] is prosecuted *ex officio* has been committed or is being prepared, and that information on the owner or user of a certain means of electronic communication whose details are not available in the relevant directory (as well as information on the time that the means of communication was or is in use) needs to be obtained in order to uncover this criminal offence or the perpetrator thereof, then the police may request that the operator of the electronic communications network furnish them with this information, at their written request and even without the consent of the individual to whom the information refers.

(4) The operator of electronic communications networks may not disclose to its clients or a third party the fact that it has given certain information to an investigating judge (see the first paragraph of this section) or the police (see the preceding paragraph), or that it intends to do so."

C. Civil Code

36. The Civil Code (Official Gazette, no. 83/2001 with amendments) contains detailed provisions concerning civil claim for non-pecuniary damage for, *inter alia*, violation of personal rights. Its sections 148 and 179 read, in so far as relevant, as follows:

Section 148

"(1) A legal entity is liable for damage caused to a third person by its body in relation to the performance of its duties. ..."

Section 179

"(1) For physical pain endured, for psychological anguish resulting from ... the infringement of personal freedom or personal rights ... the injured party may, if it is established that the circumstances of a case (and in particular the degree of pain and fear and the duration thereof) justify it, be awarded just monetary compensation, irrespective of any compensation for material damage, and even if there is no material damage.

(2) The amount of compensation for non-pecuniary damage shall depend on the importance of what was at stake and the objective of such compensation; it should, however, not nurture aspirations that are not consistent with its nature and objective."

D. Constitutional Court Act

37. Section 55b, paragraph 2, of the Constitutional Court Act (Official Gazette no. 15/94, with relevant amendments) provides as follows:

"(2) A constitutional complaint shall be accepted for consideration:

- if there has been a violation of human rights or fundamental freedoms which has had serious consequences for the complainant;

or

- if it concerns an important constitutional question which exceeds the importance of the particular case in question."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

38. The applicant complained that the use in the criminal proceedings of the evidence obtained through the examinations of X's and his own mobile telephones had violated his right to a fair trial under Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

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

B. Merits

1. The parties' arguments

40. The applicant argued that the evidence on which his conviction had been based had been obtained without a court order (and thus unlawfully), and should therefore have been excluded from the file. The domestic courts, in refusing to exclude the evidence obtained on the basis of unlawful examinations, had acted contrary to the domestic exclusionary rule (see paragraph 30 above). The applicant further reiterated the arguments he had put forward in the domestic proceedings (see paragraphs 23, 24, 27 and 30 above).

41. The Government argued that the applicant had received a fair trial, as the mistakes made by the police had had no impact on the legality of the evidence relied on by the courts. The proceedings as a whole had not been unfair.

2. The Court's assessment

(a) The general principles

42. The Court reiterates that, while Article 6 § 1 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, since this is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 46, Series A no. 140, and *Lhermitte v. Belgium* [GC], no. 34238/09, § 83, ECHR 2016).

43. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – 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 *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009, and *Prade v. Germany*, no. 7215/10, § 33, 3 March 2016).

44. 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 established, 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 *Bykov*, cited above, § 90).

(b) Application of the above principles in the present case

45. In determining whether, in the light of the above-mentioned principles, the applicant's trial had been fair, the Court shall examine firstly the "unlawfulness" of the gathering of evidence in the applicant's case (see *Prade*, cited above, § 36).

46. As regards the police examination of X's telephone, the domestic courts did not find it unlawful (see paragraph 22, 26 and 28 above). What is more, the applicant did not argue – either in the domestic proceedings or in the proceedings before the Court – that the examination of X's telephone had interfered with his own rights under Article 8 (see paragraphs 23, 24, 27, 28, 30 above and paragraph 58 below). Therefore, and having regard to the domestic courts' interpretation of the domestic law and their assessment of the parties' arguments, which was neither arbitrary nor unreasonable, the Court is not in a position to conclude that the examination of X's mobile telephone was unlawful from the perspective of the domestic law.

47. As regards the examination of the applicant's mobile telephone, the Court notes that it was acknowledged by the first- and second-instance courts that it had not been carried out in accordance with the domestic law and had been in breach of the applicant's right to privacy (see paragraphs 22, 26 and 29 above). This conclusion was not rebutted by the Supreme Court, which, however, considered that the evidence the applicant sought to exclude as tainted by the unlawful

examination was admissible because it would have inevitably been discovered (see paragraph 29 above). While section 18 (2) of the Slovenian Criminal Procedure Act (see paragraph 33 above) indeed contained a strict rule prohibiting domestic courts from relying on, *inter alia*, evidence obtained by means violating human rights, it is not for the Court to consider whether the domestic courts in the present case complied with this rule. Instead, its role is to ascertain whether the reliance on the evidence obtained in violation of the applicant's privacy undermined the fairness of the proceedings, as guaranteed under Article 6 of the Convention.

48. The Court notes in this connection that it has already found in several cases where investigative measures interfering with Article 8 rights were not "in accordance with the law" that the admission in evidence of information obtained thereby did not, in the circumstances of the cases, conflict with the requirements of fairness guaranteed by Article 6 § 1 (see *Schenk*, cited above, §§ 45-49; *Khan v. the United Kingdom*, no. 35394/97, §§ 34-40, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 76-81, ECHR 2001-IX). The decisive question is whether the proceedings as a whole were fair (see paragraph 43 above).

49. In the present case, the applicant was able to challenge the lawfulness of the examination of his mobile telephone and admissibility of related evidence in the adversarial procedure before the first-instance court and in his grounds for appeal. His arguments were addressed by the domestic courts and dismissed in well-reasoned decisions. The applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence (see *Bykov*, cited above, § 95). Indeed the crux of his complaint lies in his disagreement with the domestic courts' legal assessment of the admissibility of evidence (see paragraph 40 above), which is essentially based on the view that evidence which resulted from an unlawful examination or search but would have inevitably been discovered even in the absence of such an examination could be admitted to the criminal file (see paragraph 29 above). This disagreement, however, concerns a question of interpretation of domestic law, which is primarily a matter to be resolved by domestic courts. The

Court accordingly does not draw any conclusion as to the compliance of the "inevitable discovery doctrine" with the Convention requirements.

50. The Court further notes that while it might be that the data obtained unlawfully from the applicant's mobile telephone played a role in the initial stage of the proceedings leading to the applicant's arrest, they were not used as evidence in the trial. It observes that the applicant's conviction was based on a number of other items of incriminating evidence, not related to the unlawfully obtained data, such as (i) his own acknowledgment that he had run over X, (ii) the results of the reconstruction of events undertaken in order to test the applicant's version of events, (iii) biological traces found on the applicant, his car and on X, and (iv) material evidence, such as a rubber tube belonging to the applicant's car found at the scene, and (v) the testimony of witnesses (see paragraphs 15, 21, 25 and 28 above; see, for similar reasoning, *Schenk,* cited above, § 48; *Bykov*, cited above, §§ 96-98; and *Siništaj and Others v. Montenegro*, nos. 1451/10 and 2 others, § 178, 24 November 2015).

51. As to the reliability or accuracy of the evidence, the Court notes that the applicant did not dispute the truthfulness of the information that the message with explicit sexual content had been sent to X from his telephone on the day of the murder; this was initially confirmed by the impugned examination. Thus, there is nothing to cast any doubt on the reliability or accuracy of the evidence in question (contrast *Lisica v. Croatia*, no. 20100/06, § 57, 25 February 2010).

52. As regards other safeguards, the Court notes that the police's notes regarding that impugned examination were not admitted to the file (see paragraphs 22 and 26 above) and that court orders were subsequently issued authorising the obtaining of the traffic data relied on by the first-instance court in convicting the applicant (see paragraphs 11 and 14 above).

53. In these circumstances, and having regard to the nature of the unlawfulness of the measure, the Court concludes that the proceedings in the applicant's case, considered as a whole – including the way in which the evidence was obtained – were not contrary to the requirements of a fair trial.

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

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

55. The applicant complained that the examination of his telephone had violated his right to respect for his private life. Article 8 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."

Admissibility

56. The Government objected that the applicant had not exhausted all domestic remedies. They submitted that if the applicant had been unsatisfied with the results of the Supreme Court's findings concerning the unlawfulness of the examination of his mobile telephone he should have lodged a claim with a civil court. In particular, the criminal court had been concerned with the finding of the guilt of the applicant and had assessed the issue raised from the perspective of the admissibility of evidence. The Government added that a criminal court had no jurisdiction to determine whether the right to privacy had been violated other than when this had had an effect on the admissibility of evidence. The Government further argued that the civil claim against the State and its agents under section 148 of the Civil Code, as well as Article 26 of the Constitution (see paragraphs 32 and 36 above), was no doubt an effective remedy by which one could claim non-pecuniary damage for the violation alleged.

57. The applicant argued that his right to respect for his private life had been breached because of the unlawful police examination of his telephone. He disputed the Government's argument that he could have sought compensation in domestic proceedings. He submitted that the only way to remedy the violation of his privacy would have been to exclude from the case file the evidence obtained on the basis of the unlawful examination of his telephone. He also submitted that, because the criminal court had relied on evidence resulting from the unlawful examination of his telephone, he would not in civil proceedings be able to successfully argue that the police had acted unlawfully, which is a necessary element of tort.

58. The Court takes note of the Government's objection of non-exhaustion of domestic remedies. It reiterates that Article 35 § 1 sets out the rule on exhaustion of domestic remedies, the purpose of which is to afford Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted

to the Court. That rule is based on the assumption, reflected in Article 13 - with which it has a close affinity - that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 55, 24 July 2014).

59. The Court further notes that, pursuant to Article 26 of the Slovenian Constitution, everyone has the right to compensation for damage caused "through unlawful actions in connection with the performance of any function ... within a state or local community authority" (see paragraph 32 above). The Civil Code provides a further legal basis for claiming compensation for non-pecuniary damage in the event of a violation of personal rights (see paragraph 36 above).

60. In this connection the Court observes that when an accused person unsuccessfully requests during criminal proceedings that evidence be excluded on the basis of an alleged violation of privacy he might not always be required to pursue civil proceedings as he might, depending on the circumstances of the case, be considered to have no reasonable chance of successfully pursuing a civil claim. However, the present case is exceptional in this respect because the Koper District Court and the Koper Higher Court both acknowledged that the examination of the applicant's telephone without a court order had been unconstitutional and therefore not in accordance with the law – a finding which was not rebutted by the Supreme Court (see paragraphs 22, 26 and 29 above). It is true that the domestic courts, citing the insignificant impact that the unlawful examination had had on the outcome of the proceedings and the inevitability of the discovery of the impugned evidence (see paragraphs 22, 26 and 29 above), rejected the applicant's application for the exclusion of evidence (see paragraph 57 above). However, the Court has examined this issue under Article 6 § 1 and has found that the fairness of the criminal proceedings against the applicant was not undermined (see paragraph 53 above). As regards the alleged violation of Article 8, it notes that the domestic courts in the criminal proceedings found that the examination of the applicant's telephone had been unlawful but that they were not in a position to award the applicant compensation for any non-pecuniary damage he might have incurred on that account. If the applicant considered that he had incurred such damage, he should have thus claimed it in civil proceedings. In this connection the Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile does not constitute a valid reason for failing to pursue it (see, among many

other authorities, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 86, 9 July 2015).

61. Having regard to the foregoing, and in the absence of any persuasive arguments on the part of the applicant showing that the remedy invoked by the Government would be ineffective in his case, the Court finds, given the particular circumstances of the present case, the complaint under Article 8 inadmissible under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 22 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	Ganna Yudkivska President

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

G.Y.
M.T.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

Introduction

1. I agree with the majority that there has been no violation of Article 6 of the European Convention on Human rights ("the Convention") essentially because the applicant was convicted on the grounds of evidence that was "not related to the unlawfully obtained data"[1]. However, I write separately to register my disaccord with the doctrine of "inevitable discovery" invoked by the domestic courts.

2. The Slovenian Supreme Court acknowledged the illegality of the examination of the applicant's mobile phone, yet held that the evidence arising from it could still be used at trial because "the information ... would have inevitably been discovered"[2]. The majority opted not to draw any conclusion about the compatibility of this doctrine with the Convention[3]. I think that the European Court of Human Rights ("the Court") should have taken this opportunity to state that the doctrine of "inevitable discovery" is incompatible with the Convention and the Court's case-law. As a matter of principle, a conviction should not be based on evidence obtained through unlawful means, especially means that violate a Convention right as in the present case. Neither the unlawful primary evidence nor the tainted secondary evidence[4] can be saved simply by assuming that it would inevitably have been found.

3. In *Gäfgen* the Court set forth the only exceptions to the exclusionary rule that are acceptable under the Convention. On the one hand, the Court admitted evidence that had been "secured independently" of the unlawfully obtained evidence[5]. On the other hand, the Court asserted that evidence could be admitted where "there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence"[6]. These situations correspond to what in American doctrine are called the "independent source"[7] and the "purged taint"[8] exceptions. I think

1. Paragraph 50 of the judgment.
2. Paragraph 29 of the judgment.
3. Paragraph 49 of the judgment.
4. For the purposes of this opinion, primary evidence is evidence discovered in the course of the State's unlawful investigation, and secondary (or derivative) evidence is that gleaned from illegally obtained primary evidence.
5. *Gäfgen v. Germany* [GC], no. 22978/05, § 179, ECHR 2010.
6. Ibid., § 180.
7. *Segura v. United States*, 468 U.S. 796 (1984). The Supreme Court first formulated this doctrine in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, at 392 (1920), when it stated that, when evidence is obtained by unlawful police conduct, "this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others …". See also *Murray*

this state of the Court's case-law should be preserved and no new exceptions should be added to the exclusionary rule.

The origins of the "inevitable discovery" doctrine

4. The "inevitable discovery" doctrine was formulated by the United States Supreme Court ("the Supreme Court") in the case *Nix v. Williams*[9]. The facts of the case are dramatic. A ten-year old girl disappeared on Christmas Eve in 1968 in Des Moines, Iowa. After a witness report, the police obtained an arrest warrant against the suspect Robert Williams and started a large-scale search for the child's body in the area where it was thought to be. On 26 December Williams surrendered himself to the police in Davenport. Williams' attorneys and the police came to an arrangement whereby he would not be questioned while he was being transported back to Des Moines. However, on the ride back to Des Moines, one of the detectives convinced Williams to reveal where the body was hidden so that the girl's family could give her a proper Christian burial. Ultimately, Williams was convinced and took the police to the body.

The defendant was convicted of first-degree murder, but his conviction was reversed by the Supreme Court in *Brewer*[10] on the basis that the conviction was based on the defendant's self-incriminating statements which had been unlawfully provoked by the police[11]. Yet the majority of the *Brewer* court gave an indication for the subsequent procedure. Writing for the 4-3 majority, Justice Stewart suggested, in a footnote, that the evidence provided by Williams could still be used in a trial:

> "While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. ... In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted"[12].

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v. United States, 487 U.S. 533, at 537 (1988).

8. *Wong Sun v. United States*, 371 U.S. 471 (1963). This is also known as the attenuation exception, first formulated in *Nardone v. United States*, 308 U.S. 338, at 341 (1939): "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

9. *Nix v. Williams*, 467 U.S. 431 (1984).

10. *Brewer v. Williams*, 430 U.S. 387 (1977). On the federal courts' case-law prior to this case see B. Connelly and E. Murphy, "Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule" (1976) 5 *Hofstra Law Review* 1.

11. This conclusion was based on the precedent of *Massiah v. United States*, 377 U.S. 201 (1964).

12. This is the famous footnote 12 of the majority opinion. The argument was first used in a dissent by Justices White and Douglas in *Fitzpatrick v. New York*, 414 U.S. 1050, at 1051

In the new trial the judge decided to include the victim's body as evidence, holding that, even though it had been found through a violation of counsel rights, it would have been discovered anyway by the police search that had been in progress in the area at the time. The Supreme Court upheld this rationale, writing as follows:

> "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense"[13].

5. Scholars soon criticised "the danger to fundamental constitutional protections posed by the open-ended approach taken" in *Nix*, which was decided in a way that "is subject to and almost invites abuse"[14]. Although the "inevitable discovery" exception to the exclusionary rule has never since been the subject of a ruling by the Supreme Court, it has been expanded by the federal courts "beyond what was originally envisioned by the Supreme Court in *Nix* and ... this expansion seriously affected the vitality of the exclusionary rule as well as the Fourth Amendment warrant requirement"[15].

(1973), according to which: "… it is a significant constitutional question whether the 'independent source' exception to inadmissibility of fruits … encompasses a hypothetical as well as an actual independent source."

13. *Nix v. Williams*, 467 U.S. at 444. Footnote omitted.

14. S. Grossman, "The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations" (1988) 92 *Dickinson Law Review* 313-361, at 314. See the initial criticism of R. Lamberth, "Comment, The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability" (1988) 40 *Baylor Law Review* 129; R. Hendrix, "The Inevitable Discovery Exception to the Exclusionary Rule: *Nix v. Williams*" (1986) 54 *University of Cincinnati Law Review* 1087; E. Macon, "Nix v. Williams: The Inevitable Discovery Exception to the Exclusionary Rule" (1985) 19 *University of Richmond Law Review* 353; L. Marshall and S. Webb, "Case Note, Constitutional Law – The Burger Court's Warm Embrace of an Impermissibly Designed Interference with the Sixth Amendment Right to the Assistance of Counsel – The Adoption of the Inevitable Discovery Exception to the Exclusionary Rule: *Nix v. Williams* (1985) 28 *Howard Law Journal* 945; Wasserstrom and W. Mertens, "The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?" (1984) 22 *American Criminal Law Review* 85; and W. Cohn, "Sixth Amendment – Inevitable Discovery: A Valuable but Easily Abused Exception to the Exclusionary Rule" (1984) 75 *Journal of Criminal Law & Criminology* 729.

15. R. Bloom, "Inevitable Discovery: An Exception Beyond the Fruits" (1992) 20 *American Journal of Criminal Law* 79, at 81. For a recent summary of the critiques, see T. Golden, "The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits" (2013) 13 *Brigham Young University Journal of Public Law* 97; D. Hansen, "The Inevitable Discovery Rule – Justice Served or Justice Thwarted? – *People v. Pinckney*" (2012) 28 (3) *Touro Law Review* 715; L. Epstein, "Limits of the Inevitable Discovery Doctrine in United States v. Young: The Intersection of Private Security Guards, Hotel Guests, and the Fourth Amendment" (2010) 40 *Golden Gate University Law Review* 331; T. McInnis, "Nix v. Williams and the Inevitable Discovery Exception: Creation of a Legal Safety Net" (2009) 28 *St. Louis University Public Law Review* 397; J. Coren, "The potential abuse of the subpoena power under the inevitable discovery doctrine" (2009) 11 (3) *Journal of*

The lack of clarity of *Nix*

6. It stands to reason that the "inevitable discovery" doctrine was a legal artifice used to circumvent *Massiah* and the consequences thereof when the so-called case of the "Christian burial" returned to the Supreme Court[16]. Since the primary evidence (Williams' incriminating statements which led the police to the victim's body) was excluded from trial, the secondary evidence subsequently obtained (the victim's body) should also have been excluded, according to the doctrine of the "fruit of the poisonous tree"[17]. Yet that secondary evidence was crucial in order to secure the conviction of the defendant. This tainted evidence could only be saved by assuming that it would have been obtained if no State misconduct had taken place. Reflecting their hyper-sensitivity to the brutality of the crime, the dangerousness of the offender and the public visibility of the first judgment, the view of the Supreme Court judges was clearly determined by the punitive needs of the case, namely the need to make sure that Williams served a prison sentence in spite of the breach of his counsel rights[18]. To

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Constitutional Law 755; B. Shively, "The Inevitable Discovery Doctrine: Indiana as the Exception, Not the Rule" (2008) 43 *Valparaiso University Law Review* 407; D. Stuart, "Note, A Sign-Post Without Any Sense of Direction: The Supreme Court's Dance Around the Inevitable Discovery Doctrine and the Exclusionary Rule in Hudson v. Michigan" (2007) 27 *Pace Law Review* 503; and J. Liljestrom, "Note, Lawful to the World: Protecting the Integrity of the Inevitable Discovery Doctrine" (2006) 58 *Hastings Law Journal* 177.

16. To put it in the words of Justice Stevens, the *Nix* judgment was "an *ad hoc* response to the pressures engendered by the special facts of the case" (*Nix v. Williams*, 467 U.S. at 452). On the circumstances of the case see P. Johnson, "The Return of the Christian Burial Speech Case" (1983) 32 *Emory Law Journal* 349.

17. In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Supreme Court stated as follows: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." This meant that, in order to give meaning to the exclusionary rule, it was necessary to apply the exclusionary sanction not only to the direct result of the unlawful State conduct, but also to its indirect consequences as well. This doctrine later became known as the "fruit of the poisonous tree" doctrine (*Nardone v. United States*, 308 U.S. 338, at 341 (1939)). As Pitler had anticipated: "The logic of the 'inevitable discovery' has a certain appeal, but it collides with the fundamental purpose of the exclusionary rule. If the Supreme Court adopts the inevitable discovery exception, it will mark a sharp break with *Silverthorne, Nardone* and *Wong Sun*. The preservation of the exclusionary rule as a viable deterrent to illicit police activities requires the spotlight to focus 'on actualities, not probabilities'" (Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized" (1968) 56 *California Law Review* 579, at 630).

18. When Williams came before the Supreme Court for the second time, Justice Stewart had been replaced by Justice O'Connor, but all the other justices were there when *Brewer* was decided. In *Brewer*, Chief Justice Burger stated that "Williams is guilty of the savage murder of a small child; no member of the Court contends he is not". To this, Justice Marshall added that Williams was a "dangerous criminal", Justice White added that Williams was "[a] mentally disturbed killer whose guilt was not in question", Justice Blackmun added that "[t]he evidence of Williams's guilt is overwhelming" and even

make the new exception to the exclusionary rule even more efficiency-oriented, the Supreme Court applied the preponderance test to the determination of the "inevitable" discovery of the evidence which had been unlawfully procured[19].

7. Having said this, the vagueness of *Nix* is already patent[20]. The inevitable discovery of the evidence would have to take place within a short period of time after the State misconduct had occurred and in "essentially the same condition" as it was actually found[21], but it remained unclear how short this period should be and to what extent the conditions of the possible future findings could differ from the actually uncovered evidence. Factual considerations unique to each case could lead different courts to distinguish between degrees of "inevitability" based on arbitrary factual distinctions.

8. Finally, the *Nix* court did not impose a good-faith requirement like the appellate federal court had done[22], because police officers "will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered"[23]. Yet this did not prevent the good-faith exception from later being admitted as an autonomous exception to the exclusionary rule[24] on the basis that police officers are not expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient, and that "the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates."

Justice Stevens noted Williams's probable guilt. Most notably, after calling the inevitable discovery doctrine an "unlikely theory" in *Brewer* (430 U.S., at 416), the Chief Justice subscribed to it in *Nix*.

19. This test of preponderance was criticised by Justice Brennan, who agreed that an inevitable discovery exception existed, but argued that the burden of proof should be "clear and convincing evidence". Other voices joined this view, such as J. Fishkin, "Comment, *Nix v. Williams*: An Analysis of the Preponderance Standard for the Inevitable Discovery Exception" (1985) 70 *Iowa Law Review* 1369, at 1377 (stating that the deterrence rationale was inadequately served by the test of preponderance); and "The Supreme Court, 1983 Term, Exclusionary Rule – Inevitable Discovery Exception" 98 *Harvard Law Review* 118, at 129 (stating that the test of preponderance was "inappropriately lenient").

20. The federal courts even wrote that *Nix* was "silent as to what constitutes an 'inevitable' discovery under the doctrine" (*United States v. Satterfield*, 743 F.2d 827, at 846 (11th Cir. 1984). See also *United States v. Cherry*, 759 F.2d 1196, at 1204 (5th Cir. 1985).

21. *Nix v. Williams*, 467 U.S., at 431.

22. The argument made by the appellate federal court was that, if an absence-of-bad-faith requirement were not imposed, "the temptation to risk deliberate violations … would be too great, and the deterrent effect of the Exclusionary Rule reduced too far."

23. *Nix v. Williams*, 467 U.S. at 444-5.

24. *United States v. Leon*, 468 US 897 (1984): "… evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid". On the pernicious effects of this doctrine see already, among many others, W. Merten and S. Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law" (1981) 70 *Georgetown Legal Journal* 365.

The unsafe progeny of *Nix*

9. *Nix* involved facts that dealt with the exclusion of secondary evidence obtained in violation of a defendant's right to counsel. Although focused on the justification of secondary evidence (the victim's body), the strictly prosecution-driven rationale of *Nix*, according to which the prosecution should not be put in a worse situation simply because there was some law-enforcement misconduct[25], did not exclude the justification of both primary and secondary tainted evidence, and was later used by the lower courts with this extension[26]. By the same token, although *Nix* approved of inevitable discovery to prevent the suppression of evidence obtained in violation of the Sixth Amendment, its rationale did not rule out the exception's applicability to violations of the Fourth and Fifth Amendments, as the subsequent practice of the lower courts confirmed[27].

10. Moreover, it was also left undecided whether there had to be an independent ongoing line of investigation or even active pursuit at the time of the State misconduct. It was not clear whether the analysis should concentrate on "what was done" by the police or "what they would have done" or even "what they could have done"[28]. Even assuming that the need for an independent line of investigation that was already being pursued was inherent in the Supreme Court's reasoning, in the light of the facts of the case[29], it would be possible to apply this requirement to extremely varying degrees, as later happened in the federal courts' case-law[30]. It is not even safe to conclude from *Nix* that, in cases where the State misconduct was not a but-for cause of the discovery of the evidence, the latter should be

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25. *Nix v. Williams*, 467 U.S. at 443.

26. R. Bloom, cited above, at 87-93.

27. T. Golden, cited above, at 102-108; R. Bloom, cited above, at 94-102; and J. Forbes, "The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment" (1987) 55 *Fordham Law Review* 1221.

28. Later on, Justice Breyer explained in his dissenting opinion in *Hudson v. Michigan* as follows: "[The inevitable discovery] rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place … Instead, it must show that the same evidence 'inevitably *would* have been discovered by *lawful means'*. 'What a man *could* do is not at all the same as what he *would* do'" (*Hudson v. Michigan*, 547 U.S. 586 at 616, citations omitted).

29. When Williams spoke to the police officers on his way back to Des Moines there was already a search operation going on for the body of the victim, which was getting close to the place where it was later found.

30. On the "very significant split" among the circuits concerning the question of whether a separate and independent investigation must be ongoing at the time of the constitutional illegality, see E. Shapiro, "Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine" (2003) 39 *Gonzaga Law Review* 295; and S. Hessler, "Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule" (2000) 99 *Michigan Law Review* 238.

admitted regardless of whether there was an active pursuit going on at the time of the said State misconduct[31].

11. In sum, the justification of evidence obtained by means of State misconduct in *Nix* is very distinct from the independent source exception, affirmed in the *Segura* judgment[32]. In the former case, the exception is based on a hypothetical causal link construed with the benefit of hindsight. In the latter case, the exception is based on the actual course of events in so far as the tainted evidence must have actually been uncovered by a source independent of the unlawful State conduct. Contrary to the Supreme Court's allegation[33], there is no "functional similarity" between the independent source and inevitable discovery doctrines. The lack of clarity and consequent arbitrariness in the way the "inevitable discovery" exception was initially framed in *Nix* and subsequently developed in its progeny is plain to see, as well as the fact that the government's access to otherwise illegally obtained evidence has grown exponentially. Quite worryingly, the lower courts seem little bothered by the State's violations of the law if this is the price to pay for removing supposed offenders from the streets. But I would argue that there are additional logical, ethical and practical reasons to discard this exception altogether.

Certainty in hindsight

12. The "inevitable discovery" exception shows its flaws from a mere logical analysis of its statement. What can it possibly mean that the contested piece of evidence "inevitably would have been discovered by lawful means"? "Inevitably" is added to "would" in the sense that the doctrine does not ask simply for the mere possibility that the evidence "could" have been found: according to the very definition of the rule, there must be complete certainty that the evidence would have been found (and, of course, in the same state as to the relevant probative features) by alternative lawful means. Those alternative means are, by definition, hypothetical to some degree since, had they been actually carried on and led to the evidence independently, we would be dealing with the "independent

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31. This conclusion could be contested in the light of the casuistic approach of the Supreme Court: "…we ... decline to adopt any ... *per se* or 'but for' rule … No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse … to turn on such a talismanic test ... the presence of intervening circumstances … and particularly, the purpose and flagrancy of the official misconduct, are all relevant" (*Brown v. Illinois*, 422 U.S. 590, at 620 (1975)). Also against the "but-for" reasoning, see *Wong Sun v. United States*, 371 U.S. 471, at 487-88 (1963).

32. *Segura v. United States*, 468 U.S. 796 (1984).

33. *Nix v. Williams*, 467 U.S. at 443-44: "There is a functional similarity between [the independent source and inevitable discovery] doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place."

source" exception, which is compatible with the Convention. In other words, the certainty called for by the "inevitable source" exception is purely virtual.

Everyone is familiar with the fact that people tend to think that events were inevitable once they know that they in fact happened, and legal institutions have long been aware of this fact. As a nineteenth century English court put it, "[n]othing is so easy as to be wise after the event"[34]. In the English language, this is sometimes called "Monday morning quarterbacking", and it corresponds to a well-documented phenomenon that psychologists call *hindsight bias* (or, more illustratively, *knew-it-all-along bias*). When subject to hindsight bias, people "not only tend to view what has happened as having been inevitable but also to view it as having appeared relatively inevitable before it happened"[35]. This phenomenon had already been noted by historians[36] and has had constant empirical corroboration[37]. Furthermore, hindsight bias has proved extremely hard to eliminate from people's reasoning[38].

13. A trait which is very close to hindsight bias is another well-known phenomenon, sometimes called "the curse of knowledge"[39]: once something has been discovered it is very hard to remember how the world looked

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34. *Corman v. The Eastern Counties Railway Co*, cited in J. Rachlinski, "A Positive Psychological Theory of Judging in Hindsight" (1998) 65 *The University of Chicago Law Review* 571, at 571.

35. B. Fischhoff, "For those condemned to study the past: Heuristics and biases in hindsight", in D. Kahneman et al. (eds.), *Judgment under uncertainty: Heuristics and biases*, Cambridge: Cambridge University Press, 1982, p. 341.

36. "The tendency toward determinism is somehow implied in the method of retrospection itself. In retrospect, we seem to perceive the logic of the events which unfold themselves in a regular or linear fashion according to a recognizable pattern with an alleged inner necessity. So that we get the impression that it really could not have happened otherwise" (G. Florovsky, "The study of the past", in R. H. Nash (ed.), *Ideas of history* (Vol. 2), New York: Dutton, 1969, p. 369 (cited by Fischhoff, supra, p. 341).

37. The psychological literature on this is vast, but to cite just a few examples referring to hindsight bias in legal decision-making, see K. Kamin and J. Rachlinski, "Ex Post ≠ Ex Ante: Determining Liability in Hindsight" (1995) 19 (1) *Law and Human Behavior* 89; J. Rachlinksi et al., "Probable Cause, Probability, and Hindsight" (2011) 8 *Empirical Legal Studies* 72; and D. Teichman, "The Hindsight Bias and the Law in Hindsight", in E. Zamir and D. Teichman, *The Oxford Handbook of Behavioral Economics and the Law*, Oxford University Press: Oxford, 2014.

38. "Unfortunately, the hindsight bias has proven resistant to most debiasing techniques. Attempts to undo the hindsight effect with strategies that rely on motivation, such as suggesting to people that they try harder, increasing personal relevance of the task, and rewarding people for unbiased responses, have proven ineffective" (Kamin and Rachlinsky, cited above, at 92, internal citations omitted).

39. C. Camerer et al., "The Curse of Knowledge in Economic Settings: An Experimental Analysis" (1989) 97 (5) *The Journal of Political Economy* 1232. Authors show that "[b]etter-informed agents are unable to ignore private information even when it is in their interest to do so." Even though the experiment was done for a market-type situation, it is easy to see how this extends to other types of reasoning.

before. Such a phenomenon makes it hard to assess whether we would have come to know something if we did not actually know it. Take the following dialogue from Arthur Conan Doyle's *Silver Blaze*, after Sherlock Holmes shows an inspector a wax match covered in mud:

> "'I cannot think how I came to overlook it' said the Inspector, with an expression of annoyance.
>
> 'It was invisible, buried in the mud. I only saw it because I was looking for it.'
>
> 'What! You expected to find it?'
>
> 'I thought it not unlikely.'"

As one scholar put it, commenting on this fragment: "That which is hidden reveals itself when you know it must be there, when you have postulated its discovery as inevitable"[40].

14. Furthermore, probabilistic assessments are tainted by what psychologists call "motivated reasoning", a tendency for people "to arrive at those conclusions that they want to arrive at", even if this implies relying on the same facts to "access different beliefs and rules in the presence of different directional goals [and even] justify ... opposite conclusions on different occasions"[41]. Interestingly enough, this effect has been empirically tested in the specific context of the "inevitable discovery" exception. In an experiment, two groups were asked to assess, in a fictional case, whether a piece of evidence (drugs obtained through an illegal inspection of a car) should be excluded from trial or should be kept under the "inevitable discovery" exception. One of the groups was told that the defendant was selling marijuana to terminally ill patients, while the other group was told that he was selling heroin to addicts. Quite unsurprisingly, people in the heroin case (who were more motivated to punish the defendant) were more likely to find that the discovery of evidence was "inevitable", even though the details concerning the search were identical in both cases[42]. Regardless of the external validity we assign to this experiment[43], it does show the fragility of probabilistic judgments.

15. In sum, the "inevitable discovery" doctrine postulates a certainty that is psychologically unattainable and therefore legally inaccessible. There are no general rules governing the types of facts that are required to make such showings of inevitability. Even in the cases that we may deem most clear, it

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40. P. Brooks, "Inevitable Discovery – Law, Narrative, Retrospectivity" (2003) 15 *Yale Journal of Law and the Humanities* 82.

41. Z. Kunda, "The Case for Motivated Reasoning" (1990) 108 *Psychological Bulletin* 480.

42. A. Sood, "Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule" (2015) 103 *Georgetown Law Journal* 1543, at 1580-1581.

43. The author of the experiment notes that the participants were lay people, while evidence exclusion decisions are normally taken by professional judges. However, she suggests that this cognitive trait may extend to professional judges as well (ibid., at 1583)

is very hard, or perhaps even impossible, to detach ourselves from the knowledge we do in fact have in order to decide what would have happened if we did not.

No deterrence

16. The most frequent reason invoked to justify the exclusionary rule, both in the United States[44] and in this Court[45], is that the exclusion of illegally obtained evidence is an effective means of deterring State authorities in general, and law-enforcement forces in particular, from obtaining evidence through unlawful means. Allowing the introduction of unlawfully obtained evidence through the "inevitable discovery" exception greatly undermines the deterrent effect of the exclusionary rule. A thorough analysis of the utilisation of the doctrine in the United States can show this.

17. Firstly, take the case in which the discovery of evidence has been postulated as inevitable because it would have been found by means of a routine procedure that is invariably applied in the circumstances of the case[46]. For example, when there are numerous, lawfully obtained indicia that a person may be hiding a prohibited substance in her house, police protocol may indicate that a home search be conducted after obtaining a judicial warrant. The police, however, skip the warrant and search the house directly, finding the prohibited substance. When the evidence is challenged in court, the prosecution may invoke the "inevitable discovery" doctrine and argue that, under the circumstances of the case, the warrant would have been asked for and obtained, and the evidence would have been found in any case. Even if one conceded that this were true, the seemingly automatic application of this doctrine in this type of cases deprives the police of any incentive to actually request a warrant[47]. More generally: the surer the

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44. "Although in *Mapp* [*v. Ohio*, 367 U.S. 643 (1961)] other reasons for the exclusionary rule were suggested … deterrence has become the sole justification relied on by the present [1992] Court" (R. Bloom, cited above, at 79).

45. *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V, partly concurring, partly dissenting opinion of Judge Loucaides; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX, partly dissenting opinion of Judge Tulkens, § 5; *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, partly dissenting opinion of Judge Spielmann joined by Judges Rozakis, Tulkens, Casadevall and Mijović, § 12; and *Dragoş Ioan Rusu v. Romania*, no. 22767/08, 31 October 2017, joint partly concurring opinion of Judges Pinto de Albuquerque and Bošnjak, § 4.

46. A similar fact pattern in *United States v. Horn*, 970 F.2d 728 (10th Cir. 1992) prompted the Circuit Court to validate police action under the "inevitable discovery" doctrine. See also *United States v. Whitehorn*, 829 F.2d 1225 (2d Cir. 1987). For more examples and a scholarly elaboration on the consequences of the "inevitable discovery" doctrine for the warrant requirement in the United States, see R. Bloom, cited above, at 94-98.

47. Anthony J. Girese, "They Would Have Found It Anyway: *United States v. Eng* and the '*Inevitable Subpoena*'" (1993) 59 *Brooklyn Law Review* 461, at 492-502.

police are that in a routine procedure they will find what they are looking for, the more likely they are to halt the formal procedures and the less likely they are to behave in a lawful way. To put it simply, the doctrine provides a strong incentive for the calculating police officer to wilfully violate the rules of procedure and especially the rights of the defence.

18. The opposite case poses an analogous problem. When the procedure that could have lawfully led to discovering the evidence was not a routine procedure, but one that depended on the contingent evaluation of some facts that were known to the police, the police could perceive that "inevitable discovery" would later be harder to argue in court. However, this difficulty would be outweighed by the parallel difficulty in actually obtaining the evidence through lawful means later. In this sort of "now or never" situation, the police may very well risk securing the evidence that appears to be available, in the hope that the knowledge thus obtained will provide a credible story that will show how the discovery was bound to happen.

19. This problem appears more clearly when the time element is factored into the analysis. As noted above, the "inevitable discovery" doctrine overlooks the passage of time. Take, for example, *Nix*. In *Nix* the Supreme Court argued that the body would have been found in any event since there was a large-scale search in the area. However, there is no discussion in the decision as to *when* the body would have been found, and therefore in what state of preservation[48]. It may very well be the case that the body was bound to be found at some future time, but that, had the illegal act not occurred, it would have deteriorated to the point where it could not be used as evidence. Generalising the point, it is arguable that the urge to find the evidence before it has deteriorated or been destroyed poses another kind of "now or never" situation. Once the evidence is found, again it would be easy for the police to create a story showing the inevitability of the finding, ignoring the fact that the evidence might have been destroyed in the meantime. The court's hypothetical inquiry would be substantiated by little more than a police officer's own testimony. It is as crucial a time as ever to reflect on the sort of criminal procedure this kind of police abuse would entail.

Judicial integrity

20. However, I would emphasise that deterrence is not the only rationale for the exclusionary rule, since it is also an "imperative of judicial integrity"[49].

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48. In earlier stages of the proceedings it had been argued that, due to the extremely low temperature in the area and the fact that the body was covered in snow, the body would have been well preserved at the time of its hypothetical finding.

49. As the US Supreme Court puts it in *Elkins v. United States*, 364 U.S. 206, at 222 (1960). See also *Brown v. Illinois*, 422 U.S. 590, at 599 (1975); *Mapp v. Ohio*, 367 U.S. 643, at 659 (1961); *Olmstead v. United States*, 277 U.S. 438, at 470 (1928) (Holmes, J., dissenting); and *Weeks v. United States*, 232 U.S. 383, at 393 (1914).

This is clear, for example, in the Rome Statute, which provides for the exclusion of evidence "obtained by means of a violation of ... internationally recognized human rights ... if [its] admission ... would be antithetical to and would seriously damage the integrity of the proceedings"[50]. Unlike the "purged taint" and the "independent source" exceptions, the "inevitable discovery" exception implies condoning a breach of Convention rights that did *in fact* happen and admitting evidence that was *in fact* obtained through a violation of Convention rights on the basis of an alternative, speculative course of events. This inexorably damages the integrity of the proceedings and is unacceptable in and of itself. Thus, the Convention compatibility of the "inevitable discovery" exception is not measured by vagaries in the timing of the discovery of evidence, but by the observance by the State authorities, including the judicial authorities, of the limits of their own powers in bringing offenders to justice. In fact, as *Nix* and its progeny show *ex abundantia*, the close relationship between the "inevitable discovery" doctrine and the "harmless-error" doctrine[51] accords "excessive discretion in the manner in which breaches of basic procedural rights ... are weighed against other procedural interests"[52] and therefore subordinates fundamental guarantees of criminal procedure to prosecutorial interests. In a perfunctory balancing of the cost to society of excluding the illegally obtained evidence against the deterrent effect that the suppression of evidence will have on State misconduct, the *Nix* rationale overestimates the former and underestimates the latter[53].

21. In consideration of the tension between citizens' constitutional and Convention rights and the judiciary's role in achieving justice, it evidently offers no way out to invoke the overall fairness of the proceedings in which

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50. Rome Statute, Article 69 (7).

51. *Chapman v. California*, 386 U.S. 18, at 22 (1967). On the "harmless-error" doctrine and the impact of structural errors on the fairness of criminal proceedings see paragraphs 16 to 20 of the joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković in *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015. On the relationship between the "harmless-error" doctrine and the "inevitable discovery" doctrine see L. Epstein, "Limits of the Inevitable Discovery Doctrine in United States v. Young: The Intersection of Private Security Guards, Hotel Guests, and the Fourth Amendment", (2010) 40 *Golden Gate University Law Review* 331, at 338.

52. Paragraph 20 of the joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković, cited above.

53. One could use the strong words of Justices Brennan and Marshall, dissenting in *United States v. Leon*, 468 U.S. 897, at 949 (1984), in referring to the majority's rationale for adopting a good-faith exception to the exclusionary rule: "Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the 'substantial social costs' exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted. Upon analysis, however, such a result cannot be justified even on the Court's own terms."

the unlawful evidence was obtained. The majority in the present judgment argue that "[t]he decisive question [in order to assess whether evidence obtained in breach of Article 8 entailed a violation of Article 6] is whether the proceedings as a whole were fair"[54]. In a partly concurring opinion in a different case, Judge Bošnjak and I argued that the Court should revisit its case-law concerning the admissibility of evidence when it was obtained through unlawful means (and specifically by means that breached Article 3 or 8 of the Convention)[55]. There is no need to reiterate our reasoning here. The main point made in our opinion in *Rusu* remains valid in the present context: as a matter of principle, a trial that accepts evidence obtained in breach of Convention rights cannot, by definition, be fair. The breach of procedural rules that protect Convention rights cannot be purged through the "overall fairness" of the "proceedings as a whole", as the majority wrongly hold in the present case. The complex of Convention values that underlies the stricture against the use by the State of the "inevitable discovery" exception should not be fraudulently circumvented by way of a convenient shorthand assessment of the overall fairness of the procedure.

The wrongful application of Nix by the Supreme Court

22. I subscribe to the present judgment because it does not endorse the "inevitable discovery" exception. The trial court convicted the applicant on the basis of items of evidence not related to the violation of the applicant's right to privacy. As rightly stated by the trial court, the unlawful police examination of the applicant's telephone without a warrant took place at a time when the police had already obtained the necessary information from a lawful examination of the victim's telephone[56]. In other words, the examination of the victim's telephone had been an independent, lawful source of evidence. Therefore, the records of the communication between the applicant and the victim were lawfully obtained secondary evidence, admissible at trial.

23. Furthermore, even assuming for the sake of argument that the examination of the applicant's telephone had contributed to the discovery of the tainted evidence (the telephone records of the communication between the applicant and the victim), it could be argued that the defect relating to the telephone search had later been purged because the applicant admitted, of his own accord, that he knew the victim and had run him over[57]. Hence, the "purged taint" exception to the exclusionary rule could have been invoked, but certainly not the "inevitable discovery" exception. Its use by

54. Paragraph 48 of the judgment.
55. *Dragoş Ioan Rusu*, cited above.
56. Compare paragraph 22 of the judgment with paragraph 7.
57. Paragraph 15 of the judgment.

the Supreme Court was wrongful, both on Convention law grounds and on the facts of the case[58].

Conclusion

24. Pursuing justice and especially criminal justice does not justify the use of all means, such as coerced confessions. By justifying the use of unlawful means to reach the desired punitive ends, the "inevitable discovery" doctrine does not do justice to the Convention protections that European citizens hold dear. Worse still, this expedient legal means of circumventing the exclusionary rule opens the floodgates to all sorts of State misconduct on the basis of a practically unattainable and virtually unlimited hypothetical reasoning. The inevitable discovery exception is applied regardless of how egregious the violation of the defendant's rights may have been since the type and degree of State misconduct are irrelevant to the determination of "inevitability". To my mind, in the face of the obvious dangers inherent in this doctrine, the Court should heed attentively the advice of Justice Stevens in his concurring opinion in *Nix*:

> "The majority refers to the 'societal cost' of excluding probative evidence ... In my view, the more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law"[59].

58. Paragraph 29 of the judgment.
59. *Nix v. Williams*, 467 U.S. 431, at 457 (1984).