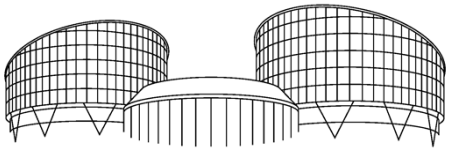

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BOSAK AND OTHERS v. CROATIA

(Applications nos. 40429/14 and 3 others – see appended list)

JUDGMENT

STRASBOURG

6 June 2019

FINAL

07/10/2019

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

In the case of Bosak and others v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Aleš Pejchal,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Tim Eicke, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 7 May 2019,

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

PROCEDURE

1. The case originated in four applications (nos. 40429/14, 41536/14, 42804/14 and 58379/14) 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 two Croatian and two Dutch nationals ("the applicants"), on the dates listed in the Appendix to this judgment.

2. The first three applicants were represented by Ms V. Drenški Lasan, a lawyer practising in Zagreb, and the fourth applicant was represented by Mr A. Ilić, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicants complained, under Articles 6 and 8 of the Convention, of the unfairness of the criminal proceedings against them and the unlawfulness of secret surveillance carried out in respect of them.

4. On 28 April 2016 and 26 May 2016 the Government were given notice of the above complaints and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. The Government of the Netherlands did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 5 and 20 March 2007 the Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) asked an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) to authorise the use of secret surveillance measures in respect of M.M., on the grounds that he was suspected of drug trafficking.

6. During the investigation and while secret surveillance measures were being used against M.M., the authorities intercepted and recorded a number of telephone conversations in connection with drug trafficking. The fourth applicant's telephone number was noted in that respect.

7. Following an application lodged on 3 May 2007 by the Zagreb County State Attorney's Office, on 4 May 2007 the investigating judge of the Zagreb County Court authorised the use of secret surveillance measures in respect of the fourth applicant and three other persons, on the grounds that they were suspected of drug trafficking proscribed by Article 173 §§ 1 and 2 of the Criminal Code. Her statement of reasons reads as follows:

> "On 3 May 2007 the Zagreb County State Attorney's Office lodged an application for an order for [secret surveillance] measures under Article 180 § 1 (1) of the Code of Criminal Procedure in respect of A.J., [the fourth applicant], G.P. and N.M., due to [there being] probable cause to believe that the criminal offence proscribed by Article 173 §§ 1 and 2 of the Criminal Code had been committed.
>
> The application of the Zagreb County State Attorney's Office is well founded.
>
> The application refers to the police report ... of 3 May 2007 concerning the use of secret surveillance measures in respect of M.M., alleging that there is probable cause to believe that the persons mentioned [in that report] often communicate about purchasing cocaine, [something] which is established on the basis of telephone conversations with M.M., [a person] in respect of whom this court ordered [secret surveillance] measures under Article 180 § 1 (1) and (3) of the Code of Criminal Procedure on 5 March 2007.
>
> The investigating judge considers that the application is well founded, because in this particular case the investigation of these criminal offences could not be carried out by other means, as [the offences] concern the criminal offence proscribed by Article 173 §§ 1 and 2 of the Criminal Code.
>
> Bearing in mind the above facts, the investigating judge [issues] an order under Article 180 § 1 (1) of the Code of Criminal Procedure ... because the stated circumstances point to there being sufficient grounds for suspecting the commission of the criminal offence proscribed under Article 173 §§ 1 and 2 of the Criminal Code."

8. On 1 June 2007 the Zagreb County Court issued another order, accepting an application by the Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta*, hereinafter "the OSCOC") for the use of secret surveillance

measures for a period of three months in respect of the first and fourth applicants and four other persons, on the grounds that they were suspected of drug trafficking proscribed by Article 173 § 3 of the Criminal Code. The judge's relevant statement of reasons reads as follows:

> "In explaining its application for an order implementing measures referred to in Article 180 § 1 (1) [in respect of the first applicant] and (3) of the Code of Criminal Procedure [in respect of the first and fourth applicants], the OSCOC refers to the report of the Zagreb Police Department ... of 31 May 2007. Namely, by analysing the implementation of surveillance measures and the recording of telephone conversations, that is remote communication by mobile telephones ... used by A.J. and the number ... used by [the fourth applicant], it was established on several occasions that conversations between the persons concerned and other persons were being held regarding the sale of cocaine, that is that the persons concerned, together with several other persons, continuously, as an organised group, were selling the drug cocaine on the Zagreb narcotics market. In addition to the [information stated] above, it appears that A.J. has three places where he stores drugs ... where there is cocaine, and that G.T., K.K. and [the first applicant] are the persons in charge of [those places], and A.J. is obviously not satisfied with cocaine leaving those places in an uncontrolled manner.
>
> ...
>
> The enclosed document delivered with the OSCOC's application ... of 31 May 2007 and the conversations monitored so far indicate that A.J., with the assistance of [the fourth applicant] has organised a criminal group that sells large amounts of cocaine (several kilograms) in the territory of Zagreb and the Republic of Croatia, [a criminal group] which, in addition to [A.J and the fourth applicant] consists of [the first applicant], G.T., K.K. and T.K.. [The first applicant] was also introduced by A.J. and [the fourth applicant] to a legal business for catering facilities, and it appears that he is the third most important person in that organisation, after [the fourth applicant]. It follows that there are grounds for suspicion that the above-mentioned persons are involved in the commission of the offence proscribed by Article 173 § 3 of the Criminal Code.
>
> ...
>
> Given the information stated above, and since there are grounds for suspicion that an offence of narcotic abuse under Article 173 § 3 of the Criminal Code has been committed and that criminal offences of this kind are still being committed, and taking into consideration that inquiries into the criminal offences could not be carried out in any other way or would be carried out with unreasonable difficulties, given how the offences are committed, the application submitted by OSCOC ought to be accepted ..."

9. On 14 June 2007 the OSCOC requested that an order which included additional telephone numbers be issued against the first applicant and A.J. The following day the investigating judge issued a decision allowing a surveillance measure which included new telephone numbers for a period of three months, and suspended the measure regarding the first applicant's previous telephone numbers. The investigating judge explained that the police report of 14 June 2007 attached to the OSCOC's application indicated that the first applicant and A.J. were using new telephone numbers

to organise the smuggling and selling of cocaine, and that the measure was necessary in order to identify persons who were committing the criminal offence of drug trafficking – proscribed by Article 173 § 3 of the Criminal Code – together with the first applicant and A.J. The judge further explained that owing to the specific manner in which the latter criminal offence was being committed, inquiries into that criminal offence could not be carried out in any other way, or would be carried out with unreasonable difficulties.

10. While secret surveillance measures were being used against the first applicant, on 27, 28 and 29 June and 2 July 2007 the authorities intercepted and recorded a number of his telephone conversations with the second and third applicants – who lived in the Netherlands at the time – in connection with drug trafficking.

11. On 2 July 2007 the OSCOC requested that the order issued against A.J. and the fourth applicant on 4 May 2007 (see paragraph 7 above) be extended for another two months, stating that the measures carried out thus far indicated that A.J. and the fourth applicant continuously communicated regarding perpetrating the criminal offence proscribed by Article 173 § 3 of the Criminal Code. On the same day the investigating judge allowed the extension, deeming the application "well founded, because in this particular case, the investigation of these criminal offences could not be carried out by other means".

12. On 6 July 2007 the secret surveillance measures were suspended, since the applicants and several other persons had been arrested and a criminal complaint against them had been filed.

13. On 1 October 2007 the OSCOC indicted the applicants and several other persons in the Zagreb County Court on charges of drug trafficking under Article 173 § 3 of the Criminal Code. In particular, they were charged with associating in the territory of Croatia and the Netherlands from May to July 2007 for the purpose of continuously smuggling large amounts of cocaine from the Netherlands to Croatia, and selling those drugs in Croatian territory with a view to acquiring pecuniary gain. As to the fourth applicant, he was charged with, *inter alia*, selling cocaine to B.S. in May 2007 in Zagreb, after acquiring that drug from the first applicant.

14. In the course of the proceedings before the Zagreb County Court the applicants challenged the lawfulness of the secret surveillance, alleging that it had not been ordered in accordance with the relevant domestic law and that the evidence so obtained was not relevant or accurate, as nothing suggested that they had been involved in the alleged drug trafficking.

15. On 25 March 2008 the trial court dismissed the applicants' complaints concerning the alleged unlawfulness of the secret surveillance orders as unfounded, and proceeded with the examination of the case.

16. The latter decision was confirmed by the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 14 May 2008. The relevant statement of reasons given by the Supreme Court reads as follows:

"... this second-instance court agrees with the first-instance court's conclusion that evidence obtained by using an investigative measure ordered against a person in respect of whom there is a reasonable suspicion that he is committing, alone or jointly with others, one of the criminal offences proscribed under Article 181 of the Code of Criminal Procedure, can be used not only against [that person], but also against every other person caught participating in [that person's] criminal activity, [when] the criminal activity of the other person amounts to the criminal offence proscribed under Article 181 of the Code of Criminal Procedure, but always on the condition that the other person has been caught acting together with the person against whom one of the measures under Article 180 § 1(1)-(6) has been lawfully issued.

...

Section 22 of the Office for the Suppression of Corruption and Organised Crime Act (*Zakon o Uredu za suzbijanje korupcije i organiziranog kriminaliteta*, hereinafter 'the OSCOC Act') provides that in proceedings concerning criminal offences under section 21 of the OSCOC Act, the Code of Criminal Procedure and other general provisions of criminal procedure shall apply, unless the OSCOC Act provides otherwise.

Section 42(1) of the OSCOC Act is an extension of section 41 of that Act. [Section41] provides that other measures provided for in that section may be ordered for criminal offences set out in that section, in addition to measures under Article 180 § 1 of the Code of Criminal Procedure. Therefore, the content of the cited provisions of the OSCOC Act, to which the appellants refer in their appeals, does not exclude the application of special measures under Article 180 § 1 of the Code of Criminal Procedure, but such measures are extended in respect of some criminal offences by the measures provided for under section 41 of the OSCOC Act.

Consequently, in its application for special measures of inquiry into criminal offences proscribed by Article 173 § 3 of the Criminal Code in the specific case against the defendants, the OSCOC proposed the application of the provisions of Article 180 § 1 of the Code of Criminal Procedure which the court had applied when issuing the order ... of 1 June 2007. Therefore, since the OSCOC has jurisdiction over proceedings regarding the criminal offence under Article 173 § 3 of the Criminal Code and proposed ordering special measures of inquiry into such an offence under Article 180 § 1of the Code of Criminal Procedure, the court accepted the application, which is why the issued order is not unlawful. Furthermore, applying Article 180 § 1 of the Code of Criminal Procedure to the order at issue, even though daily reports and documentation regarding technical recordings drafted by the members of the police authorities who were implementing the ordered measures were not delivered to the investigating judge on a daily basis – the judge did not ask for this under Article 182a of the Code of Criminal Procedure, but this was done after the special measures had been implemented – this does not render the order in question unlawful pursuant to Article 9 §§ 1 and 2 of the Code of Criminal Procedure, nor does it make the material evidence obtained from the measures unlawful, contrary to the allegations in the defendants' appeals.

... restricting the freedom and confidentiality of correspondence ... was necessary for conducting the criminal proceedings. It was not contrary to Article 8 of the European Convention on Human Rights and Fundamental Freedoms or contrary to the criteria set by the European Court of Human Rights, because it was based on the relevant provisions of the Code of Criminal Procedure, had a legitimate aim, and was necessary, taking into account all the specific circumstances involved in establishing the perpetrators of the criminal offence."

17. At a hearing held on 15 December 2008 the trial court heard M.S., a witness called by the fourth applicant. M.S. stated that he had been friends with the fourth applicant, whom he had asked to watch over his son, B.S., who had been a drug addict. In May 2007 B.S. had gone to Zagreb to purchase an air-conditioning device. B.S. had subsequently told him that in Zagreb he had purchased drugs from some people.

18. At a hearing held on 30 January 2009 the trial court heard B.S., a witness called by the fourth applicant. B.S. stated that in May 2007 he had purchased cocaine from S.H., and not from the fourth applicant, and that this fact could be confirmed by A.P. and M.D., who had been with him on that day. The fourth applicant then asked to call A.P. and M.D., who he said would testify about the circumstances in which B.S. had purchased cocaine in May 2007. The trial court dismissed that proposal.

19. On 4 February 2009 the Zagreb County Court found the applicants guilty as charged and sentenced the first applicant to ten years' imprisonment, the second and the third applicants to six years' imprisonment, and the fourth applicant to seven years' imprisonment. In convicting them, the Zagreb County Court relied on the recordings obtained by secret surveillance, finding them lawful and credible. As to the fourth applicant, it explained that it had refused to hear A.P. and M.D. as witnesses since at that point it had already been established beyond doubt, on the basis of the results of the secret surveillance measures and the cocaine found on B.S., that B.S. had purchased the cocaine from the fourth applicant.

20. The applicants challenged the Zagreb County Court's judgment by lodging appeals with the Supreme Court. They contended that the secret surveillance orders had lacked the relevant reasoning as to the lawfulness and necessity of such surveillance. Moreover, they contended that the procedure for supervising the execution of the secret surveillance orders, which in the case at hand had been based on the Code of Criminal Procedure, should have been based on special legislation concerning organised crime (the OSCOC Act). The OSCOC Act required the police to submit daily reports to the investigating judge concerning the execution of such orders, something which had not been done in their case. The applicants further challenged the findings which were based on the recordings obtained by secret surveillance. The second and third applicants also contended that the secret surveillance orders had not been issued in respect of them, and that the secret surveillance had been conducted outside Croatian territory in the absence of a request for international legal assistance in criminal matters. In their view, there was no provision for this in the relevant domestic law, and thus the secret surveillance carried out in respect of them had run counter to Article 36 of the Constitution and Article 8 of the Convention. The fourth applicant also complained that the trial court had failed to call two defence witnesses he had asked to be called (A.P. and M.D.), who would have confirmed B.S.' statement that he had not

purchased cocaine from the fourth applicant, but from S.H. Lastly, the first applicant, who disputed his conviction and sentence, challenging all factual aspects of the case and alleging procedural errors in the trial, asked that his lawyer be allowed to attend the session of the appeal panel.

21. On 21 September 2009 the State Attorney's Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*) submitted a reasoned opinion proposing that the applicants' appeals be dismissed. That opinion was not forwarded to the defence.

22. On 13 January 2010 the Supreme Court informed the parties that a session of the appeal panel would be held on 9 March 2010. The parties were invited to attend, but it was expressly stated that the presence of the accused, who were in pre-trial detention and had a lawyer, would not be ensured, and that there would be no order for them to be brought to court.

23. On 9 March 2010 the Supreme Court held a session in the presence of the applicants' lawyers and the Deputy State Attorney of the Republic of Croatia (*Zamjenik Glavnog državnog odvjetnika Republike Hrvatske,* hereinafter, "the Deputy State Attorney"). That court stated that it had decided that it would not be useful to have the accused, who were represented by lawyers, brought from pre-trial detention. The Deputy State Attorney stated that he confirmed the proposal submitted under Article 373 § 2 of the Code of Criminal Procedure (see paragraph 21 above and 33 below). The parties stated that they had no objections as to how the session had been conducted or the content of the record of the session. The record of the session was signed by the appeal panel president and the clerk.

24. On the same day the Supreme Court dismissed the applicants' appeals and upheld their convictions. It held that all the secret surveillance orders had essentially provided sufficient reasoning. It explained that although the orders – apart from the first one issued against the fourth applicant – had been based on the Code of Criminal Procedure and not on the special legislation concerning organised crime (the OSCOC Act), that on its own did not render them unlawful. Section 41 and section 42(1) of the OSCOC Act provided for the possibility of ordering such measures. Also, the fact that the police had not submitted daily reports to the investigating judge concerning the execution of the orders did not render the secret surveillance orders unlawful, because a report had been submitted after the measures had been implemented. The court further held that the sovereignty of the Netherlands had not been violated by the interception of the second and third applicants' telephone conversations, since the Croatian authorities had never issued a secret surveillance order against them. The secret surveillance orders had been lawfully issued in respect of several people in Croatia whom the second and third applicants – who had lived in the Netherlands at the time – had contacted. Since the second and third applicants had participated in the criminal activities of the persons under secret surveillance – activities which had amounted to the criminal offence

proscribed under Article 181 of the Code of Criminal Procedure – such evidence (intercepted telephone conversations) could be used in the criminal proceedings against them. The Supreme Court also indicated that the trial court had correctly established the facts which were based on the applicants' telephone conversations recorded by secret surveillance.

25. The applicants challenged those findings by lodging constitutional complaints with the Constitutional Court (*Ustavni sud Republike Hrvatske*). They reiterated their complaints concerning the secret surveillance and the use of evidence so obtained in the criminal proceedings against them. The first, second and third applicants contended that the reasoned opinion of the State Attorney's Office of the Republic of Croatia submitted during the appeal proceedings had not been forwarded to the defence. In addition, the first applicant complained that even though the Supreme Court had examined a number of legal and factual issues, including the question of an appropriate sentence which he had raised in his appeal, he had not been invited to attend the session of the appeal panel. The fourth applicant also complained that the domestic courts had failed to call two defence witnesses he had wished to call.

26. On 9 January 2014 the Constitutional Court dismissed the applicants' constitutional complaints, upholding the findings of the Supreme Court. As to the first, second and third applicants' complaint concerning the reasoned opinion of the State Attorney's Office of the Republic of Croatia not being forwarded to the defence, the Constitutional Court noted that at the session of the appeal panel the Deputy State Attorney had reiterated the arguments submitted in the opinion in question. The applicants' lawyers had attended the session and had therefore had the opportunity to have knowledge of and comment on those submissions. As to the fourth applicant's complaint that the trial court had refused to hear two witnesses whom he had wished to call, the Constitutional Court noted that the trial court had given reasons for doing so.

27. The decisions of the Constitutional Court were served on the lawyer representing the first, second and third applicants and the lawyer representing the fourth applicant on 21 and 24 February 2014 respectively.

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. The relevant part of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 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."

(3) If the criminal offence under paragraphs 1 and 2 of this Article was committed by a group or a criminal organisation, the perpetrator shall be liable to a minimum sentence of five years' imprisonment, or life imprisonment.

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

Article 182(4)

"If, during surveillance and secret recording, information is noted which points to another criminal offence [proscribed under Article 181 of the Code of Criminal Procedure], that part of the recording shall be copied and delivered to the prosecutor."

30. The relevant provisions of the OSCOC Act (Official Gazette nos. 88/2001, 12/2002, 33/2005 and 48/2005), as in force at the material time, read as follows:

Section 21

"(1) The OSCOC acts as a prosecutor as regards the following criminal offences:

...

3. the abuse of narcotics under Article 173 § 3 of the Criminal Code;

..."

Section 22

"In proceedings regarding the criminal offences referred to in section 21 of this Act, the Code of Criminal Procedure ... and other general provisions of criminal procedure shall apply, unless otherwise provided for by this Act."

Section 41

"(1) At the request of the Head [of the OSCOC], or *proprio motu*, the investigating judge may order the application of measures involving the supply of simulated professional services or the conclusion of simulated legal transactions, in addition to the measures provided for in Article 180 § 1 of the Code of Criminal Procedure, against the person suspected of preparing, alone or together with other persons, any of the criminal offences referred to in section 21 of this Act, and [where] the extent of the planned operations and connections among such persons indicate that they pose a serious threat to public order, if the police cannot detect, prevent or prove such

criminal offences in any other manner, or if this would entail disproportionate difficulties.

(2) A written reasoned order allowing the measure ... can be extended [for three months] after the expiry of three months if the circumstances learned of subsequently justify this.

(3) A decision on [the extension] is issued by a panel under Article 20 § 2 of the Code on Criminal Procedure [a three-judge panel of the county court], taking into account in particular whether the purpose of the measure is proportionate to the degree of restriction of the [citizen's] personal rights and whether the same result could be achieved by other, less restrictive, actions and measures."

Section 42

"(1) The measures referred to in section 41 of [this Act] shall be carried out by the police. While they are being implemented, the police shall prepare daily reports and documents related to the technical recording, which shall be forwarded to the investigating judge and the Head [of the OSCOC] at his or her request.

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

1. the time the use of the measure began and ended;

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

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 offences under section 21(1) of this Act which were prevented by the use of the measure;

6. a succinct analysis of the question of whether the measure assisted in achieving or achieved the aim indicated in the order for its use.

...

(8) Decisions in criminal proceedings cannot be based on information gathered through the implementation of measures undertaken in contravention of the provisions of subsections 1, 2, 4, and 5 of this section."

31. The relevant part of the Supreme Court's decision Kž-Us 84/16-4 of 11 July 2016 reads:

"...

As to the argument of the accused persons ... that their conversations were intercepted even though the investigating judge's [secret surveillance] order had not been issued in respect of them, but in respect of [another person], and for an entirely different criminal activity ..., it should be noted that the first-instance court correctly differentiated between the lawful use of the so-called 'accidental finding' under Article 182(4) of the Code of Criminal Procedure, and Article 182(6) of that Code, which sets out situations in which the evidence so obtained is considered unlawful evidence. [The latter provision] is only applicable if the evidence was obtained by conducting the [secret surveillance] without the order of an investigating judge, or by acting contrary to Articles 180 and 182(2) of the Code of Criminal Procedure. ...

> As to the so-called 'accidental finding' in respect of persons against whom [a secret surveillance] order has not been issued, but who have been caught participating in the criminal activity [amounting to] the criminal offence proscribed under Article 181 of the Code of Criminal Procedure, together with the person against whom the order has been issued, ... the Supreme Court expressed the view in several of its decisions (IV Kž 109/97; I Kž-411/03; I Kž-Us-59/14 and others) that the evidence thus obtained was not considered unlawful and its usage in criminal proceedings was allowed ..."

32. Other relevant domestic law and practice and international material concerning the use of secret surveillance measures are set out in the case of *Dragojević v. Croatia* (no. 68955/11, §§ 52-66, 15 January 2015).

33. The relevant domestic law concerning the forwarding of a reasoned submission of the State Attorney's Office to the defence in the course of appeal proceedings and the presence of an applicant at a session of the appeal panel is set out in the cases of *Zahirović v. Croatia*, (no. 58590/11, §§ 23 and 25, 25 April 2013) and *Lonić v. Croatia*, (no. 8067/12, §§ 36 and 37, 4 December 2014).

THE LAW

I. JOINDER OF THE APPLICATIONS

34. Given their similar factual and legal background, the Court decides that the four applications should be joined under Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicants complained that they had been subjected to secret surveillance measures 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

36. 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.

B. Merits

1. The parties' arguments

37. The applicants contended that the secret surveillance carried out in respect of them had been unlawful because it had not been based on orders by the investigating judge containing proper reasoning. They also argued that the domestic authorities had failed to demonstrate that the interference with their right to respect for their private life and correspondence had been justified and necessary, as required under Article 8 of the Convention.

38. The applicants further contended that the secret surveillance orders against them (save for the first one issued against the fourth applicant) had been based on the Code of Criminal Procedure instead of the special legislation concerning organised crime (the OSCOC Act). The latter provided for a stricter procedure for supervising the execution of secret surveillance orders, in that the police were required to submit daily reports to the investigating judge, something which had not been done in their case. Pursuant to section 42(8) of the OSCOC Act, the decisions in the criminal proceedings against them could not have been based on the information thus obtained.

39. The second and third applicants also complained about the secret surveillance carried out abroad in the absence of a request for international legal assistance in criminal matters and the fact that the results of secret surveillance ordered against third parties had been used in the criminal proceedings against them.

40. The Government accepted that there had been an interference with the applicants' rights under Article 8 of the Convention. However, they considered that such interference had been lawful and justified. Referring to the Court's findings in the *Dragojević* case (cited above), the Government argued that the investigating judge's orders contained detailed reasoning regarding the existence of "grounds for suspicion" in respect of a criminal offence, as well as reasoning as to why an effective inquiry could not otherwise be achieved. The interference had pursued the legitimate aim of investigating and prosecuting the crime of drug trafficking, and had been proportionate to the circumstances, the gravity of the offence at issue and the applicants' criminal activity.

41. As to the complaint about the procedure for supervising the execution of the secret surveillance orders, the Government submitted that all the applicants' complaints in that respect had been thoroughly addressed by the domestic courts, whose explanations had been neither illogical nor arbitrary. As to the second and third applicants' complaints that the results

of secret surveillance ordered against third parties had been used in the criminal proceedings against them, the Government relied on the well-established practice of the domestic courts in that regard, which, under certain conditions, allowed evidence so obtained to be used in criminal proceedings (see paragraph 31 above).

2. The Court's assessment

42. The Court refers to the general principles concerning the use of secret surveillance measures set out in the *Dragojević* judgment (cited above, §§ 78-84, 86-89; see also *Bašić v. Croatia*, no. 22251/13, § 32, 25 October 2016, and *Matanović v. Croatia*, no. 2742/12, § 112, 4 April 2017). It notes that there is no dispute between the parties that tapping the applicants' telephones and covertly monitoring the first and fourth applicants constituted an interference with their right to respect for "private life" and "correspondence" guaranteed under Article 8 of the Convention (see paragraph 40 above). The Court must assess whether the interference was "in accordance with the law" and "necessary".

(a) Whether the secret surveillance orders contained adequate reasoning

43. As to the applicants' complaint that the secret surveillance orders against them were not properly reasoned (see paragraph 37 above), the Court found in the *Dragojević* case (cited above, §§ 90-101) that the lack of reasoning underlying the investigating judge's order, accompanied by the domestic courts' practice of circumventing such a lack of reasoning by retrospectively justifying the use of secret surveillance, was not in compliance with the relevant domestic law and therefore did not, in practice, secure adequate safeguards against various possible abuses. The Court thus considered that such practices were not compatible with the requirement of lawfulness, nor were they sufficient to keep the interference with an applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society" (see also *Bašić*, cited above, §§ 33-34, and *Matanović*, cited above, § 114).

44. The Court's task is to examine the following orders issued in the present case: the order issued on 4 May 2007 to carry out secret surveillance in respect of the fourth applicant (see paragraph 7 above); the orders issued on 1 and 15 June 2007 to carry out secret surveillance in respect of the first and fourth applicants (see paragraphs 8 and 9 above); and the order of 2 July 2007 extending the secret surveillance order of 4 May 2007 in respect of the fourth applicant (see paragraph 11 above).

45. As to the secret surveillance order issued on 4 May 2007 in respect of the fourth applicant (see paragraph 7 above), and the order of 2 July 2007 extending the secret surveillance order of 4 May 2007 for another two months (see paragraph 11 above), the Court notes that, as in the *Dragojević* case, they were essentially based on a statement referring to the existence of

the competent prosecutor's request for the use of secret surveillance and the statutory phrase that "the investigation could not be conducted by other means". They did not, however, provide adequate reasoning as to the particular circumstances of the case, and in particular reasons why the investigation could not be conducted by other, less intrusive, means (see also *Roman Zakharov v. Russia* [GC], no. 47143/06, § 260, ECHR 2015).

46. The Court therefore finds that the same considerations which arose in the *Dragojević* case are applicable to the situation at hand.

47. There has therefore been a violation of Article 8 of the Convention in respect of the fourth applicant on that account.

48. As to the secret surveillance orders issued against the first and fourth applicants on 1 and 15 June 2007 (see paragraphs 8 and 9 above), the Court firstly notes that even though these orders were not issued in respect of the second and third applicants, their implementation led to those applicants' telephone conversations being intercepted and recorded (see paragraph 10 above), and consequently to evidence thus obtained being used in the criminal proceedings against them. The assessment of the complaints in paragraphs 49-61 below thus applies to the second and third applicants as well (see *Lambert v. France*, 24 August 1998, § 21, *Reports of Judgments and Decisions* 1998-V).

49. The Court observes that unlike in the cases of *Dragojević, Bašić*, and *Matanović*, in the case at hand the investigating judge's order of 1 June 2007 did not include only the statutory phrase that "the investigation could not be conducted by other means, or would be extremely difficult". That order provided reasons based on the specific facts of the case and the particular circumstances indicating probable cause for believing that the offence had been committed by the first and fourth applicants and that the investigation could not be conducted by other, less intrusive, means (see paragraph 8 above and compare *Ringwald v. Croatia* (dec.), nos. 14590/15 and 25405/15, § 34, 22 January 2019). Likewise, the investigating judge's order of 15 June 2007 provided reasons based on the specific facts of the case for suspending the surveillance measures regarding the first applicant's previous telephone numbers and including new telephone numbers, as well as reasons as to why the investigation could not be conducted by other, less intrusive, means (see paragraph 9 above).

50. The Court therefore finds no violation in respect of the applicants on that account.

(b) Whether the domestic authorities applied the correct legislation in implementing the secret surveillance measures

51. As to the applicants' complaint that the domestic authorities applied general provisions in implementing the measures in their case, instead of special legislation requiring stricter judicial control over their implementation (see paragraph 38 above), the Court notes that the

complaint relates to the secret surveillance orders issued and extended on the basis of the OSCOC's request on 1 and 15 June and 2 July 2007 (see paragraphs 8-11 above).

52. The central question for the Court to determine is thus whether the relevant domestic law, including the way in which it was interpreted by the domestic authorities, 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 possible abuse. Since the existence of adequate safeguards against abuse is a matter closely related to the question of 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 the requirement that it be "necessary" (see *Dragojević*, cited above, § 89, with further references).

53. The Court notes that under the domestic law the use of secret surveillance measures is regulated by the Code of Criminal Procedure and the OSCOC Act, the latter being the *lex specialis* on the matter.

54. The Court observes that even though the two legal instruments are to a certain extent identical, the OSCOC Act sets out stricter criteria for authorising, extending and supervising the implementation of secret surveillance measures.

In particular, the OSCOC Act provides for the possibility of applying further measures in addition to those under Article 180 § 1 of the Code of Criminal Procedure (supplying simulated professional services or concluding simulated legal transactions, see paragraph 30 above, section 41(1)).

Under the Code of Criminal Procedure, measures may be authorised for an initial period of four months (see paragraph 32 above, Article 182(2) of the Code of Criminal Procedure), whereas under the OSCOC Act they may be authorised for an initial period of three months (see paragraph 30 above, section 41(2) and (3)).

Under the Code of Criminal Procedure, the investigating judge is competent to extend such a measure, and only in the event of a disagreement between the investigating judge and the State Attorney does a three-judge panel of the county court have competence to extend it, whereas under the OSCOC Act, only a three-judge panel of the county court has competence to do so (ibid.).

Under the Code of Criminal Procedure, the measure can be extended on the basis of an application by the competent prosecutor, whereas under the OSCOC Act a further requirement is necessary – that the circumstances learned of subsequently justify such an extension (ibid.).

Under the Code of Criminal Procedure, the police are obliged to submit to the investigating judge or the State Attorney's Office daily reports and other relevant documentation only on the basis of special requests by those

persons (see paragraph 32 above, Article 182a(1) of the Code of Criminal Procedure). Under the OSCOC Act, such an obligation towards the investigating judge exists independently of such requests (see paragraph 30 above, section 42(1)).

The OSCOC Act expressly provides that decisions in criminal proceedings cannot be based on information gathered in breach of the obligation to submit daily reports to the investigating judge (see paragraph 30 above, section 42(8)). The Code of Criminal Procedure does not contain such a provision.

55. The Court observes that in addressing the applicants' arguments, the domestic courts explained that no issue arose regarding the fact that secret surveillance measures against them had been based on the Code of Criminal Procedure instead of the OSCOC Act (see paragraphs 16 and 24 above), since secret surveillance measures under Article 180 § 1 of the Code of Criminal Procedure may be ordered for criminal offences under the OSCOC's jurisdiction, such as drug trafficking under Article 173(3) of the Criminal Code, which the applicants were suspected of (see paragraph 30 above, section 41(1) of the OSCOC Act).

56. The domestic courts further held that the fact that the police had not submitted reports and documentation regarding technical recordings to the investigating judge on a daily basis, did not render the order or the evidence thus obtained unlawful, as a report had been submitted after the measures had been implemented (see paragraphs 16 and 24 above). The Government reiterated the latter arguments before the Court (see paragraph 41 above).

57. It is not in principle for the Court to interfere with the domestic courts' right to determine the procedure for implementing secret surveillance measures. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention refers to the rules of that law, since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see *Brežec v. Croatia*, no. 7177/10, § 42, 18 July 2013).

58. In the Court's view, the domestic courts' reasoning that the secret surveillance measures under Article 180 § 1 of the Code of Criminal Procedure – such as telephone tapping and the covert monitoring of persons in relation to criminal offences under the OSCOC's jurisdiction – could be implemented on the basis of the Code of Criminal Procedure does not appear arbitrary or manifestly unreasonable.

59. The relevant domestic law provides that the special OSCOC provisions apply whenever they regulate a matter differently from the Code of Criminal Procedure (see paragraph 30, section 22 of the OSCOC Act and paragraph 31 above). For criminal offences under the OSCOC's jurisdiction, this is not the case as regards secret surveillance measures

under Article 180 § 1 of the Code of Criminal Procedure. This has been explained by the domestic courts (see paragraphs 16, 19, 24 and 26 above).

60. In these circumstances the Court finds that the relevant domestic law, as interpreted and applied by the competent courts in the present case, provided reasonable clarity regarding the scope and manner in which the discretion conferred on the public authorities was exercised, and that in practice adequate safeguards were secured against possible abuse. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicants' telephone communications and the first and fourth applicants' covert monitoring was shown to have complied with the requirements of lawfulness, and was adequate to keep the interference with the applicants' right to respect for their private life and correspondence to what was "necessary in a democratic society".

61. The Court therefore concludes that there has been no violation of Article 8 of the Convention in respect of the applicants as regards the fact that in implementing the secret surveillance measures of 1 and 15 June and 2 July 2007, the domestic authorities applied the Code of Criminal Procedure (see paragraphs 8-11 above).

(c) Whether the secret surveillance carried out in respect of the second and third applicants was lawful

62. It remains for the Court to address the second and third applicants' complaint that the secret surveillance carried out while they were abroad in the absence of a request for international legal assistance in criminal matters was unlawful, and that the results of secret surveillance ordered against third parties were used in the criminal proceedings against them (see paragraph 39 above).

63. The Court notes that in the case of *Lambert*, cited above, it did not find a violation of Article 8 of the Convention on the grounds that the applicant's telephone conversations had been intercepted on the basis of secret surveillance measures ordered in respect of another person and not him. Rather, it found a violation of Article 8 because, in that case, the applicant had not enjoyed the effective protection of national law which would have been capable of restricting the interference in question to what was "necessary in a democratic society", since he could not challenge the telephone tapping to which he had been made subject (ibid., §§ 21-41).

64. In the present case, the Court has already found that the secret surveillance measures issued in respect of the first applicant, in the course of which the second and third applicants' telephone conversations were intercepted, were "in accordance with the law" and "necessary" within the meaning of Article 8 of the Convention (see paragraphs 48-61 above).

65. Further to this, unlike in the case of *Lambert*, in the case at hand, the second and third applicants were able to effectively challenge the telephone tapping to which they had been made subject. Indeed, the complaints which

they brought throughout the criminal proceedings were not dismissed by the domestic courts on the grounds that they had no standing to challenge the lawfulness and necessity of the secret surveillance measures issued against third parties and not them (see, *a contrario*, *Lambert*, cited above, § 14). Their complaints – that the secret surveillance orders in question had lacked reasons; that the procedure for supervising the execution of those orders had been unlawful; and that the orders had not been issued in respect of them and had been implemented against them in the Netherlands, in the absence of a request for international assistance – were examined by the domestic courts, which deemed the complaints unfounded (see paragraphs 16, 19, 24 and 26 above).

66. The Court notes that the Croatian authorities never issued a secret surveillance order in respect of the second and third applicants in the Netherlands (see paragraph 24 above). Their telephone conversations were intercepted and recorded on the basis of the secret surveillance orders lawfully issued against the first applicant, whom they contacted. Since they participated in the criminal activities of the first applicant, who was under secret surveillance, activities which amounted to the criminal offence proscribed under Article 181 of the Code of Criminal Procedure, the domestic courts deemed that the evidence so obtained could be used in the criminal proceedings against them (see paragraph 24 above). That conclusion is based on the relevant domestic law and practice concerning the so-called "accidental finding" (see paragraphs 29, 31 and 32 above).

67. In the above circumstances, the second and third applicants' complaint about the secret surveillance carried out abroad in the absence of a request for international legal assistance in criminal matters and the use of the results of secret surveillance ordered against third parties in the criminal proceedings against them must be dismissed.

68. Accordingly, the Court finds that there has been no violation of Article 8 of the Convention in respect of the second and third applicants on that account.

(d) Conclusion

69. The Court finds that there has been a violation of Article 8 of the Convention in respect of the fourth applicant as regards the secret surveillance order issued on 4 May 2007 and extended on 2 July 2007, for lack of adequate reasoning. It finds that there has been no violation of that Article in respect of the applicants as regards the remainder of their complaints concerning the secret surveillance measures.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) AND (d) OF THE CONVENTION

70. The applicants complained that they had not had a fair trial. They alleged in particular:

(i) that evidence unlawfully obtained by means of secret surveillance had been used in the criminal proceedings against them (all four applicants);

(ii) that the principle of equality of arms had been violated in that a submission of the State Attorney's Office of the Republic of Croatia to the Supreme Court had not been forwarded to the defence (the first, second and third applicants);

(iii) that the first applicant had not been allowed to be present at the session of the appeal panel;

(iv) that the domestic courts had failed to call two defence witnesses (the fourth applicant).

71. They relied on Article 6 §§ 1 and 3 (c) and (d) of the Convention, which, in so far as relevant, reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Alleged use of evidence obtained by means of unlawful secret surveillance

1. The parties' arguments

72. The Government pointed out that the applicants had been given adequate opportunity to challenge the evidence at issue and to oppose its use in the proceedings, and to ask for further evidence to be examined at the trial. In the Government's view, all their arguments in this respect had been duly examined and addressed by the domestic courts, including the Supreme Court and the Constitutional Court. Moreover, the Government considered that even though the disputed evidence had been important for the applicants' conviction, it had been concordant with the rest of the evidence against them.

73. The applicants contended that their conviction had been based solely on evidence obtained by unlawful and unjustified secret surveillance. The surveillance had been based on the Code of Criminal Procedure instead of on the special legislation concerning organised crime, which required stricter judicial control over the implementation of such surveillance. Information thus obtained should not have been used in the criminal proceedings against them. The second and third applicants also raised an issue with regard to the unlawfulness of secret surveillance abroad which had been conducted in the absence of a request for international legal assistance in criminal matters, and the possibility to use the results of secret surveillance ordered against a third party rather than against them in the criminal proceedings against them.

74. In the applicants' view, the domestic courts' reliance on such evidence had not been accompanied by adequate procedural safeguards guaranteeing the fairness of the proceedings. Their doubts as to the accuracy of the recordings had never been properly addressed by the domestic courts.

2. The Court's assessment

75. The general principles for the Court's assessment of whether or not the use of evidence obtained by secret surveillance runs counter to the requirements of a fair trial under Article 6 § 1 of the Convention are set out in the *Dragojević* case (cited above, §§ 127-130).

76. In this connection, the Court reiterates that it is not its role to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether an 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 (ibid., § 128).

77. The Court found no violation of Article 8 of the Convention against the applicants as regards the secret surveillance measures issued on 1 and 15 June 2007 (see paragraphs 48-68 above). That implies that secret surveillance measures in question and the evidence thus obtained were not unlawful, since a requirement that any interference with an applicant's rights protected under Article 8 has to be based in law is inherent in the guarantees of that Article. The Court further finds that the applicants' allegations in that respect do not disclose any appearance of a violation of the fair trial guarantees, within the meaning of Article 6 § 1 of the Convention (see *Ringwald,* cited above, § 41).

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

79. The Court found a breach of Article 8 of the Convention against the fourth applicant as regards the secret surveillance order issued on 4 May 2007 and extended on 2 July 2007 (see paragraphs 45-47 above).

80. The first question to be examined in this context is whether the fourth applicant was given the opportunity to challenge the authenticity of the evidence and oppose its use. In this connection, the Court notes that the fourth applicant was given, and effectively used, such an opportunity during the proceedings, in his appeals (see paragraph 14-16 and 20 above) and in his constitutional complaint (see paragraph 25 above). The domestic courts examined the fourth applicant's arguments on the merits and provided reasons for their decisions (see paragraphs 15, 16, 19, 24 and 26 above). The fact that the fourth 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 v. Switzerland*, 12 July 1988, § 47, Series A no. 140, and *Khan v. the United Kingdom*, no. 35394/97, § 38, ECHR 2000-V).

81. With regard to the quality of the evidence in question, which is a further element for the Court's consideration, the Court notes that the fourth applicant's main objection to the use of the evidence obtained by means of secret surveillance concerned the formal use of such information as evidence during the proceedings. All the defence's doubts as to the accuracy of the recordings were duly examined and addressed by the trial court (see paragraph 19 above). Those findings were also examined and confirmed by the Supreme Court, which considered that all the relevant circumstances of the case had been properly established by the trial court (see paragraph 24 above).

82. Given that it is primarily for the domestic courts to decide on the admissibility of evidence, its relevance and the weight to be given to it in reaching a judgment (see, amongst many others, *Fomin v. Moldova*, no. 36755/06, § 30, 11 October 2011), the Court finds nothing here that casts any doubt on the reliability and accuracy of the evidence in question.

83. Lastly, as regards the importance of the disputed evidence for the fourth applicant's conviction, the Court notes that the contested material was the decisive evidence on the basis of which criminal proceedings were instituted against him, and likewise it was decisive for his conviction (see paragraph 19 above). However, this element is not the determining factor in the Court's assessment of the fairness of the proceedings taken as a whole (see *Khan*, cited above, § 37). The Court reiterates that the relevance of the existence of evidence other than evidence which is contested will depend on the circumstances of the particular case. In the present circumstances, where the substance of the recordings provided accurate and reliable evidence, the need for supporting evidence was correspondingly weaker (see *Prade v. Germany*, no. 7215/10, § 40, 3 March 2016).

84. In view of the above, the Court considers that there is nothing to substantiate the allegation that the fourth 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 v. Russia* [GC],

no. 4378/02, § 98, 10 March 2009). In conclusion, the Court finds that the use of the disputed recordings in evidence did not as such deprive the fourth applicant of a fair trial.

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

B. Alleged violation of the principle of equality of arms as regards the submission of the State Attorney's Office of the Republic of Croatia

1. Admissibility

86. 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' arguments

87. The first, second and third applicants submitted that the prosecution's submission of 21 September 2009 to the Supreme Court had never been forwarded to the defence. At the session of the appeal panel their lawyers had learned of the existence of the submission but not of its content. In any event, it had not been sufficient that their lawyers had learned of it; the applicants themselves should have been made aware of it, because it had been for them to instruct their lawyers as to which actions to take in that respect.

88. The applicants had not been present in person at the session, and it had been pointless to ask for it to be adjourned because the Supreme Court had been aware of the submission in question from the prosecution and had still held that the applicants' presence was not expedient and would not be ensured.

89. As to the statement in the record of the session of the appeal panel that the parties had not had any objections, the applicants contended that the record had not been read out to the parties and had not been signed by them.

90. The Government submitted that the defence had been aware of the existence of the prosecution's submission of 21 September 2009; the applicants' lawyers had learned of its existence at the session of the appeal panel which they had attended. They could therefore have asked for the submission to be read out during the session, or sought an adjournment in order to gain more time to examine it. However, they had done nothing of the sort.

(b) The Court's assessment

91. In the cases of *Zahirović v. Croatia*, (no. 58590/11, §§ 44-50, 25 April 2013) and *Lonić v. Croatia*, (no. 8067/12, §§ 83-86, 4 December 2014), the Court found, after a detailed examination of the Croatian system of appeal proceedings, a violation of the principle of equality of arms and the right to adversarial proceedings under Article 6 § 1 of the Convention on the grounds that a submission of the State Attorney's Office of the Republic of Croatia to the Supreme Court had not been forwarded to the defence. It held that it did not need to determine whether the omission to forward the relevant document had been prejudicial to the applicant; the existence of a violation was conceivable even in the absence of prejudice (see *Zahirović*, cited above, §§ 48 and 49, and *Lonić*, cited above, § 84).

92. The violation originated in a situation where, under the relevant domestic law, the courts were under no obligation to forward the opinion of the competent State Attorney to the defence (see paragraph 33 above, Article 373 of the 1997 Code of Criminal Procedure).

93. The Court notes that the amendments made to the relevant domestic law in the wake of the *Zahirović* judgment excluded the possibility for the competent State Attorney to submit an opinion after the examination of a case during the appeal proceedings. The issues of inequality between the parties and lack of an adversarial trial in that respect were therefore removed (see paragraph 33 above, amendments to the 2008 Code of Criminal Procedure of 15 December 2013). However, in the proceedings complained of by the applicants, the previous legislation and practice was applicable.

94. In the present case, whilst admitting that the prosecution's submission had not been forwarded to the applicants, the Government contended that the principle of adversarial trial had been complied with, since the applicants' lawyers had learned about the prosecution's submission at the session of the appeal panel. They could therefore have asked for the submission to be read out or for the session to be adjourned, and could have responded to the submission before the second-instance judgment had been given (see, *a contrario*, *Zahirović*, cited above, § 41, and paragraph 91 above). However, they had done nothing of the sort.

95. The Court is not convinced that the Government's argument should lead it to come to a different conclusion than that in *Zahirović*.

96. The Court notes that at the session of the appeal panel held on 9 March 2010, the Deputy State Attorney indeed just confirmed the proposal submitted in the reasoned opinion of 21 September 2009 (see paragraphs 23-24 above). The applicants' lawyers attended the session and therefore the defence learned of the existence of the prosecution's submission at that time. The present case thus differs from cases in which the applicants had no knowledge of the other party's submissions before a decision was given (see, for example, *Brandstetter v. Austria*, 28 August

1991, § 67, Series A no. 211; *Bulut v. Austria*, 22 February 1996, § 49, *Reports* 1996-II; and *Josef Fischer v. Austria*, no. 33382/96, § 21, 17 January 2002).

97. However, the issue to be examined is whether in the present case the defence was afforded an effective opportunity to familiarise itself with the prosecution's submission, as well as an opportunity to comment on its content in an appropriate form and within an appropriate time-frame before the appellate judgment was given. What is particularly at stake here is the applicants' confidence in the workings of criminal justice, which is based on*, inter alia*, the assumption that they would be afforded the opportunity to express their views on every document in the file concerning their appeal against the first-instance judgment.

98. The Court reiterates that it is for the domestic authorities to ensure compliance with the principle of adversarial trial. It notes that under the relevant domestic law applicable at the time, there was no obligation to forward the opinion of the competent State Attorney to the defence. In the present case it is undisputed that the defence was not served with the prosecution's submission of 21 September 2009. The Court further notes that under the relevant domestic law applicable at the time, the accused and his or her defence counsel were invited to the session of the appeal panel if they so requested or if the panel deemed that their presence was useful for the clarification of the case. If the accused was in pre-trial detention and had a defence lawyer, his or her presence was ensured only if the panel considered it expedient (see paragraph 33 above, Article 374 of the 2007 Code of Criminal Procedure). In the present case the Supreme Court, which had been aware of the prosecution's submission in question, did not invite the applicants to the session, only their lawyers.. The applicants were in pre-trial detention and the court did not deem it expedient to summon them (see paragraph 22 above).

99. The Court notes that the prosecution's submission in question constituted a reasoned opinion on the merits of the applicants' appeals against the first-instance judgment, manifestly aiming to influence the decision of the Supreme Court by calling for the appeals to be dismissed. Thus, having regard to the nature of the issues to be decided by the Supreme Court, that is, questions of both fact and law, the applicants had a clear interest in receiving a copy of the prosecution's written submission (see *Zahirović*, cited above, § 47, and *Borgers v. Belgium*, 30 October 1991, § 27, Series A no. 214 B).

100. The Court is of the view that rendering the knowledge that observations have been filed by the prosecution entirely dependent on the presence of the defence at the session of the appeal panel amounted to imposing a disproportionate burden on the defence and did not necessarily guarantee a real opportunity to comment on the observations. In other words, it did not guarantee an unconditional right of the defence to have

knowledge of, and to comment on, the prosecution's submission in the appeal proceedings (see, *mutatis mutandis*, *Brandstetter*, cited above, § 67; *Göç v. Turkey* [GC], no. 36590/97, § 57, ECHR 2002 V; and *Kliba v. Croatia* [Committee], no. 30375/16, § 26, 18 April 2019).

101. In view of these findings, and having regard to its case-law as set out in the *Zahirović* and *Lonić* cases (cited above), the Court finds that there has been a violation of Article 6 § 1 of the Convention in respect of the first, second and third applicants.

C. The first applicant's absence from the session of the appeal panel

1. Admissibility

102. 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' arguments

103. The first applicant submitted that his presence at the session had been necessary because the Supreme Court had been called upon to examine all the factual and legal circumstances of the case. Moreover, as the prosecution had been summoned to the session, he had been placed in a disadvantageous position *vis-à-vis* the opposing party. He further contended that in his appeal he had not asked to attend the session of the appeal panel in person because the practice of the domestic courts had been that an accused who was in detention at the time of a session was not allowed to attend it. Such a request would therefore have been devoid of any purpose.

104. The Government contended that the first applicant had never asked to attend the session of the appeal panel in person. In his appeal, he had only asked that his lawyer be invited, a request which the Supreme Court had granted. Moreover, the issues to be decided by the Supreme Court had been of a strictly legal nature, and the applicant's attendance in person had not been necessary.

(b) The Court's assessment

105. In the cases of *Zahirović* (cited above, §§ 58-64) and *Lonić* (cited above, §§ 94-102), the Court found, after a detailed examination of the Croatian system of appeal proceedings, that when an appeal court was called upon to make a full assessment of an applicant's guilt or innocence regarding the charges against him or her, in view of not only the arguments he or she had adduced before the first-instance court, but also the arguments

concerning the alleged failures of that court to establish all the relevant facts and to apply the relevant substantive and procedural rules correctly, this − as a matter of fairness − required the applicant's presence at a session of the appeal panel. Moreover, in the case of *Lonić* (cited above, § 100), the Court considered it irrelevant that the appeal against the first-instance judgment had been lodged only by the applicant, since that had not affected the principal question brought before the second-instance court, namely whether the applicant was guilty or innocent, an issue which, in order for the trial to be fair, had required the applicant's presence at the session of the appeal panel.

106. In the present case, the Court notes that in his appeal the first applicant contested his conviction and sentence on both factual and legal grounds (see paragraph 20 above). The Supreme Court was therefore called upon to make a full assessment of the first applicant's guilt or innocence in respect of the charges against him in the light of not only the arguments he had adduced before the first-instance court, but also those concerning the alleged failures of that court to establish all the relevant facts and to apply the relevant substantive and procedural rules correctly (see *Lonić*, cited above, § 99, compare *Abdulgadirov v. Azerbaijan*, no. 24510/06, § 42, 20 June 2013, and *Kozlitin v. Russia*, no. 17092/04, § 63, 14 November 2013; and contrast *Fejde v. Sweden*, 29 October 1991, § 33, Series A no. 212-C, and *Hermi v. Italy* [GC], no. 18114/02, § 85, ECHR 2006-XII). However, contrary to the requirements of the above case-law, the Supreme Court decided that the first applicant's presence was not expedient (see paragraphs 22 and 23 above).

107. The Court notes that unlike in the cases of *Zahirović* and *Lonić*, the first applicant in the present case did not ask to attend the session in person, only that his lawyer be invited, a request which was granted (see paragraph 20 above; see *Zahirović*, cited above, § 20, and *Lonić*, cited above, § 9; see also *Arps v. Croatia*, no. 23444/12, § 8, 25 October 2016). The first applicant explained that he had done so because, in accordance with the domestic courts' practice, an accused who was in detention at the time of a session was not allowed to attend it (see paragraph 103 above).

108. The Court notes that under the domestic law in force at the time, if an accused was in detention, the president of the appeal panel might ensure his or her presence only if he or she considered it to be expedient (see paragraph 33 above; Article 374 § 2 of the Code of Criminal Procedure). In the present case, upon informing the parties that a session of the appeal panel would be held, the Supreme Court expressly stated that the presence of the accused, who were in pre-trial detention and who had a lawyer, would not be ensured, and that there would be no order for them to be brought to court (see paragraph 22 above). In such circumstances, the fact that the applicant did not ask to attend the session in person cannot be held against him. Indeed, his attendance at the session was not refused because he had

failed to submit such a request, but because the Supreme Court held that his presence was not expedient (compare *Zahirović*, cited above, § 20).

109. Accordingly, in view of these findings, having regard to its case-law as set out in the *Zahirović* and *Lonić* cases (cited above), the Court finds that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the first applicant.

D. Failure of the domestic courts to call two defence witnesses

1. Admissibility

110. 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' arguments

111. The fourth applicant complained that he had not been able to obtain the attendance of witnesses on his behalf under the same conditions as the prosecution, as the domestic courts had failed to call A.P. and M.D., witnesses who would have testified as to the matter of B.S. not buying the cocaine from him, but from another person.

112. The Government contended that the trial court had given the fourth applicant a proper opportunity to put forward his defence. After hearing the two witnesses he had called, it had refused to hear A.P. and M.D. as witnesses, providing sufficient reasons for that decision.

(b) The Court's assessment

(i) General principles

113. The general principles concerning the examination of defence witnesses under Article 6 §§ 1 and 3 (d) of the Convention have recently been clarified in the case of *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139-168, 18 December 2018). In particular, the Court formulated the following three-pronged test for cases where a request for the examination of a witness on behalf of the accused has been made in accordance with domestic law:

(1) Whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation?

(2) Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?

(3) Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

114. In the *Murtazaliyeva* case, the Court provided guidance for applying the test in future cases (ibid., §§ 160-168).

(ii) Application of the principles to the present case

(α) Whether the request for A.P. and M.D. to be examined as witnesses was sufficiently reasoned and relevant to the subject matter of the accusation

115. The Court notes that, in the proceedings in question, the fourth applicant was accused of, *inter alia*, selling cocaine to B.S. in May 2007 in Zagreb, after acquiring that drug from the first applicant (see paragraph 13 above). At the hearing held on 30 January 2009 the trial court heard B.S., a witness called by the fourth applicant, who stated that in May 2007 he had purchased cocaine from S.H., and not from the fourth applicant, and that this fact could be confirmed by A.P. and M.D., who had been with him on that day. The fourth applicant then asked to call A.P. and M.D., who he said would testify about the circumstances in which B.S. had purchased cocaine in May 2007 (see paragraph 18 above). In these circumstances, the Court accepts that the request for A.P. and M.D. to be examined as witnesses was sufficiently reasoned, and that the testimony of those two witnesses was reasonably expected to strengthen the position of the defence.

(β) Whether the domestic courts considered the relevance of any testimony from A.P. and M.D. and provided sufficient reasons for their decision not to examine them at trial

116. The Court notes that the trial court examined the circumstances as to which A.P. and M.D. could testify, namely the matter of whether B.S. had bought drugs from the fourth applicant or from another person. After having already heard two witnesses called by the fourth applicant in relation to that matter (M.S. and B.S.), the trial court considered that the evidence of two other persons, A.P. and M.D., could not change its conclusion that the fourth applicant had sold drugs to B.S. This fact was established by the transcripts of the surveillance of the telephone conversations, as well by the drugs found on B.S. (see paragraphs 18 and 19 above). In the Court's view, the reasons given by the trial court were appropriate in the circumstances of the case and were adequate, in terms of their scope and level of detail, with regard to the reasons advanced by the defence.

(γ) Whether the domestic courts' decision not to examine A.P. and M.D. undermined the overall fairness of the proceedings

117. In view of the principles established in its case-law and above findings, the Court concludes that it cannot be said that the failure to examine the above-mentioned defence witnesses prejudiced the fairness of the proceedings (compare *Gregačević v. Croatia*, no. 58331/09, § 64,

10 July 2012). The fourth applicant's conviction for selling cocaine to B.S. in May 2007 in Zagreb was based on the transcripts of the surveillance of the telephone conversations and the drugs found on B.S. (see paragraph 19 above). The fourth applicant's complaint amounts to a mere disagreement with the domestic courts' assessment of the evidence, and the Court does not find that assessment arbitrary or manifestly unreasonable.

118. The fourth applicant, represented by a lawyer, was able to conduct his defence effectively, comment without hindrance on the incriminating evidence, adduce evidence he considered relevant, and present his account of the events to the domestic courts.

(δ) Conclusion

119. Accordingly, being mindful that its role is not to give a ruling as to whether the statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Topić v. Croatia*, no. 51355/10, § 40, 10 October 2013), the Court finds that there has been no violation of the fourth applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention as regards the witnesses A.P. and M.D.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. 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

121. The first, second and third applicants claimed an unspecified amount in respect of non-pecuniary damage, and the fourth applicant claimed 180,000 euros (EUR) in respect of non-pecuniary damage for wrongful imprisonment and the violation of his right to respect for his private and family life and correspondence.

122. The Government contested these claims.

123. Having regard to all the circumstances of the present case, the Court accepts that the applicants have 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:

- EUR 4,000 each to the first, second and third applicants in respect of non-pecuniary damage for the violation(s) of Article 6 §§ 1 and 3 (c) of the Convention, plus any tax that may be chargeable to them, and

- EUR 1,500 to the fourth applicant in respect of non-pecuniary damage for the violation of Article 8 of the Convention, plus any tax that may be chargeable to him.

B. Costs and expenses

124. The first, second and third applicants each claimed 18,750 Croatian kunas (HRK)[1] for the costs and expenses incurred before the domestic courts, and EUR 2,000 for those incurred before the Court.

125. The fourth applicant claimed EUR 666.66 for the costs and expenses incurred before the domestic courts, and EUR 1,999.98 for those incurred before the Court.

126. The Government submitted that the claim for expenses had been lodged without any supporting documents, so should be rejected.

127. With regard to the costs and expenses incurred before the domestic courts, regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award:

- EUR 1,000 each to the first, second and third applicants, and
- EUR 666.66 to the fourth applicant.

128. With regard to the costs incurred before the Court, regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award:

- EUR 2,000 to the first applicant,
- EUR 1,600 each to the second and third applicants,
- EUR 1,999.98 to the fourth applicant.

C. Default interest

129. 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. *Decides* to join the applications;

2. *Declares* the applicants' complaints under Article 6 § 1 of the Convention concerning the use in the criminal proceedings against them of evidence obtained by means of secret surveillance inadmissible and the remainder of the applications admissible;

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1. EUR 2,500

3. *Holds* that there has been a violation of Article 8 of the Convention in respect of the fourth applicant as regards the secret surveillance order issued on 4 May 2007 and extended on 2 July 2007 on account of lack of adequate reasoning;

4. *Holds* that there has been no violation of Article 8 of the Convention in respect of the applicants as regards the remainder of their complaints concerning the secret surveillance measures;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the first, second and third applicants concerning the failure to forward the submission of the State Attorney's Office of the Republic of Croatia to the defence;

6. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the first applicant concerning his absence from the session of the appeal panel;

7. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention in respect of the fourth applicant;

8. *Holds,*
(a) that the respondent State is to pay, 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 4,000 (four thousand euros) each to the first, second and third applicants and EUR 1,500 (one thousand five hundred euros) to the fourth applicant, plus any tax that may be chargeable to them, in respect of non-pecuniary damage;
(ii) EUR 3,000 (three thousand euros) to the first applicant, EUR 2,600 (two thousand six hundred euros) each to the second and third applicants and EUR 2,666.64 (two thousand six hundred and sixty-six euros and sixty-four cents) to the fourth applicant, plus any tax that may be chargeable to them, 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;

9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 6 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Krzysztof Wojtyczek President

APPENDIX

No.	Application no.	Lodged on	Applicant Date of birth Nationality Place of residence	Represented by	Complaint(s)
1.	40429/14	23/05/2014	**Željko BOSAK** 09/02/1973 Croatian Zagreb	Višnja DRENŠKI LASAN	1.Unlawful and unjustified secret surveillance 2. Submission of the State Attorney's Office not forwarded to the defence 3. Not present at the session of the appeal panel
2.	41536/14	29/05/2014	**Ramazan KESKIN** 01/01/1979 Dutch Rotterdam	Višnja DRENŠKI LASAN	1.Unlawful and unjustified secret surveillance 2. Submission of the State Attorney's Office not forwarded to the defence
3.	42804/14	02/06/2014	**Ahmet BASALAN** 07/12/1984 Dutch Rotterdam	Višnja DRENŠKI LASAN	1.Unlawful and unjustified secret surveillance 2. Submission of the State Attorney's Office not forwarded to the defence
4.	58379/14	18/08/2014	**Dubravko ŠOŠO** 31/08/1957 Croatian Zagreb	Andrej ILIĆ	1.Unlawful and unjustified secret surveillance 2. Examination of witnesses