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Europees Hof voor de Rechten van de Mens
15 januari 2015, nr. 68955/11
(Berro-Lefèvre, Steiner, Hajiyev, Lazarova Trajkovska, Laffranque, Turković, Dedov)
Noot J. Lindeman

Telefoontaps. Subsidiariteitstoets geschonden.

[EVRM art. 8]

Klager, Ante Dragojević, werkte als matroos op een containerschip. Hij wordt verdacht van betrokkenheid bij drugssmokkel tussen Latijns-Amerika en Europa. De autoriteiten hebben daarop een verzoek voorgelegd om de telefoon van klager af te tappen. Dit verzoek is toegewezen: van 23 maart tot 7 augustus 2007 is de telefoon afgetapt. Op 17 september 2007 is een nieuw verzoek voor het aftappen van de telefoon opnieuw toegewezen. In 2009 is klager opgepakt wegens verdenking van betrokkenheid bij drugssmokkel. Dragojević stelt dat artikel 8 EVRM is geschonden, omdat niet is getoetst of het onderzoek niet op een minder ingrijpende manier kon worden bewerkstelligd.
Het Hof oordeelt dat de taps een inbreuk vormen op de persoonlijke levenssfeer. Voor de vraag of de inbreuk bij wet is voorzien en noodzakelijk is in een democratische samenleving oordeelt het Hof als volgt. De toewijzing van de taps door de rechter is tot vier maal toe in wezen gestoeld op de enkele grond dat het onderzoek niet kan worden uitgevoerd op andere wijzen of omdat die zeer moeilijk uitvoerbaar zouden zijn ("the investigation could not be conducted by other means or that it would be extremely difficult"). Daarbij is niet ingegaan op de feitelijke gegevens van de zaak die erop wijzen dat het onderzoek inderdaad niet op een andere, minder ingrijpende wijze kon worden gerealiseerd. Alhoewel dit volgens de Kroatische rechter niet in strijd is met het nationale recht, uit het Hof zijn bedenkingen hierbij gelet op de gevoeligheid van geheime surveillance. Het zou hiermee in feite mogelijk zijn om de door de wetgever beoogde voorafgaande controle voor het gebruik van surveillancemaatregelen te omzeilen. Deze situatie biedt onvoldoende waarborgen tegen mogelijk misbruik en opent de deur tot willekeur, zeker in situaties waarin de rechtmatigheid van de maatregel betwist.
Gelet op het bovenstaande stelt het Hof vast dat het nationale recht, zoals het door de nationale rechter is uitgelegd en toegepast, onvoldoende waarborgen biedt tegen misbruik van recht. Bijgevolg voldeed de onderhavige procedure voor het aanvragen en uitvoeren van de telefoontap niet aan de eisen van rechtmatigheid, noch kan de interventie noodzakelijk worden geacht in een democratische samenleving.

Dragojević
tegen
Kroatië

THE LAW

I. Alleged violation of Article 8 of the Convention

67. The applicant complained that the secret surveillance of his telephone conversations had been in violation of the guarantees of Article 8 of the Convention, which reads as follows:
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

68. The Government pointed out that the applicant had been under secret surveillance between 23 March and 7 August 2007 and subsequently from 17 September 2007, and that he had learnt this when the indictment had been lodged on 10 March 2009. Accordingly, in the Government's view, the six-month time-limit had started running from that time and there had been no reason for the applicant to wait for the outcome of the criminal proceedings. Furthermore, the Govern-

ment pointed out that in his constitutional complaint the applicant had not expressly relied on the provisions of Article 8 of the Convention and Article 35 of the Constitution. He had only complained about the alleged unlawfulness of the secret surveillance orders and the use of their results in the criminal proceedings against him.

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

2. The Court's assessment

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

71. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. In this regard, the Court has already held that in order to comply with the principle of subsidiarity, before bringing complaints against Croatia to the Court applicants are in principle required to afford the Croatian Constitutional Court the opportunity to remedy their situation (see *Orlić v. Croatia*, no. 48833/07, § 46, 21 June 2011; *Čamovski v. Croatia*, no. 38280/10, § 27, 23 October 2012; *Bajić v. Croatia*, no. 41108/10, § 66, 13 November 2012; *Remetin v. Croatia*, no. 29525/10, § 81, 11 December 2012; *Tarbuk v. Croatia*, no. 31360/10, § 29, 11 December 2012; *Damjanac v. Croatia*, no. 52943/10, § 70, 24 October 2013; and *Šimecki v. Croatia*, no. 15253/10, § 29, 30 April 2014).

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

73. Furthermore, the Court considers that the applicant, having raised the issue in substance in his constitutional complaint, did raise before the domestic courts the complaint which he has submitted to the Court (see, by contrast, *Mađer v. Croatia*, no. 56185/07, § 137, 21 June 2011, and *Merot d.o.o. and Storitve Tir d.o.o. v. Croatia* (dec.), nos. 29426/08 and 29737/08, §§ 35 and 36 10 December 2013). The applicant thereby provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely of putting right the violations alleged against them (see *Lelas*, cited above, § 51; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 144-46, ECHR 2010; *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010; *Bjedov v. Croatia*, no. 42150/09, § 48, 29 May 2012; and *Tarbuk v. Croatia*, no. 31360/10, § 32, 11 December 2012). The Court also notes that the decision of the Constitutional Court was served on the applicant's representative on 13 June 2011

(see paragraph 51 above) and that the applicant lodged his complaint with the Court on 20 October 2011.
74. Against the above background, the Court rejects the Government's objection.
75. The Court also notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions
76. The applicant contended that his secret surveillance had been unlawful because it had been based on orders of the investigating judge issued contrary to the relevant domestic law and the case-law of the higher domestic courts. Those orders of the investigating judge had contained no assessment of the likelihood that an offence had been committed and that the investigation into that offence could not be conducted by other, less intrusive, means. At the same time the relevant domestic law provided for judicial control of secret surveillance measures and required the judicial authority to examine the reasons put forward by the prosecuting authorities before issuing the secret surveillance orders. The statutory requirement for a reasoned order was necessary as a form of effective judicial control of measures interfering with the fundamental rights of an individual.
77. The Government accepted that there had been interference with the applicant's rights under Article 8 of the Convention. However, they considered that such interference had been justified. In particular, the secret surveillance orders had been based on Article 180 of the Code of Criminal Procedure and had been issued and supervised by an investigating judge pursuant to reasoned and substantiated requests from the OSCOC which the investigating judge had accepted as such. Moreover, such interference had pursued the legitimate aim of investigating and prosecuting crime and had been proportionate to the circumstances and gravity of the offence at issue.

2. The Court's assessment

(a) General principles
78. The Court reiterates that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8. Their monitoring amounts to an interference with the exercise of one's rights under Article 8 (see *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82).
79. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see, amongst many others, *Kvasnica v. Slovakia*, no. 72094/01, § 77, 9 June 2009).
80. The expression "in accordance with the law" under Article 8 § 2 in general requires, first, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned, who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law (see, for example, *Kruslin v. France*, 24 April 1990, § 27, Series A no. 176 A).
81. In particular, in the context of secret measures of surveillance as the interception of communications, the requirement of legal "foreseeability" cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret the risks of arbitrariness are evident. Thus, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see, for example, *Malone*, cited above, § 67; *Huvig v. France*, 24 April 1990, § 29, Series A no. 176 B; *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998 V; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 93, ECHR 2006 XI; and *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009).

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

83. Furthermore, in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist guarantees against abuse which are adequate and effective. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law (see *Klass and Others v. Germany*, 6 September 1978, § 50, Series A no. 28; *Weber and Saravia*, cited above, § 106; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, § 77, 28 June 2007; and *Kennedy v. the United Kingdom*, no. 26839/05, § 153, 18 May 2010).

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

(b) Application of these principles to the present case

(i) Whether there was an interference

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

(ii) Whether the interference was justified

86. The Court observes that in the instant case the applicant did not complain in general about the existence of legislation allowing measures of covert surveillance. The basis of his complaint was a specific instance of such surveillance which took place in connection with criminal proceedings against him. As the Court must first ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant domestic law in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction (see *Kruslin*, cited above, § 32). Nevertheless, in cases arising from individual applications, the Court must as a rule focus its attention not on the law as such but on the manner in which it was applied to the applicant in the particular circumstances (see *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 48, 8 March 2011).

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

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

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

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

91. The domestic law also expressly provides that the investigating judge's order authorising the use of secret surveillance must be in written form and must contain a statement of reasons specifying: information concerning the person in respect of whom the measures are carried out, relevant circumstances justifying the need for secret surveillance measures, the time-limits in which the measures can be carried out – which must be proportionate to the legitimate aim pursued – and the scope of the measures (see paragraph 55 above; Article 182 § 1 of the Code of Criminal Procedure).

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

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

94. In this connection the Court has also emphasised that verification by the authority empowered to authorise the use of secret surveillance, *inter alia*, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, committing or having committed certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts

by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration (see *Klass and Others*, cited above, § 51). It is therefore important that the authorising authority – the investigating judge in the instant case – determines whether there is compelling justification for authorising measures of secret surveillance (compare *Iordachi and Others v. Moldova*, no. 25198/02, § 51, 10 February 2009).

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

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

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

98. Moreover, the Court considers that in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law.

99. This is particularly true in cases where the only effective possibility for an individual subjected to covert surveillance in the context of criminal proceedings is to challenge the lawfulness of the use of such measures before the criminal courts during the criminal proceedings against him or her (see paragraph 72 above). The Court has already held that although the courts could, in the criminal proceedings, consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance

with the law"; still less was it open to them to grant appropriate relief in connection with the complaint (see *Khan*, cited above, § 44; P.G. and *J.H. v. the United Kingdom*, no. 44787/98, § 86, ECHR 2001 IX; and *Goranova-Karaeneva*, cited above, § 59).

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

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

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

II. Alleged violations of Article 6 § 1 of the Convention

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

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

A. Alleged lack of impartiality of the trial bench

1. Admissibility

(a) The parties' submissions

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

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

(b) The Court's assessment

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

107. In such circumstances any other complaint by the applicant about the composition of the trial bench or a lack of impartiality of the Dubrovnik County Court judges would have been theoretical and illusory, whereas the Convention is intended to guarantee rights which are practical and effective (see, amongst many other authorities, *Erkapić v. Croatia*, no. 51198/08, § 78, 25 April 2013).

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

2. Merits

(a) The parties' submissions

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

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

(b) The Court's assessment

(i) General principles

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

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

113. The Court also emphasises that in this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998 VIII; and *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009).
114. In cases where a judge presiding over the trial has already dealt with the case at an earlier stage of the proceedings and has given various decisions in respect of the applicant at the pre-trial stage – including decisions on continued detention – the Court has observed that, in general, one of the roles of the trial judge is to manage the proceedings with a view to ensuring the proper administration of justice. It is perfectly normal that a judge may consider and dismiss an application for release lodged by a detained defendant. In doing so the judge is required, under both the Convention and the domestic law, to establish the existence of a "reasonable suspicion" against the defendant. The mere fact that a trial judge has already taken pre-trial decisions in the case, including decisions relating to detention, cannot in itself justify fears as to his impartiality; only special circumstances may warrant a different conclusion (see *Hauschildt v. Denmark*, 24 May 1989, § 51, Series A no. 154; *Sainte-Marie v. France*, no. 12981/87, § 32, 16 December 1992; and *Romenskiy v. Russia*, no. 22875/02, § 27, 13 June 2013). What matters is the extent and nature of the pre-trial measures taken by the judge (see *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255 A).
115. Any misgivings which the accused may occasion in these instances are understandable but cannot in themselves be treated as objectively justified. Indeed, the questions which the judge has to answer when taking decisions on continuing detention are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether there are prima facie grounds for the suspicion against an accused of having committed an offence; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and formal finding of guilt are not to be treated as being the same (see *Jasiński v. Poland*, no. 30865/96, § 55, 20 December 2005).

(ii) Application of these principles to the present case
116. The Court notes that during the proceedings in the applicant's case his pre-trial detention was extended four times by a three-judge panel of the Dubrovnik County Court in which Judge Z.Č., who later assumed responsibility for the applicant's case as the president of the trial bench, took part as either the president or member of the panel (see paragraphs 24, 30, 32 and 41 above). The applicant's detention was extended on the grounds of a risk of reoffending and the gravity of the charges.
117. The assessment of those grounds involved an analysis of all the relevant circumstances of the offence, the manner of its commission and the gravity of specific elements of the charges such as the necessary criminal resolve and engagement in the commission of the offence (see paragraphs 24 and 30 above). However, in the assessment, the judges referred only to the offence as "the subject matter of the charges", which did not convey their conviction that the applicant had committed the offences in question and cannot be considered tantamount to a finding of guilt (compare *Jasiński*, cited above, § 56, and, by contrast, *Romenskiy*, cited above, § 28).
118. Similarly, the Court does not consider that the reference to the particular circumstances of the charges, indicating the gravity of the offences and the applicant's previous convictions, could be seen as going beyond what should be regarded as an objective and reasonable evaluation of the situation for the purposes of deciding the question of his pre-trial detention. These elements played a role in the assessment of the grounds for ordering pre-trial detention under the relevant domestic law and, as such, had to be reviewed by Judge Z.Č. from the point of view of justification for the applicant's continued detention. However, they could not be seen as indicating any preconceived view of the applicant's guilt or sentence which should be imposed on him (see *Jasiński*, cited above, § 56).

119. The Court therefore considers that the mere fact that Judge Z.Č. sat as a member of the three-judge panel of the Dubrovnik County Court which extended the applicant's detention does not raise an issue of lack of impartiality under the Convention.
120. The Court notes, however, that during the proceedings, owing to his previous involvement in the case, Judge Z.Č., of his own motion, sought leave from the President of the Dubrovnik County Court to withdraw from the case as president of the trial bench (see paragraph 38 above). Leave was granted by the President of the Dubrovnik County Court, who, relying on the same grounds, asked the Supreme Court to transfer the proceedings to another court (see paragraph 39 above) because all the judges of the Criminal Division of that court had already taken part in the proceedings. However, leave was refused by the Supreme Court on the grounds that there were no reasons to doubt the impartiality of the Dubrovnik County Court judges. It explained that the mere fact that a judge had presided over the panels extending the applicant's detention could not raise any issue of his impartiality since the questions to be decided when the detention was extended differed from those which the judge had to decide when examining the case on the merits (see paragraph 40 above).
121. Whereas this situation could have raised certain misgivings on the part of the applicant, the Court notes that, in his request, Judge Z.Č. did not refer to any specific reason for his withdrawal but requested leave to withdraw as a merely precautionary measure (see paragraph 38 above). Moreover, in dismissing the request the Supreme Court gave sufficient and relevant reasons for its decision, which were compatible with the Court's case-law (see paragraph 120 above, and, by contrast, *Rudnichenko v. Ukraine*, no. 2775/07, §§ 116-18, 11 July 2013).
122. In view of the foregoing, the Court finds that the applicant's misgivings about the impartiality of the judge presiding over his trial cannot be regarded as objectively justified.
123. There has accordingly been no violation of Article 6 § 1 of the Convention.

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

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

2. Merits

(a) The parties' submissions
125. The applicant contended that he had not had a fair trial because the trial bench had admitted in evidence the recordings unlawfully obtained by virtue of the secret surveillance orders and had based its decisions on that evidence. This had been contrary to the relevant rules on admissibility of evidence under the Code of Criminal Procedure which had rendered his trial unfair.
126. The Government submitted that during the proceedings the applicant had had every possibility to examine the recordings obtained by secret surveillance and to oppose their use as evidence. Indeed, he had challenged the lawfulness of such evidence and had asked that they be excluded from the case file. The domestic courts had dismissed his request and provided sufficient reasons for their decisions.

(b) The Court's assessment

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

128. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found (see *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002 IX).
129. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, amongst many others, *Bykov*, cited above, § 90).
130. As regards, in particular, the examination of the nature of the Convention violation found, the Court observes that in several cases it has found the use of covert listening devices to be in breach of Article 8 since such interference was not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of a particular case conflict with the requirements of fairness guaranteed by Article 6 § 1 (see *Khan*, cited above, §§ 25-28; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 37-38, ECHR 2001 IX; and *Bykov*, cited above, §§ 94-105).

(ii) Application of these principles to the present case

131. The Court notes at the outset that the applicant did not put forward any argument disputing the reliability of the information obtained by secret surveillance measures but limited his objection exclusively to the formal use of such information as evidence during the proceedings (compare *Khan*, cited above, § 38; *P.G. and J.H.*, cited above, § 79; and *Bykov*, cited above, § 95).
132. He also had an effective opportunity to challenge the authenticity of the evidence and oppose its use and used that opportunity during the proceedings before the first-instance court (see paragraphs 35 and 42 above), and in his appeal (see paragraph 47 above) and constitutional complaint (see paragraph 49 above). The domestic courts examined his arguments on the merits and provided reasons for their decisions (see paragraphs 46, 48 and 50 above). The fact that the applicant was unsuccessful at each step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use (see *Schenk*, cited above, § 47, and *Khan*, cited above, § 38).
133. The Court further notes that the impugned evidence was not the only evidence on which the conviction was based (compare *Schenk*, cited above, § 48). When convicting the applicant the Dubrovnik County Court took into account the applicant's statements and the statements of his co-accused and examined them against the statements of other witnesses and evidence obtained by numerous searches and seizures (see paragraph 45 above).
134. Against the above background, the Court considers that there is nothing to substantiate the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary (see *Bykov*, cited above, § 98). In conclusion, the Court finds that the use of the impugned recordings in evidence did not as such deprive the applicant of a fair trial.
135. There has accordingly been no violation of Article 6 § 1 of the Convention.

III. Application of Article 41 of the Convention

136. Article 41 of the Convention provides:
"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

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

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

B. Costs and expenses
140. The applicant also claimed 16,493.75 Croatian kunas for the costs and expenses incurred before the Court.
141. The Government considered the applicant's claim unsubstantiated and unfounded.
142. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,160 plus any tax that may be chargeable, covering costs for the proceedings before the Court.

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

For these reasons, the Court, unanimously,
1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the lack of impartiality of the trial bench;
4. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards the use of evidence obtained by secret surveillance in the criminal proceedings against the applicant;
5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas, at the rate applicable at the date of settlement:
(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 2,160 (two thousand one hundred sixty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

NOOT

1. In deze annotatie ga ik in een strafrechtelijke context in op de klachten over een onrechtmatige inbreuk op de privacy en over het gebruik van het aldus verkregen bewijsmateriaal. Ik zal met name ingaan op de kwaliteit van de wetgeving en de daarmee samenhangende toetsing die ten aanzien van inbreuken op de privacy door middel van heimelijke opsporingsbevoegdheden wordt vereist. Daarbij werp ik ook een korte blik op de toekomst: met het oog op het onlangs ingediende wetsvoorstel *Computercriminaliteit III* is het goed weer eens nadrukkelijk stil te staan bij de eisen die door het EHRM worden gesteld aan heimelijke (technische) opsporingsbevoegdheden. In de annotatie van Samadi bij het arrest in «EHRC» 2015/114 wordt ingegaan op de klacht over de partijdigheid van de rechter.

2. Het EHRM oordeelt dat sprake is van een ongerechtvaardigde inbreuk op de privacy, maar het verkregen bewijsmateriaal mocht in de strafzaak worden gebruikt zonder dat dat een schending van artikel 6 EVRM (het recht op een eerlijk proces) opleverde. Deze benadering van artikel 6 EVRM is vaste jurisprudentie van het EHRM waar de Nederlandse strafrechter gretig gebruik van maakt – daartoe aangemoedigd door de Hoge Raad: een vormverzuim dat bestaat uit een inbreuk op de privacy zonder toereikende wettelijke grondslag behoeft in de regel niet tot bewijsuitsluiting te leiden (HR 19 februari 2013, «NBSTRAF» 2013/139; «JIN» 2013/56 (m.nt. M.L.C.C. de Bruijn-Lückers); «NJ» 2013/308). Aan

die "bagatelliserende" benadering (*dixit* Ölcer in haar noot bij *Bykov* t. *Rusland,* «EHRC» 2009/69) komt met dit arrest geen eind.

3. Wat de uitspraak de moeite waard maakt is de rechtmatigheidstoets die door het EHRM wordt uitgevoerd met betrekking tot artikel 8 EVRM. Uiteraard wordt op basis van artikel 8 lid 2 EVRM uitgegaan van de vereisten dat (i) de inbreuk bij wet is voorzien, dat er (ii) een in het verdrag genoemd doel (*legitimate aim*) mee is gediend en dat (iii) de inbreuk noodzakelijk moet zijn in een democratische samenleving.

4. Het EHRM hanteert ten aanzien van (i) het uitgangspunt dat sprake moet zijn van een basis in het nationale recht en dat deze regelgeving aan kwaliteitseisen moet voldoen: zij moet kenbaar en voorzienbaar zijn en *compatible with the rule of law* (par. 80). Het laatste begrip laat zich lastig naar het Nederlands vertalen, maar moet aldus worden verstaan dat voorzienbaarheid mede inhoudt dat er een rechtsbeschermende dimensie is. Dat in dit verband – gekoppeld aan gebruik van de telefoontap – strenge kwaliteitseisen worden gesteld, weten we al sinds uitspraken als *Malone* t. *Verenigd Koninkrijk* (EHRM 2 augustus 1984, «NJ» 1988/534) en *Kruslin & Huvig* t. *Frankrijk* (EHRM 24 april 1990, «NJ» 1991/523), waarin in dit arrest ook wordt gerefereerd. Regelgeving moet voldoende duidelijk aangeven onder welke omstandigheden en onder welke voorwaarden het gebruik van dergelijke heimelijke opsporingsbevoegdheden is toegestaan (para 81). Daarnaast mag de regelgeving niet voorzien in bevoegdheden die ongebreideld gebruikt kunnen worden. De wet moet de beslissingsbevoegdheid van de autoriteiten duidelijk afbakenen zodat het individu wordt beschermd tegen willekeurige inmenging in de privacy (para 82). Verder moeten er adequate en effectieve waarborgen zijn tegen misbruik van de bevoegdheden. De omvang van deze waarborgen is afhankelijk van de aard, reikwijdte en duur van de bevoegdheden, van de gronden voor het gebruik ervan, van de autoriteiten die bevoegd zijn de bevoegdheden te verlenen, uit de voeren en te superviseren en van de voorhanden zijnde "remedy" (para 83). In wat recentere jurisprudentie heeft het EHRM nog gesteld dat bij het beoordelen van de waarborgen tegen misbruik óók de "noodzaak in een democratische samenleving" om een van de in artikel 8 lid 2 EVRM genoemde doelen te dienen een rol speelt (para 84). Daarmee integreert het EHRM criteria (ii) en (iii) in die kwaliteitstoets: de wet is pas van voldoende kwaliteit als zij erin voorziet dat óók de noodzaak – in relatie tot het te dienen doel – van de inbreuk *voorafgaand* aan de toepassing ervan wordt getoetst.

5. Uit het arrest blijkt duidelijk dat voorafgaande betrokkenheid van een rechterlijke autoriteit in dit verband zwaar weegt. Net als in Nederland is in Kroatië gebruik van de telefoontap in een strafrechtelijk onderzoek afhankelijk van toestemming van een rechter. Het probleem zit hem echter in het feit dat in de praktijk werd goed gevonden dat een bevel om te tappen zonder onderbouwing werd gegeven en dat de zittingsrechter in het kader van een dientengevolge gevoerd verweer tot bewijsuitsluiting *ex post* kon bepalen welke feiten en omstandigheden het bevel legitimeerden (para 97). Het EHRM oordeelt dat een dergelijke werkwijze het mogelijk maakt om de wettelijk voorgeschreven, zorgvuldige belangenafweging te omzeilen en dat er daardoor dus onvoldoende adequate en effectieve waarborgen zijn tegen misbruik (para 98). Dit geldt temeer omdat iemand wiens telefoon onrechtmatig wordt getapt, zich dit ten tijde van de besluitvorming *ex ante* natuurlijk helemaal niet realiseert (dus ook geen invloed op die besluitvorming kan uitoefenen) en zich pas achteraf over deze onrechtmatigheid kan beklagen tegenover de strafrechter die zijn zaak behandelt. Deze strafrechter kan zich weliswaar over de toelaatbaarheid van dit bewijs uitlaten, hij spreekt zich niet ten gronde uit over de vraag of artikel 8 EVRM is geschonden. Ook biedt het Kroatische recht geen "remedies" die beschikbaar zouden zijn voor personen zoals de verzoeker in deze zaak. (para 100). Kortom: een schending van artikel 8 EVRM omdat de geconstateerde inbreuk niet *in accordance with the law* was.

6. Afgaand op de laatste volzin van para. 92 zou de stelling kunnen worden verdedigd dat op basis van het Nederlandse strafprocesrecht ieder bevel tot een telefoontap wordt voorafgegaan door zorgvuldige rechterlijke toetsing en alleen dan wordt uitgevoerd indien er een uitgebreid gemotiveerde rechterlijke machtiging aan ten grondslag ligt waarin nadrukkelijk de proportio-

naliteit en de noodzaak van het gebruik van deze opsporingsbevoegdheid wordt gemotiveerd. Immers: artikel 126*m* van het Wetboek van Strafvordering (Sv) stipuleert dat voor een telefoontap een machtiging van de rechter-commissaris (RC) noodzakelijk is en dat het bevel door de officier van justitie slechts mag worden gegeven "indien het onderzoek dit dringend vordert" en dat er sprake moet zijn van een "ernstige inbreuk op de rechtsorde". Daar waar onze wetgeving een dergelijke, voorafgaande, rechterlijke toets vereist, zal bij de beoordeling of "in accordance with the law" is gehandeld de concrete toepassing van deze toets dan ook zwaar wegen. De zittingsrechter zal dus grondig moeten kijken of – en hoe – op basis van het het door de RC gemachtigde bevel is gehandeld.
Iedereen die in de strafrechtspleging actief is, weet echter dat van nadrukkelijk gemotiveerde machtigingen nauwelijks sprake is. De RC gebruikt gestandaardiseerde formulieren en vinkt daar wat vakjes op af. Natuurlijk worden de machtiging en het bevel in de regel afgegeven op basis van een door de politie aangeleverd proces-verbaal, waarin wordt uitgewerkt op welke feiten en omstandigheden de verdenking is gebaseerd, waarom het een feit betreft waardoor de rechtsorde ernstig geschokt is (een criterium waarvoor de lat in de jurisprudentie een stuk lager wordt gelegd dan je op het eerste gezicht zou vermoeden) en waarom het onderzoek e.e.a. dringend vordert (ook een niet heel duidelijk uitgewerkt criterium). In het algemeen bestaat toch niet de indruk dat de drempel voor de telefoontap in Nederland erg hoog ligt: er wordt in Nederland heel veel getapt. De zittingsrechter mag slechts terughoudend toetsen of de rechter-commissaris "in redelijkheid" tot het afgeven van een machtiging had kunnen komen en of de officier van justitie in overeenstemming met de machtiging en ook overigens rechtmatig heeft gehandeld (zie HR 11 oktober 2005, «NJ» 2006/625 en HR 21 november 2011, «NBSTRAF» 2006/454; «NJ» 2007/233 m.nt. Mevis). Bij deze toch als marginaal te karakteriseren toetsingsruimte is in de literatuur al enige tijd geleden vraagtekens gezet (o.a. A.A. Franken, 'Proportionaliteit en subsidiariteit in de opsporing', «DD» 2009/8). In Straatsburg heeft dit tot op heden nog niet tot een geconstateerde schending van het EVRM geleid, maar in de tussentijd is met een aantal arresten van het EHRM (veelal geciteerd in de hier besproken uitspraak) echter duidelijk geworden dat het toetsen van – kortgezegd – de proportionaliteit en de subsidiariteit van heimelijke opsporingsmethoden steeds meer van belang wordt geacht (zie in dit verband bijvoorbeeld ook het uitgebreide jurisprudentieoverzicht in Loof e.a., *Het mensenrechtenkader voor het Nederlandse stelsel van toezicht op de inlichtingen- en veiligheidsdiensten*, Leiden: Afdeling staats- en bestuursrecht, Universiteit Leiden, 2015, p. 8-18). Al met al vraag ik mij dus af in hoeverre ons – vooral in de Wet Bijzondere Opsporingsbevoegdheden (Wet BOB) geregelde – stelsel nog EVRM-proof is: vindt er wel een voldoende concrete rechterlijke toets plaats?

7. Dit klemt temeer als gekeken wordt naar de almaar toenemende technische mogelijkheden van "secret surveillance". Onlangs is door de politie nog een *Visie op sensing* aan de Minister van Veiligheid en Justitie uitgebracht, op basis waarvan laatstgenoemde een beleidsvisie heeft geformulieerd (*TK* 2015/16, 29628, nr. 594). Ook in die visie wordt benadrukt dat "sensing" (een brede term voor het waarnemen met technische hulpmiddelen), steeds zoveel mogelijk een wettelijke grondslag moet hebben en dat voorafgaande toestemming en voldoende controlemogelijkheden van belang zijn. Een concreet voorbeeld van nieuwe wetgeving op dit vlak is het recent eindelijk bij de Tweede Kamer ingediende wetsvoorstel *Computercriminaliteit III* waarin onder andere een artikel 126*nba* Sv voor het zogenaamde "terughacken" door de politie wordt voorgesteld (*TK* 2015/16, 34372, nr 2). Dit terughacken kan worden toegepast om kenmerken van een geautomatiseerd werk vast te stellen en vast te leggen of om gegevens vast te leggen of ontoegankelijk te maken. Daarnaast mag terughacken bijvoorbeeld ook gebruikt worden in de context van telefoontaps (art. 126*m* Sv), het opnemen van vertrouwelijke informatie (126*l* Sv) en stelsematige observatie (126*g* Sv). Bij uitstek een middel van *secret surveillance* dus en ook een middel om reeds bestaande vormen van *secret surveillance* uit te breiden en te ondersteunen. In de memorie van toelichting bij het wetsvoorstel wordt nadrukkelijk aansluiting gezocht bij de reeds bestaande systematiek van de Wet BOB (MvT, p. 30). De hierboven beschreven praktijk met betrekking tot de telefoontap is – als gezegd – niet heel indrukwek-

kend. Naast de wettelijke eis van een toets door de RC wordt in de MvT echter ook duidelijk gemaakt dat inzet van de terughack-bevoegdheid slechts na toestemming van de Centrale Toetsing Commissie (CTC) van het OM mag geschieden (zoals bijvoorbeeld ook is vereist voor de inzet van het opnemen van vertrouwelijke communicatie (art. 126*l* Sv)). Dat is nog een extra toets in het kader van de proportionaliteit en subsidiariteit (MvT p. 37). Nu is de CTC naar verluidt in de praktijk behoorlijk streng – en is deze extra toets wat dat betreft dus goed nieuws – maar het blijft wel een toets door het OM zélf: hoe zou het EHRM daar tegenaan kijken? Zou een dergelijke toets door een rechter niet de voorkeur verdienen?
De RC krijgt in de voorgestelde wet geen duidelijke instructies over de aan te leggen toets bij het beoordelen van de vordering tot machtiging. Een bevel mag ook voor maar liefst 4 weken worden gegeven en kan steeds verlengd worden. In de MvT worden wél de nodige instructies gegeven (MvT p. 38). In die zin kan de RC de machtiging dus wel duidelijk afbakenen. Het zal van de invulling van de bevoegdheid in de praktijk afhangen in hoeverre het EHRM vindt dat de toets voldoende gewicht heeft en voorziet in de vereiste waarborgen.
Een punt verdient mijns inziens nog nadrukkelijke aandacht en dat is dat een (langdurige) combinatie van verschillende heimelijke opsporingsbevoegdheden natuurlijk een veel ingrijpender inbreuk op de privacy met zich mee kan brengen. De RC (en de CTC) zullen hiervoor wel oog moeten hebben, maar worden daartoe door de wetgever nu niet aangemoedigd.

8. Los van dit alles geldt voor alle (toekomstige) heimelijke opsporingsbevoegdheden dat het EHRM in para 83 en para 99-100 van het arrest benadrukt dat het argeloze object van onderzoek *ex post* nog wel een "remedy" moet hebben. Kent het Nederlandse recht die wel? Ook de Nederlandse strafrechter stelt in de regel enkel een vormverzuim vast en *kan* daaraan de gevolgtrekking verbinden dat bewijsuitsluiting, strafvermindering of niet-ontvankelijkverklaring van het OM volgt (359a Sv). Dat zijn echter allemaal maatregelen die niet rechtstreeks een relatie hebben tot de geconstateerde schending van artikel 8 EVRM, maar die in de context van het recht op een eerlijk proces (art. 6 EVRM) relevant zijn. In zoverre zijn dit dus geen "remedies" voor een geconstateerde schending van artikel 8 EVRM. Buiten de context van een concrete tegen hem/haar lopende strafzaak zijn er voor het Nederlandse object van heimelijk opsporingsonderzoek verder weinig mogelijkheden om op te komen tegen onrechtmatige taps (of andere vormen van heimelijke opsporing). Het is maar de vraag of de klachtenprocedure bij de politie, die uiteindelijk kan uitmonden in de gang naar de Nationale Ombudsman, gezien wordt als een voldoende effectieve procedure. Maar zolang het EHRM zelf geen klare wijn schenkt over de vraag wanneer een remedie effectief is, is het uitermate lastig deze vraag te beantwoorden. Ook de onderhavige uitspraak voegt wat dat betreft weinig tastbaars toe.

8. Een cynicus vraagt zich intussen af waarom het EHRM eigenlijk zoveel "scrutiny" verwacht ten aanzien van de rechtmatigheidstoets van artikel 8 EVRM terwijl – ook in dit arrest – het gevolg van een schending van artikel 8 EVRM *niet* is dat er procedureel voordeel te halen is in de strafzaak. Het recht op een eerlijk proces (art. 6 EVRM) komt niet snel in gevaar als gebruik wordt gemaakt van bewijs dat door een schending van artikel 8 EVRM is verkregen. Sterker nog: de benadering in de Kroatische rechtspraak verbaast in het licht van deze jurisprudentie geenszins. Toch is hier een opmerking op zijn plaats: het EHRM acht gebruik van onrechtmatig verkregen bewijs niet in strijd met artikel 6 EVRM indien de omstandigheden waaronder het bewijs is verkregen geen twijfels doen ontstaan omtrent de betrouwbaarheid en/of accuratesse ervan. Nu kun je van telefoongesprekken, videobeelden en dergelijke nog stellen dat de betrouwbaarheid in de regel groot is (what you see/hear is what you get), maar de stelling dat door middel van bijvoorbeeld 'terughacken' bepaald incrimerend bewijsmateriaal op een computer is aangetroffen laat wel meer ruimte voor discussie: kan hard gemaakt worden dat het materiaal inderdaad op een voor de verdachte toegankelijke plaats in die computer aanwezig was, dat de computer enkel en alleen door de verdachte werd gebruikt, dat er geen sprake is van 'planted evidence' etc? De wijze waarop van de bevoegdheid gebruik is gemaakt zal een en ander zonder meer inzichtelijk moeten maken. De aard van het middels 'terughacken' verzamelde bewijsmateriaal kan

een heel andere zijn dan van het materiaal dat via de meer traditionele heimelijke opsporingsbevoegdheden wordt verkregen. Ook de werkwijze (op afstand, al dan niet via (versleutelde) netwerken zal een ander beoordelingskader vergen.

9. Concluderend kan gezegd worden dat het EHRM voor wat betreft artikel 8 EVRM andermaal een streng beoordelingskader voor heimelijke opsporingsbevoegdheden vraagt en nadrukkelijke eisen stelt aan de toetsing *ex ante* en *ex post*. Bovendien wordt gehamerd op de aanwezigheid van een “effective remedy” voor de gevallen waarin schending van artikel 8 EVRM zou worden geconstateerd. Voor Nederland betekent dit mijns inziens in ieder geval dat we bij de les moeten blijven als het ten aanzien van opsporingsbevoegdheden gaat om de proportionaliteits- en subsidiariteitstoets *ex ante*. Met name daar waar heimelijke opsporingsbevoegdheden met elkaar gecombineerd gaan worden en betrekking gaan hebben op omvangrijke dataverzamelingen in geautomatiseerde werken, zal de inbreuk op de privacy dusdanig groot worden dat de huidige toch wat routineuze praktijk ten aanzien van de telefoontaps niet volstaat. Het is zelfs de vraag of de praktijk omtrent de telefoontap in alle gevallen nu al de toets van het EHRM zou doorstaan! De bij het voorgestelde artikel 126*nba* voorgeschreven aanvullende toetsingsprocedure door de CTC komt hieraan wellicht tegemoet maar de EHRM jurisprudentie laat m.i. zien dat er een voorkeur is voor een strengere toets vanuit de zittende magistratuur.
Voor wat betreft de “effective remedies” is niet helemaal duidelijk wat het EHRM nu van de verdragsluitende partijen verwacht, maar aangezien het instrumentarium in strafzaken op dat punt soms non-existent is, zal ook daar niet raar opgekeken moeten worden als in Straatsburg op enig moment een schending wordt geconstateerd.
Gebruik van onrechtmatig verkregen materiaal in een strafzaak is niet zonder meer in strijd met artikel 6 EVRM: daaraan verandert dit arrest niets. De ontwikkelingen die (een combinatie van) steeds verdergaande heimelijke opsporingsmethoden introduceren betekenen mijns inziens echter dat steeds acht geslagen moet worden op de omstandigheden waaronder het bewijsmateriaal is vergaard. Juist om het de rechter mogelijk te maken die omstandigheden goed te kunnen beoordelen zijn strenge voorschriften nodig. Er komt een moment dat het EHRM bij het veronachtzamen van dergelijke regels tóch besluit dat daardoor de betrouwbaarheid van het vergaarde bewijs niet meer buiten kijf staat, waardoor het het gebruik in een strafzaak in strijd zal achten met een eerlijk proces.

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Rechtbank Noord-Nederland
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(mr. Janse van Mantgem, mr. Terwiel-Keuneman, mr. Duin)

Verstrekking FIOD-journaal Klimop-zaak. Bestandsbegrip.

[Wpg art. 1; Wbp art. 1]

Eiser heeft de Minister van Financiën op grond van de Wpg verzocht om het FIOD-journaal te verstrekken, om zo inzage te krijgen in de op eiser betrekking hebbende persoonsgegevens die in het journaal voorkomen. Dit journaal heeft betrekking op het strafrechtelijke onderzoek naar vastgoedfraude, genaamd ‘Klimop’. Het journaal betreft een digitaal PDF-document dat ruim 7500 digitale bladzijdes telt. Het bevat politiegegevens en persoonsgegevens betreffende eiser en vele andere personen. Verweerder heeft verstrekking geweigerd, omdat het journaal uitsluitend bestemd is voor intern gebruik en het journaal geen bestand is in de zin van de Wpg.
Voor de beantwoording van de vraag of sprake is van een bestand in de zin van artikel 1, aanhef en onder p, van de Wpg is van belang dat voor de invulling van het begrip “bestand” in de Wpg is aangesloten bij het bestandsbegrip uit de Wbp: er moet sprake zijn van een gestructureerd geheel en systematische toegankelijkheid.
De rechtbank acht het journaal het best vergelijkbaar met een logboek dat in de loop der jaren – gedurende het Klimop-onderzoek – op chronologische wijze is volgeschreven met alle stappen en overwegingen die in het kader van het onderzoek