

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

GRAND CHAMBER

CASE OF DVORSKI v. CROATIA

(Application no. 25703/11)

JUDGMENT

STRASBOURG

20 October 2015

This judgment is final.

In the case of Dvorski v. Croatia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Boštjan M. Zupančič,
Ján Šikuta,
Päivi Hirvelä,
Luis López Guerra,
Zdravka Kalaydjieva,
Paulo Pinto de Albuquerque,
Helen Keller,
Paul Mahoney,
Johannes Silvis,
Valeriu Griţco,
Faris Vehabović,
Ksenija Turković,
Jon Fridrik Kjølbro, *judges*,
and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 21 January and 26 August 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 25703/11) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Ivan Dvorski ("the applicant"), on 16 April 2011.

2. The applicant was represented by Ms S. Maroševac-Čapko, a lawyer practising in Rijeka. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that he had not had a fair trial because he had not been allowed to be represented by a lawyer of his own choosing during police questioning and that incriminating statements he had made had been used to convict him.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 28 June 2011 the President of the First Section decided to give notice of the application to the Government.

On 5 November 2013 a Chamber of that Section, composed of Isabelle Berro-Lefèvre, President, Mirjana Lazarova-Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković and Dmitry Dedov, judges, and Søren Nielsen, Section Registrar, gave judgment. They unanimously declared the complaint under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible. They held by a majority that there had been no violation of Article 6 § 1 of the Convention. The joint dissenting opinion of Judges Berro-Lefèvre and Laffranque was annexed to the judgment.

5. In a letter of 21 February 2014, the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. A panel of the Grand Chamber granted the request on 14 April 2014.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. Judge Karakaş was subsequently prevented from taking part in the case and was replaced by the first substitute judge, Ján Šikuta (Rule 28).

8. The applicant and the Government each filed further observations on the merits (Rule 59 § 1).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms Š. STAŽNIK, *Agent*,
Ms N. KATIĆ,
Ms M. BRIŠKI,
Ms S. RAGUŽ,
Mr Z. BUDIMIR, *Advisers*;

(b) *for the applicant*
Ms S. MAROŠEVAC-ČAPKO, *Counsel*.

The Court heard addresses by Ms Maroševac-Čapko and Ms Stažnik, as well as their replies to questions put by Judges Griţco, López Guerra, Vehabović, Hirvelä, Pinto de Albuquerque, Zupančič, Kalaydjieva and Šikuta.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1986 and lives in Rijeka.

A. Background to the case

11. On 13 March 2007, between 2 and 3.30 a.m., three murders, an armed robbery and an arson attack were committed in Vežica, a residential neighbourhood of Rijeka.

12. Later that day, a number of people from Vežica were brought in for questioning at the Rijeka Third Police Station of the Primorsko-Goranska Police Department (*Policijska uprava Primorsko-goranska, Treća policijska postaja Rijeka* – "Rijeka Police Station").

13. At about 1 p.m. the same day, the applicant was brought to Rijeka Police Station for questioning. Blood samples were taken from him for DNA analysis and the police searched his flat and through his mobile phone and seized a number of his personal items.

14. The applicant was kept at Rijeka Police Station until his formal arrest at 9.50 a.m. on 14 March 2007 in connection with the above offences.

B. The applicant's questioning by the police on 14 March 2007

1. The applicant's version of events

15. According to the applicant, at about 10.40 a.m. on 14 March 2007 his mother, who lived and worked in Italy, called a lawyer, G.M., and asked him to represent the applicant. G.M. came to Rijeka Police Station at 10.45 a.m. but the police officers refused to let him see the applicant. G.M. remained in Rijeka Police Station until midday. He wanted to file a criminal complaint against an unknown person for abuse of power and unlawfully extracting a confession, but the police officers refused to accept his complaint on the ground that he had no power of attorney, and pushed him out of the police station. G.M. immediately informed the Rijeka County Deputy State Attorneys, D.K. and I.B., about the incident and they made a note in their case file. The Rijeka County Court was also immediately informed.

16. At around 1.30 p.m. the applicant's father signed a power of attorney in favour of G.M. to defend his son. A legal trainee, B.P., then tried to submit the power of attorney to the police but was told to leave.

17. At some time between 3 and 3.30 p.m. G.M. again tried to contact the applicant in Rijeka Police Station but was denied access to him.

18. At about 3.30 p.m. G.M. reported the events described above to the Chief of the Primorsko-Goranska Police Department, V., who made a note regarding their conversation.

19. The applicant was never informed by the police that G.M. had been instructed to represent him and had come to Rijeka Police Station.

20. According to the applicant, he had repeatedly asked the police officers in Rijeka Police Station to contact G.M., but was told that they had tried but there had been no answer.

2. The Government's version of events

21. According to the Government, at 6 p.m. on 14 March 2007 the applicant agreed to be represented by a lawyer, M.R., a former chief of the Primorsko-Goranska Police. He arrived at Rijeka Police Station at about 7.45 p.m. The Government state that the applicant chose M.R. from a list of lawyers of the Rijeka Bar Association presented to him by the police and that the questioning of the applicant began at 8.10 p.m. According to the record of the applicant's questioning, the police advised him of his right not to incriminate himself and his right to remain silent and he expressly stated for the record that his lawyer was M.R.

3. Extract of the record of the applicant's questioning

22. The relevant part of the record of the police questioning of the applicant by Officers T.K. and Z.N. on 14 March 2007, which commenced at 8.10 p.m. and concluded at 11 p.m., reads as follows:

> "I have been informed of the reasons for my arrest, the criminal offences of which I am accused, my rights, the right not to answer and the right to be legally represented, as well as the right to have members of my family informed about my arrest. I have chosen and authorised a defence lawyer from Rijeka, M.R., to represent me in these proceedings, and I have consulted him in private; following the consultation with [M.]R. I have decided to give my evidence."

The record then gives the applicant's description of the relevant events concerning the charges against him: he confessed that on the night of 13 March 2007, together with L.O. and R.Lj., he had gone to Đ.V.'s flat in Vežica, where he had taken a certain amount of money from Đ.V. and then shot and killed him, his girlfriend and his father. He had then set their flat on fire in order to destroy any trace of his having been there. He also stated that he had promised L.O. and R.Lj. that he would confess to the crimes and take the blame himself if they were arrested.

The final part of the report reads:

> "I am not experiencing any withdrawal symptoms or any other crisis. I have given my evidence voluntarily in the presence of my lawyer and a County State Attorney. I have read the entire statement and am signing it as truthful."

Every page of the record of the applicant's statement is signed by him.

C. Questioning by an investigating judge on 15 March 2007 at 1.15 p.m.

23. The relevant part of the written record of the applicant's questioning by an investigating judge reads as follows.

> "In response to a question by the court regarding the choice of defence counsel since the case file includes a record of the questioning of the suspect in the presence of defence counsel M.R., and also a power of attorney signed by his parents in favour of the lawyer G.M., the suspect answers:
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> 'I wish to sign the power of attorney for G.M., a lawyer from Rijeka, and I am hereby withdrawing the power of attorney for M.R.'
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> ...
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> In response to a question by defence counsel as to whether he had instructed [M.]R. to represent him, the suspect answers:
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> 'No, I did not. I specifically told the police officers that I wanted G.M. to represent me.
>
> I do not know anything about G.M. coming to the police premises.'
>
> ...
>
> In response to a further question by defence counsel as to whether he was under the influence of drugs, the accused answers:
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> 'I was under the influence of alcohol and drugs.'
>
> ..."

24. On 16 March 2007 G.M. applied to the investigating judge for the Rijeka County State Attorney and all his deputies to be removed from the case. The investigating judge forwarded the request to the Rijeka County State Attorney's Office. The relevant part of the request reads as follows.

> "About thirty minutes ago, counsel for the defence learned that the Rijeka County State Attorney, D.H., had been present during the questioning of Ivan Dvorski as a suspect by police officers of Rijeka Police Station on 14 March 2007 at around 7 p.m., in the presence of the 'defence lawyer' M.R.
>
> On the same date, at around 10.40 a.m., the mother of Ivan Dvorski, Lj.D., who lives and works in Italy, called [G.M.] and asked him to defend her son Ivan, who was suspected of the offence of aggravated murder. At around 10.45 a.m., [G.M.] went to Rijeka Police Station but the police officers refused to let him see Ivan Dvorski and also did not tell [Ivan Dvorski] that his mother had instructed a lawyer. [G.M.] remained in Rijeka Police Station until 12 noon. He wanted to file a criminal complaint against an unknown person for abuse of power and unlawfully extracting a confession, but the police officers refused to accept his complaint on the ground that he had no power of attorney and pushed him out of the police station. [G.M.] immediately informed the Rijeka County Deputy State Attorneys, D.K. and I.B., about the incident and they made an official note in their case file.
>
> Therefore, at around 12.30 p.m. the Rijeka County State Attorney already knew that [G.M.] had been retained by [Ivan Dvorski's] mother and that he had not been able to contact his client.

The [Rijeka] County Court was also immediately informed.

At around 1.30 p.m. Ivan Dvorski's father signed a power of attorney for the defence of his son. A legal trainee, B.P., [then] tried to submit the power of attorney to the police but was told to 'fuck off with that power of attorney' and therefore it was not submitted.

At around 3 to 3.30 p.m. [G.]M. again tried to contact his client in Rijeka Police Station but was denied access to him ... However, the defendant was never informed that a defence lawyer had been instructed and had come to Rijeka Police Station.

At around 3.30 p.m. [G.M.] informed the Chief of the Primorsko-Goranska Police Department ..., V., who apparently made an official note concerning their conversation. However, the defendant was never informed that a defence lawyer had been retained and was also never asked whether he wanted to be represented by the lawyer instructed by his family.

Besides that, ever since he had been brought to Rijeka Police Station, [Ivan Dvorski] had asked on a number of occasions for [G.M.] to be contacted but was told by the police officers that they had tried but there had been no answer. When he was brought to the police station, blood samples were taken from the defendant. They showed that he had a high level of alcohol and drugs in his blood.

Between 1 p.m. on 13 March 2007 and around 7 p.m. on 14 March 2007 (these time periods are only known to [G.M.] from informal sources because he had no access to the Rijeka County State Attorney's case file), the defendant was not given any food.

It is clear that, although all these facts were known to the Rijeka County State Attorney, D.H., he disregarded them and, although present in person, allowed the defendant to be questioned in the presence of a lawyer who had [neither been requested by him] nor ... instructed by his family. This amounts to unlawfully extracting a confession, in breach of Article 225 § 8 of the Code of Criminal Procedure, given that the Rijeka County State Attorney, since about 12.30 p.m. [on 14 March 2007], had known who the [applicant's chosen] defence lawyer was.

On the same date [G.M.] sent the power of attorney to the Primorsko-Goranska Police Department and written complaints were also sent to the Supreme Court of the Republic of Croatia, the State Attorney General of the Republic of Croatia, the Rijeka County State Attorney's Office, the Croatian Bar Association, the Ministry of Justice, the Ministry of the Interior, the Chief of the Primorsko-Goranska Police Department and the Rijeka County Court. ..."

D. Investigation

25. On 16 March 2007 an investigation was opened in respect of the applicant, L.O. and R.Lj. on suspicion of having committed the three aggravated murders and arson in Vežica on 13 March 2007.

26. On 23 March 2007 the State Attorney General of the Republic of Croatia (*Glavni državni odvjetnik Republike Hrvatske*) dismissed G.M.'s request for the removal of the Rijeka County State Attorney on the ground that there were no reasons for disqualifying him from dealing with the case. The relevant part of the decision reads as follows.

"... a statement from D.H., the Rijeka County State Attorney, has been obtained.

In his statement the Rijeka County State Attorney states that on 14 March 2007 at about 10 a.m. he was on the premises of the Rijeka Police Station together with his colleague, I.B.-L., where they were informed of the evidence thus far obtained, and all the evidence that remained to be taken in connection with the events in issue. He came back to the County State Attorney's premises at about 1 p.m., when the deputies, D.K. and I.B., informed him that G.M. had come to the premises of the County State Attorney and made a complaint regarding the conduct of the police officers of the Rijeka Police Station in refusing him access to Ivan Dvorski, even though he had been given an oral authorisation by Ivan Dvorski's mother, [who had called him from] Italy. The lawyer had not presented any proof of his authority to represent Ivan Dvorski or of his telephone conversation with Ivan Dvorski's mother. He had not been able to make contact with the suspect's father, having been unable to find him since he had no fixed address.

After [the Rijeka County State Attorney, D.H.], had left the premises of the County State Attorney, he had had no further information regarding the actions of the above-mentioned lawyer.

At 5 p.m. [D.H.] returned to the Rijeka Police Station in connection with the case in issue. There, an inspector of the Primorsko-Goranska Police Department told him that Ivan Dvorski was willing to submit his defence in the presence of his defence counsel, M.R., and it was agreed that the questioning would start at about 7 p.m. M.R. arrived at the Rijeka Police Station at 6.40 p.m. and together they went to the room where Ivan Dvorski was. There, the suspect signed the power of attorney in favour of M.R. and agreed that [M.R.] would be present during his questioning by the police. After that, at the request of M.R., the suspect was allowed to talk to the lawyer in private. After ten minutes they all moved to another room, where the suspect, in the presence of his lawyer, the County State Attorney, two police inspectors and a typist, put forward his defence, which was recorded in writing, and all this lasted for more than three hours. After that they all signed the written record [of questioning] and he left the room with M.R."

27. On 26 March 2007 the Rijeka County State Attorney dismissed the request for the removal of his deputies on the same grounds. The relevant part of that decision reads as follows.

"A Rijeka County Deputy State Attorney, I.B.-L., stated that she had not participated at all in the questioning of Ivan Dvorski by the police, and that she had no knowledge of that stage of the proceedings and, in particular, that she had had no information regarding Ivan Dvorski's representation by or choice of defence counsel during his questioning. She only knew that on 14 March 2007 G.M. had come to the premises of the Rijeka County State Attorney, where she had met him. He had made a complaint regarding the choice of defence counsel for Ivan Dvorski. He had said that he was Ivan Dvorski's defence counsel, having been authorised by his mother in a telephone conversation. She [I.B.-L.] commented that that could not constitute a valid power of attorney ...

The statements of the Rijeka County Deputy State Attorneys, D.K. and I.B., show that the only information they had regarding the conduct of the police came from [G.]M., who wanted to made a complaint regarding the conduct of police officers in connection with the choice of lawyer to represent and defend Ivan Dvorski. ... D.K. drew up an official note about this matter and presented it to G.M. The statements of the Rijeka County Deputy State Attorneys, D.K. and I.B., show that [G.M.] had mentioned a power of attorney given to him by Ivan Dvorski's mother, who lived in Italy and with whom G.M. had talked on the telephone. The Deputies told him that a

power of attorney given by telephone could not be considered valid. They had no knowledge of any other acts, including the obtaining of a power of attorney from Ivan Dvorski's father ..."

28. On 28 March 2007 G.M. informed the Rijeka County Court that he would no longer be representing the applicant and on 30 March 2007 the President of the Rijeka County Court appointed a legal-aid lawyer, Ms Maroševac-Čapko, to represent the applicant.

29. During the investigation, evidence was taken from a number of witnesses, and a report on the inspection of the crime scene and the search and seizure, as well as medical, fire and ballistics expert reports, were obtained by the investigating judge.

E. Proceedings on indictment

30. On 12 July 2007 the Rijeka County State Attorney's Office indicted the applicant, L.O. and R.Lj. in the Rijeka County Court on three counts of aggravated murder and one count of arson committed on 13 March 2007 in Vežica.

31. The applicant, represented by Ms Maroševac-Čapko, lodged an objection against the indictment with the Rijeka County Court on 24 July 2007 on the ground that it contained numerous substantive and procedural flaws. He also argued that he had given his statement to the police under the influence of alcohol and drugs. He made no comments regarding his legal representation during the police questioning.

32. The applicant's objection against the indictment was dismissed as ill-founded by a three-judge panel of the Rijeka County Court on 28 August 2007.

33. On 9 October 2007, the first day of the trial, the applicant and the other accused pleaded not guilty to all charges and the trial court heard evidence from seven witnesses.

34. Another hearing was held on 11 October 2007, at which the trial court examined video-recordings of the crime-scene investigation and the autopsies of the victims.

35. Further hearings were held on 12 November 2007 and 11 January 2008, at which the trial court heard evidence from nine witnesses.

36. At a hearing on 14 January 2008, two experts in toxicology, a fingerprint expert, a ballistics expert and a DNA expert gave evidence. The defence made no objections in respect of their evidence. At the same hearing four other witnesses gave evidence.

37. At a hearing on 15 January 2008, the trial court heard evidence from another expert in toxicology and a pathologist, as well as thirteen other witnesses. The defence made no objections in respect of the evidence of the expert witnesses but asked the trial court to commission a psychiatric report in respect of the applicant.

38. At the same hearing the defence lawyer asked for a handwriting expert's report to be commissioned in respect of the applicant's signature on the record of his statement given to the police on 14 March 2007. She argued that the applicant had not signed any record during his questioning by the police.

39. The trial court considered that for the time being it was not necessary to commission a psychiatric report and thus dismissed the applicant's request to that effect. However, it commissioned a handwriting expert's report in respect of the signature on the record of the applicant's statement given to the police.

40. On 23 January 2008 the handwriting expert submitted her report. She found that the applicant had signed the record of his statement given to the police on 14 March 2007.

41. Another hearing was held on 12 March 2008, at which a medical expert, fire expert witnesses and one other witness gave evidence. The handwriting expert also gave oral evidence confirming her previous findings. The applicant's lawyer challenged the veracity of these findings and applied to have another report commissioned, but the application was rejected by the trial court. At the same hearing, the trial court commissioned a psychiatric report in respect of the applicant and the other accused.

42. On 2 April 2008 the applicant asked the Rijeka County Court to call the lawyer, G.M., as a witness in connection with the alleged unlawful extraction of his confession by the police. He pointed out that G.M. had not been allowed to see him while he had been in police custody and stated that he had been forced to confess by the police officers.

43. On 24 April 2008 the two psychiatric experts submitted their report to the Rijeka County Court. They found that the applicant suffered from borderline personality disorder and addictions to heroin and alcohol. However, they found no distinctive mental disorder or illness. They concluded that, even assuming that he had been intoxicated at the time the murders had been committed, he had retained the mental capacity to understand the nature of his acts, although it had been diminished to a certain degree. As to his mental capacity concerning the charge of arson, they concluded that, at the time the offence had been committed, the applicant had been able to understand the nature of his acts and to control his actions.

44. At a hearing on 26 June 2008, the psychiatric experts confirmed their findings and the parties made no objections in respect of their evidence. The trial court also dismissed the applicant's request for G.M. to be heard as a witness, on the ground that all the relevant facts had already been established.

45. At the same hearing one of the accused, R.Lj., confirmed the course of the events as described by the applicant in his statement given to the police on 14 March 2007. R.Lj. claimed, however, that he had not

personally participated in the killings, because he had panicked and had left the flat when he had heard fighting.

46. After R.Lj. had given his statement, the Rijeka County Deputy State Attorney amended the indictment. The applicant was charged with three counts of aggravated murder, armed robbery and arson, and L.O. and R.Lj. were charged with armed robbery and aiding and abetting the perpetrator of an offence. The applicant and the other accused pleaded not guilty to the charges listed in the amended indictment.

47. On 27 June 2008 L.O. gave oral evidence confirming the course of the events as described by R.Lj. He stated that after the applicant had got into a fight with Đ.V. he had heard gunshots, after which he had panicked and left the flat.

48. At the same hearing the parties submitted their closing arguments. The applicant's defence lawyer argued that it had not been proved that the applicant had committed the offences he was charged with. She pointed out, however, that if the trial court took a different view, then the applicant's confession to the police and his sincere regret had to be taken into consideration in sentencing him.

49. On 30 June 2008 the Rijeka County Court found the applicant guilty of the three counts of aggravated murder and of the charges of armed robbery and arson and sentenced him to forty years' imprisonment. The trial court first examined the applicant's confession against those of the other co-accused, L.O. and R.Lj., and found that his confession was essentially consistent with the evidence provided by them. In finding the applicant guilty, the trial court also assessed his confession against the evidence from the case file.

50. The trial court relied in particular on the search and seizure records and photographs depicting L.O. holding the same type of handgun as had been used for the murders. On the basis of the witness statements and the recording of a nearby video surveillance camera, the trial court concluded that the applicant and the other co-accused had gone to Đ.V.'s flat on the date in question. Furthermore, the ballistics reports and the crime-scene reports indicated that the details of the statements of the applicant and his co-accused were accurate, and the course of the events was ascertained on the basis of the fire, ballistics, toxicology and DNA reports. The trial court also found that the statements of the accused as to the manner in which the murders had been carried out were supported by the autopsy reports, the evidence of the pathologist provided at the trial, the crime-scene report and the witness statements about the gunshots that had been heard in Đ.V.'s flat. Furthermore, as to the arson charge, the trial court examined the material from the crime-scene investigation and the evidence from the fire expert report, as well as medical records and damage reports submitted by the victims, and the statements of a number of residents in the building where the fire had occurred.

51. As regards the applicant's questioning by the police and the request made by the defence to hear evidence from G.M. (see paragraphs 42 and 44 above), the Rijeka County Court noted as follows.

> "The first accused, Ivan Dvorski, confessed to the criminal offences of robbery, aggravated murder of Đ.V., M.Š. and B.V. ..., exactly as is stated in the operative part of this judgment, to the police and in the presence of a defence lawyer. He later tried to contest that statement, claiming that he had not instructed the defence lawyer, M.R., that he had told the police officers that he wanted G.M. as his lawyer, that at the time he had been taken to the police station he had been under the influence of alcohol and drugs, and so on. However, this defence is not acceptable. The written record of arrest shows that Ivan Dvorski was arrested on 14 March 2007 at 9.50 a.m. at the Rijeka Police Station, and [M.]R., in favour of whom Ivan Dvorski signed the power of attorney, came to the police station on 14 March 2007 at 7.45 p.m. The written record of the questioning of the then suspect Ivan Dvorski shows that M.R. was informed at 6.15 p.m. and that the questioning started at 8.10 p.m. Besides the officers of the Rijeka Police, a typist and the defence lawyer of the then suspect Ivan Dvorski, the County State Attorney was also present during the questioning. The introductory part of the written record [indicates] that the then suspect Ivan Dvorski clearly stated that he had chosen and authorised M.R. to act as his defence lawyer and had consulted with him, after which he decided to give his statement. The written record is properly signed by the persons present. The first accused Ivan Dvorski had read the written record before signing it. Thus, the above shows without doubt that the contentions of Ivan Dvorski that he had not retained M.R. as his lawyer are unfounded. During the trial, at the request of Ivan Dvorski's defence, a handwriting expert gave her opinion regarding the signature of Ivan Dvorski on the written record of his questioning by the police. The expert opinion proved beyond any doubt that the contested signature was that of Ivan Dvorski. The panel accepts such findings in their entirety; the findings were further explained at a hearing by the expert Lj.Z. Her findings were given in an objective, impartial and professional manner. Therefore, the questioning of Ivan Dvorski by the police was carried out in compliance with the provisions of the Code of Criminal Procedure.
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> ...
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> The request made by [Ivan Dvorski's] defence to call G.M. as a witness ... was dismissed as irrelevant, since the documents from the case file do not reveal that there was any extraction of a confession by the police, but only [record] the time at which [M.]R. came [to the police station], whereupon the questioning of [Ivan Dvorski] in the presence of the lawyer for whom he had signed a power of attorney started ... Nobody, including [Ivan Dvorski's] defence lawyer who was present during the police questioning – [M.]R. – has alleged any unlawful extraction of a confession and there is no indication of this in the record of the statement given by Ivan Dvorski, [who] at the time [was] only a suspect."

52. The applicant lodged an appeal against the first-instance judgment with the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 6 November 2008. He complained, *inter alia*, that the conviction had been based on his confession to the police, which had not been given in the presence of a lawyer of his own choosing, namely G.M., but in the presence of a lawyer, M.R., who had been offered to him by the police. The applicant also referred to the request for the removal of the Rijeka County State Attorney and all his deputies lodged by G.M. on 16 March 2007, highlighting the part

of that request which stated that he had been denied food during his detention in police custody. The relevant part of the applicant's appeal reads as follows.

> "The statement given by the first accused to the police was unlawfully obtained, for the following reasons. When the first accused was brought to the Rijeka Police Station his defence rights were seriously infringed. However, during the trial this infringement was ignored. On 14 March 2007, the first accused's mother and then also his now late father retained G.M. as his defence lawyer before the police, after he had been arrested. However, G.M. was not allowed access to the accused, and subsequently informed the relevant authorities thereof, but they ignored this. G.M. therefore lodged an action in the Rijeka Municipal Court in respect of an unlawful act, as well as a request for the removal of the Rijeka County State Attorney and all his deputies. In that request he alleged that the first accused had not been given any food by the police from 13 March 2007 at 1 p.m., when he had been brought to the Rijeka Police Station, until he had agreed to be represented by M.R. on 14 March at about 7 p.m. so as to give a self-incriminating statement, which was in violation of Article 225 § 8 of the Code of Criminal Procedure. Because of that, the defence asked for G.M. to be examined [at the trial] since he had knowledge about the questioning of the first accused by the police."

53. On 8 April 2009 the Supreme Court dismissed the applicant's appeal as ill-founded. As regards his complaints concerning his statement to the police, that court noted:

> "... The lawfulness of [the statement given to the police] was not put in doubt by the appellant's complaints that M.R. was not his lawyer and that his lawyer was G.M., who had been retained by his father and mother on the same day, or by the appellant's complaints that he had been denied food in the period between 1 p.m. on 13 March 2007 and 7 p.m. on 14 March 2007 until he had agreed to instruct M.R. to act as his lawyer, since according to the record of his arrest ..., the appellant was arrested at 9.50 a.m. on 14 March 2007 and the lawyer M.R. arrived [at the police station] at 6.45 p.m. on the same day."

54. The applicant lodged a further appeal against the judgment of the Court of Appeal with the Supreme Court on 14 September 2009, reiterating his previous arguments. The relevant part of the appeal reads as follows.

> "The first accused has to comment on the conclusions of the appeal court that the allegation that food was denied to him from 1 p.m. on 13 March 2007 until he agreed to be represented by M.R. at 7 p.m. on 14 March 2007 had no bearing on the lawfulness of the evidence [(the record of his questioning)] because the written record of his arrest showed that he had been arrested on 14 March 2007 at 9.50 a.m. and that M.R. had arrived on the same day at 6.45 p.m. The Record of Attendance F/949, which is in the case file, shows that the first accused was brought to the police station on 13 March 2007 at 2 p.m. and was kept there. He was arrested the next day, as found by the first-instance court. However, it is not true that M.R. came to the police station at 6.45 p.m.: he came at 7.45 p.m., which shows that the allegations of the first accused are true. That fact could have been verified by the evidence of G.M., who represented the first accused during the investigation ..."

55. On 17 December 2009 the Supreme Court, acting as the court of final appeal, dismissed the applicant's appeal as ill-founded. That court

pointed out that the record of the applicant's statement suggested that he had chosen M.R. to represent him during police questioning and that M.R. had provided him with adequate legal advice. The Supreme Court also noted that there was nothing in the case file to indicate that the applicant had been ill-treated or forced to confess. The relevant part of the judgment reads as follows.

> "The appellant erroneously argues that the first-instance court committed a grave breach of criminal procedure, contrary to Article 367 § 2 of the Code of Criminal Procedure, in basing his conviction on the statement he gave to the police in the presence of a defence lawyer, which [in the appellant's view] constitutes unlawfully obtained evidence for the purposes of Article 9 § 2 of the Code of Criminal Procedure, and that the record of his questioning as a suspect by the police (in the presence of a defence lawyer) should thus have been excluded from the case file. In so doing, the appellant challenges the reasoning of the second-instance judgment to the effect that the lawfulness of the evidence was not affected by the appellant's arguments that during his apprehension and arrest he had not been given food until he had agreed to be represented by M.R. These arguments of the appellant were refuted by the second-instance court on the basis of all the formally established information contained in the record of [his] questioning in the presence of a lawyer on 14 March 2007.
>
> This Court notes that [the complaint] regarding the question of the presence of a lawyer [during the questioning], as a legal requirement for the lawfulness of evidence obtained in this way during the police investigation, relates to two objections. The first objection concerns the restriction of access to the lawyer of [the defendant's] own choosing, and the second objection relates to the pressure exerted on the suspect through the denial of food (Article 225 § 8 of the Code of Criminal Procedure), which, according to the appeal, eventually made him accept legal representation by the lawyer imposed on him, M.R., although his parents had already engaged the services of G.M. on the morning of 14 March 2007.
>
> It is to be noted that during the police criminal investigation a number of persons with a background of drug abuse, and with links to the victim Đ.V., were arrested, in particular from the neighbourhood of Gornja Vežica, and it was in the course of this action that the accused, Ivan Dvorski, was also apprehended. Only when a probable cause was established that the accused could have been the perpetrator of the offences in issue was he arrested on 14 March 2007 at 9.50 a.m.
>
> At the same time the father of the accused, who was in Croatia, whereas the accused's mother was in Italy, was informed [of the arrest] by the police at 2.10 p.m., which shows that from that moment the father of the accused (after a telephone conversation with his mother) could have engaged the services of a lawyer for the accused, for which he would most certainly have needed some time. In such circumstances, this Court finds that the parents of the accused could not have already signed a power of attorney for the lawyer of the accused's choice by 1.30 p.m. on the day in question.
>
> The other information from the record of the accused's arrest and from the record of his questioning by the police shows that on 14 March 2007, as is indicated by the record of the arrest, the accused was brought to the Rijeka Police Station and, as is apparent from the record of Ivan Dvorski's questioning by the police, the defence lawyer, M.R., was informed at 6.15 p.m. and came to the police station at 7.45 p.m. The questioning itself commenced at 8.10 p.m. and ended at 11 p.m., with a break between 10.35 p.m. and 10.38 p.m.

It should be emphasised that in the introductory part of the record [of his questioning] the suspect, Ivan Dvorski, expressly stated that he had chosen M.R. as his defence lawyer and had signed the power of attorney in favour of him, and the record of the questioning shows that the defence lawyer had almost half an hour for consultation with the suspect before the questioning, in which time he was able to advise him of his rights.

Thus, the relevant fact which follows from the formal procedural action described in the record of the suspect's questioning is that the chosen lawyer came at least half an hour before the questioning commenced, and in the consultation with [the suspect] before the questioning he was able to give [the suspect] genuine legal advice as his chosen lawyer.

It should also be noted that the essence of the suspect's right to have a lawyer present during his questioning by the police lies in the necessity for legal protection of his rights, which is why the beginning, conduct and end of this formal [procedural] action is fully registered in the record [of the questioning].

This is why all arguments to the contrary, as set out in the appeal against the second-instance judgment, and particularly those relating to the need to question G.M. as the second concurrent lawyer of [the suspect's] choosing, have no support in the content of the formal record of the suspect's questioning of 14 March 2007, because the record contains formally registered information regarding the contact with the chosen lawyer, the time the chosen lawyer came into the Rijeka Police Station, the time the questioning of the suspect commenced, the period in which a short break took place, and the time the procedural action finished, all of which was confirmed by the suspect and the defence lawyer of his choosing by signing the record without any objections as to its content.

However, irrespective of the fact that the defence of the accused in the context of police questioning formally satisfied the requirements of Article 177 § 5 of the Code of Criminal Procedure, the general thrust of the defence, as well as the substance of the defence as regards particular acts, and the confession, were provided voluntarily by the suspect, and his chosen lawyer was most certainly unable to have any influence on this, which at the same time rules out the possibility of any mental pressure being exerted on the suspect, as well as his subsequent arguments regarding the lawyer having been imposed on him during the police investigation. On the contrary, the suspect's defence rights were fully secured, as required under the Constitution and the Code of Criminal Procedure.

There is therefore no breach of Article 367 § 2 in conjunction with Article 9 § 2 of the Code of Criminal Procedure. The refusal of the request to have the record of the suspect's questioning by the police in the presence of a lawyer of his choosing excluded from the case file as unlawfully obtained evidence does not constitute a breach of his defence rights because the record of the suspect's questioning by the police clearly and undoubtedly shows that the lawyer who was present [during the questioning] was the lawyer of the suspect's free choice, and this also follows from the signed power of attorney in favour of the lawyer in question, who protected the suspect's rights during the questioning. Accordingly, the refusal of the defence's request did not have any bearing on the lawfulness and correctness of the judgment. At the same time, it was not necessary to question the new chosen lawyer as a witness and, for the reasons set out above, the facts of the case were not insufficiently or erroneously established, as was argued in the defendant's appeal against the second-instance judgment."

56. The applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) on 11 March 2010. He complained, *inter alia*, that he had been ill-treated while in police custody and that he had been forced to confess. He also complained that he had been denied the chance to have a lawyer of his own choosing conduct his defence. He reiterated his arguments from his previous appeals and added:

> "It is also important to stress that at the session of the Supreme Court as the court of third instance, held on 17 December 2009, the defence indicated that the applicant had been brought to the police station at 2 p.m. on 13 March 2007, and that that fact was shown in the Record of Attendance F/949, which was in the case file. The defence asked the panel [of the Supreme Court] to have a look at that record. However, after a brief examination of the case file it was established that the document in question could not be found, and that it would be looked at later. However, the judgment of the Supreme Court, acting as a third-instance court, shows that the document had [still] not been found ..."

57. On 16 September 2010 the Constitutional Court dismissed the applicant's constitutional complaint. The Constitutional Court, endorsing the reasoning of the Supreme Court, noted that the proceedings as a whole had been fair and that there was no evidence in the case file that the applicant had been ill-treated while in police custody.

II. RELEVANT LAW

A. Domestic law

58. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 113/2000, 28/2001 and 76/2010) read as follows.

Article 23

> "No one shall be subjected to any form of ill-treatment ..."

Article 29

> "In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> In the event of suspicion of a criminal offence or criminal charges [being brought], the suspect, defendant or accused shall have the right:
>
> ...
>
> – to defend himself in person or with the assistance of a defence lawyer of his own choosing, and if he does not have sufficient means to pay for legal assistance, to be given it free as provided by law,
>
> ..."

59. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 27/1998, 129/2000, 51/2001, 105/2004, 84/2005 and 71/2006) provide as follows.

Aggravated Murder
Article 91

"A sentence of imprisonment of not less than ten years or long-term imprisonment shall be imposed on anyone who:

...

(6) murders another in order to commit or to cover up another criminal offence,

..."

Robbery
Article 218

"1. Anyone who, by using force against a person or threatening a direct attack on a person's life or limb, takes away movable property from another with intent to unlawfully appropriate it shall be punished by imprisonment of one to ten years.

2. If the perpetrator commits the robbery as a member of a group or a criminal organisation, or if, during the robbery, a weapon or dangerous instrument is used, the perpetrator shall be punished by imprisonment of three to fifteen years."

Endangering Life and Property through Dangerous Acts or Means
Article 263

"1. Anyone who endangers the life or limb of others or property of considerable value by [starting a] fire ... shall be punished by imprisonment of six months to five years.

...

3. If the criminal offences referred to in paragraphs 1 and 2 of this Article are committed at a place where a number of people are gathered ... the perpetrator shall be punished by imprisonment of one to eight years.

..."

Aggravated Criminal Offences against Public Safety
Article 271 § 1

"If, as a result of the criminal offence referred to in Article 263 § 1 ... of this Code, serious bodily injury to another or extensive material damage has been caused, the perpetrator shall be punished by imprisonment of one to eight years."

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

Article 62

"1. A defendant may be represented by a lawyer at any stage of the proceedings, as well as before their commencement when prescribed by this Act. ...

...

4. The defendant's legal guardian, spouse or common-law spouse, linear blood relative, adoptive parent or adopted child, sibling or foster parent may instruct a lawyer for the defendant, unless the defendant expressly refuses this.

...

6. A defence lawyer must present his power of attorney to the authorities conducting the proceedings. The defendant may also grant a power of attorney to a lawyer orally before the authority conducting the proceedings, in which case this must be entered in the record."

Article 177 § 5

"In the course of the investigation, the police authorities shall inform the suspect pursuant to Article 225, paragraph 2, of this Code. At the request of the suspect, the police authorities shall allow him to instruct a lawyer and for that purpose they shall stop interviewing the suspect until the lawyer appears or at the latest three hours from the moment the suspect asked to appoint the lawyer. ... If the circumstances indicate that the chosen lawyer will not be able to appear within this period of time, the police authorities shall allow the suspect to appoint a lawyer from the list of lawyers on duty provided to the competent police authority by the county branches of the Croatian Bar Association ... If the suspect does not instruct a lawyer or if the requested lawyer fails to appear within the time allowed, the police authorities may resume interviewing the suspect ... The State Attorney has the right to be present during the questioning. The record of [any] statement given by the defendant to the police authorities in the presence of a lawyer may be used as evidence in the criminal proceedings."

Article 225 § 2

"The accused shall be informed of the charges and the grounds of suspicion against him, as well as of his right to remain silent."

61. The Code of Criminal Procedure, as amended in 2011, provides as follows.

Article 502

"...

2. The provisions concerning the reopening of criminal proceedings shall be applicable in the case of a request for revision of any final court decision on account of a final judgment of the European Court of Human Rights by which a violation of the rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms has been found.

3. A request for the reopening of proceedings on account of a final judgment of the European Court of Human Rights may be lodged within a thirty-day time-limit starting from the date on which the judgment of the European Court of Human Rights becomes final."

Article 574

"...

2. If prior to the entry into force of this Code a decision was adopted in respect of which a legal remedy is available pursuant to the provisions of legislation relevant to

the proceedings [in which the decision was adopted], ... the provisions of that legislation shall be applicable [to the proceedings concerning the remedy], unless otherwise provided under this Code.

3. Articles 497 to 508 of this Code shall accordingly be applicable to requests for the reopening of criminal proceedings made under the Code of Criminal Procedure (Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003 and 115/2006)."

B. Relevant international law materials

Right of access to a lawyer of one's own choosing during police custody

(a) Council of Europe

(i) Rules adopted by the Committee of Ministers

62. Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73) 5 of the Committee of Ministers of the Council of Europe) provides:

"An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request, he shall be given all necessary facilities for this purpose. ... Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official."

63. Furthermore, Recommendation Rec(2006)2 of the Committee of Ministers to member States of the Council of Europe on the European Prison Rules, adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, reads in so far as relevant as follows:

"*Legal advice*

23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

...

23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security."

(ii) Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 14 May 2007

64. The relevant part of this report reads as follows.

"18. The majority of the persons interviewed by the delegation during the 2007 visit indicated that they had been informed of their right of access to a lawyer shortly after apprehension. However, as during previous visits, it appeared that many persons detained by the police had been allowed to exercise that right only some time after apprehension, in particular after a statement relating to a specific criminal offence had been obtained from them.

The fact that persons summoned to a police station for 'informative talks' were still not allowed to have access to a lawyer is another matter of continuing concern to the Committee. Police officers interviewed by the delegation stated that, in the context of such 'talks', access to a lawyer could only be granted when a person was formally declared a suspect.

In the light of the above, **the CPT again calls upon the Croatian authorities to take effective steps without any further delay to ensure that the right of access to a lawyer (including the right to have a lawyer present during police questioning) is enjoyed by all persons detained by the police, as from the very outset of their deprivation of liberty. This right should apply not only to criminal suspects but also to anyone who is under a legal obligation to attend – and stay at – a police establishment. If necessary, the law should be amended**. Naturally, the fact that a detained person has stated that he wishes to have access to a lawyer should not prevent the police from beginning to question/interview him on urgent matters before the lawyer arrives. Provision could also be made for the replacement of a lawyer who impedes the proper conduct of an interrogation, on the understanding that such a possibility should be strictly circumscribed and subject to appropriate safeguards.

19. The CPT is concerned that, during the 2007 visit, the Croatian legal aid system appeared to display the same shortcomings as in 2003. In many instances, *ex officio* lawyers had had no contact with the detained persons until the first court hearing. In addition, in some cases, detained persons expressed scepticism about *ex officio* lawyers' independence from the police. **The CPT reiterates its recommendation that the system of free legal aid to detained persons be reviewed, in order to ensure its effectiveness from the very outset of police custody. Particular attention should be paid to the issue of independence of *ex officio* lawyers from the police**."

(iii) Report to the Croatian Government on the visit to Croatia carried out by the CPT from 19 to 27 September 2012

65. The relevant part of this report reads as follows.

"19. The CPT's delegation also received some allegations that detained persons had not been able to have access to a lawyer named by them, as the police officers considered that their only duty was to contact ex officio lawyers from the standard list rather than to contact a specific lawyer directly.

The CPT recommends that police officers be reminded that persons deprived of their liberty by the police have the right of access to a lawyer of their own choice; if a detained person requests access to a specific lawyer, then that contact should be facilitated; the ex officio lawyer from the standard list should be contacted only if the first-mentioned lawyer cannot be reached or does not appear."

(b) United Nations

International Covenant on Civil and Political Rights

66. Article 14 § 3 (b) of the International Covenant on Civil and Political Rights provides that everyone charged with a criminal offence is entitled "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

THE LAW

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

67. The applicant complained that he had not had a fair trial because he had not been allowed to be represented by G.M. during police questioning. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which, in so far as relevant, reads as follows.

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 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;
>
> ..."

A. The Chamber's conclusions

68. The Chamber concentrated its assessment on the issue of the applicant's right to retain counsel of his own choosing and whether as a result of not having had that opportunity, he was prevailed upon in a coercive environment to incriminate himself without the benefit of effective legal advice. It concluded, given that the applicant had never complained about the quality of the service provided by M.R., that the trial court had addressed the applicant's complaint about his representation during police questioning; that the applicant's confession was not central to the prosecution's case; and that there was no evidence that any pressure had been exerted on the applicant to confess. Viewing the fairness of the proceedings as a whole, the Chamber found that the applicant's defence rights had not been irretrievably prejudiced, nor had his right to a fair trial

under Article 6 of the Convention been adversely affected. The Chamber held that there had been no violation of Article 6.

B. The parties' submissions to the Grand Chamber

1. The applicant

69. The applicant argued that when questioned by the police he had wanted G.M. to represent him since G.M. had been his lawyer in another case and the applicant trusted him. Furthermore, his parents had instructed G.M. to represent him. However, G.M. had been prevented by the police from seeing him.

70. The police had not presented him with a list of lawyers from which to choose his defence counsel. Another lawyer, M.R., had been called by the police and had been given only twenty-five minutes to confer with the applicant, which, given the complexity and seriousness of the charges against him, had clearly not been sufficient. M.R. had requested the police to commence questioning as soon as possible, given the late hour.

2. The Government

71. The Government argued that the applicant had already been aware at about 2 p.m. on 13 March 2007 that the police wished to question him in connection with three murders, armed robbery and arson, yet he had not attempted to contact G.M. before the questioning.

72. When arrested by the police at 9.50 a.m. on 14 March 2007, the applicant had at first waived his right to a lawyer. About eight hours later he had changed his mind and asked for a lawyer. The police had then presented him with a list of the Primorsko-Goranska County criminal defence lawyers, from which he had chosen M.R. of his own free will. Upon M.R.'s arrival, he had signed a power of attorney, without being coerced into doing so by the police. Therefore, M.R. had been the lawyer of the applicant's own choosing. The Government stressed that these were the facts and that all the applicant's other allegations, namely those concerning G.M., amounted to mere speculation.

73. The Government further submitted that there had been no evidence that G.M. had had a power of attorney on 14 March 2007, signed by either of the applicant's parents. Even if G.M. had been the lawyer appointed by either of the applicant's parents, he had not been the lawyer of the applicant's own choosing since the applicant had chosen M.R. to represent him.

74. The applicant had been questioned by the police on numerous previous occasions (he had been arrested twenty-two times in the past), and had therefore been familiar with the situation in which he had found himself. On each of these occasions he had been represented by a different

lawyer. Had he wished G.M. to represent him, he would have indicated that to the police. However, he had not done so.

75. The applicant had never complained to the domestic courts about the quality of the service provided by M.R. The Government argued that the domestic courts had provided adequate reasoning in response to the applicant's complaint that he had not been represented by a lawyer of his own choosing during the questioning at the police station. The fact that the applicant had chosen to confess to the charges against him was not unusual, since the applicant had previously confessed to committing crimes with which he had been charged in different criminal proceedings, including on one occasion in the presence of G.M.

C. The Grand Chamber's assessment

1. General principles

76. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 (see *Imbrioscia v. Switzerland*, 24 November 1993, §§ 36-37, Series A no. 275, and *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008).

77. The Court has held that, in order to exercise his right of defence, the accused should normally be allowed to have the effective benefit of the assistance of a lawyer from the initial stages of the proceedings because national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings (see *Salduz*, cited above, § 52). The Court has also recognised that an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, and in most cases this can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected (ibid., § 54; see also *Pavlenko v. Russia*, no. 42371/02, § 101, 1 April 2010).

78. In such circumstances, the Court considers it important that from the initial stages of the proceedings a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (for more detailed

reasoning, see *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013). This follows from the very wording of Article 6 § 3 (c), which guarantees that "[e]veryone charged with a criminal offence has the following minimum rights: ... to defend himself ... through legal assistance of his own choosing ...", and is generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused. The Court emphasises that the fairness of proceedings requires that an accused should be able to obtain the whole range of services specifically associated with legal assistance (see *Dayanan v. Turkey*, no. 7377/03, § 32, 13 October 2009, and paragraph 108 below).

79. Notwithstanding the importance of the relationship of confidence between a lawyer and his client, this right is not absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them (see *Croissant v. Germany*, 25 September 1992, § 29, Series A no. 237-B). The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (ibid., § 29; see also *Meftah and Others v. France* [GC], nos. 32911/96 and 2 others, § 45, ECHR 2002-VII; *Mayzit v. Russia*, no. 63378/00, § 66, 20 January 2005; *Klimentyev v. Russia*, no. 46503/99, § 116, 16 November 2006; *Vitan v. Romania*, no. 42084/02, § 59, 25 March 2008; *Pavlenko*, cited above, § 98; *Zagorodniy v. Ukraine*, no. 27004/06, § 52, 24 November 2011; and *Martin*, cited above, § 90). Where such grounds are lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole (see *Croissant*, cited above, § 31; see also *Meftah and Others*, cited above, §§ 46-47; *Vitan*, cited above, §§ 58-64; *Zagorodniy*, cited above, §§ 53-55; and *Martin*, cited above, §§ 90-97).

80. Moreover, having regard to the considerations mentioned above, as the Court affirmed in its judgment in *Salduz*, in order for the right to a fair trial to remain "practical and effective", Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police questioning without access to a lawyer are

used for a conviction (see *Salduz*, cited above, § 55-57; see also *Panovits v. Cyprus*, no. 4268/04, § 66, 11 December 2008).

81. Unlike in *Salduz*, where the accused, who was being held in custody, had been denied access to a lawyer during police questioning, the present case concerns a situation where the applicant was afforded access to a lawyer from his first interrogation, but not – according to his complaint – a lawyer of his own choosing. In contrast to the cases involving denial of access, the more lenient requirement of "relevant and sufficient" reasons has been applied in situations raising the less serious issue of "denial of choice". In such cases the Court's task will be to assess whether, in the light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness (see, for example, *Croissant*, cited above, § 31; *Klimentyev*, cited above, §§ 117-18; and *Martin*, cited above, §§ 96-97).

82. It is the latter test which is to be applied in the present case. Against the above background, the Court considers that the first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements (see *Meftah and Others*, cited above, §§ 45-48, and *Martin*, cited above, § 90); the circumstances surrounding the designation of counsel and the existence of opportunities for challenging this (ibid., §§ 90-97); the effectiveness of counsel's assistance (see *Croissant*, cited above § 31, and *Vitan*, cited above, §§ 58-64); whether the accused's privilege against self-incrimination has been respected (see *Martin*, cited above, § 90); the accused's age (ibid., § 92); and the trial court's use of any statements given by the accused at the material time (see, for example, *Croissant*, cited above, § 31; *Klimentyev*, cited above, §§ 117-18; and *Martin*, cited above, §§ 94-95). It is further mindful that the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory (see, among many other authorities, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32; *Imbrioscia*, cited above, § 38; *Goddi v. Italy*, 9 April 1984, § 30, Series A no. 76; and *Salduz*, cited above, § 55) and that in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation (see, *inter alia*, *Delcourt v. Belgium*, 17 January 1970, § 31, Series A no. 11; *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 48, Series A no. 77; *Pavlenko*, cited above, § 112; and *Erkapić v. Croatia*, no. 51198/08, §§ 80-82, 25 April 2013). In cases where the accused had no legal representation, the Court also takes into consideration the opportunity given

to the accused to challenge the authenticity of evidence and to oppose its use (see *Panovits*, cited above, § 82), whether the accused is in custody (see *Salduz*, cited above, § 60); whether such statements constituted a significant element on which the conviction was based and the strength of the other evidence in the case (see *Salduz*, cited above, § 57, and *Panovits*, cited above, §§ 76 and 82).

2. Application of these principles to the present case

(a) Was the applicant represented by a lawyer selected on the basis of his own informed choice?

83. On 14 March 2007, between 8.10 p.m. and 11 p.m., the applicant was questioned as a suspect by the police in the presence of a lawyer, M.R. (see paragraphs 21-22 above). The applicant's statement to the police was used as evidence in the criminal proceedings against him (see, by contrast, *Bandaletov v. Ukraine*, no. 23180/06, §§ 60 and 68, 31 October 2013).

84. According to the Government, the only certain fact concerning the applicant's representation during police questioning was that he had chosen of his own free will to be represented by M.R.; any allegations concerning the applicant's wish to be represented by another lawyer, G.M., were pure speculation (see paragraphs 71-73 above).

85. The applicant's allegations of coercion were declared inadmissible by the Chamber (see paragraph 73 of the Chamber judgment). The Court also notes the finding by the national courts, with the aid of a handwriting expert, that the applicant did indeed sign a power of attorney in favour of M.R. (see paragraph 40 above).

86. However, the Court observes that already on the morning of 14 March 2007 G.M. informed the Rijeka County Deputy State Attorneys, D.K. and I.B., of his unsuccessful attempt to contact the applicant, who was at Rijeka Police Station. An official note was made to that effect and the Rijeka County Court was also immediately informed (see paragraph 15 above). In his complaint, lodged on the afternoon of 14 March 2007 with the Chief of the Primorsko-Goranska Police Department, V., G.M. alleged that he had again tried to see the applicant between 3 p.m. and 3.30 p.m., but had again been told by the police to leave.

87. The day after the police questioning, when the applicant was brought before an investigating judge and asked who his lawyer was, he complained that he had not instructed M.R. to act as his lawyer and that he had expressly requested to be represented by G.M. during police questioning. He alleged that the police had never informed him that G.M. had tried to contact him. At that point, during his examination by the investigating judge, the applicant was no longer represented by M.R. but by G.M. (see paragraph 23 above).

88. In his further request of 16 March 2007 to the investigating judge, G.M. described the conduct of the police in detail and raised his objections in that respect (see paragraph 24 above).

89. Also, during the trial the applicant complained of the police's refusal to allow G.M. to contact him on 14 March 2007 and asked the trial court to hear evidence from G.M., but his request was refused as irrelevant (see paragraph 44 above).

90. In all these submissions it was stated that G.M. had been instructed by the applicant's parents to represent the applicant during police questioning and that the police had denied G.M. access to him even though he had actually come to the police station before the questioning of the applicant had started and before M.R. had been called to the police station. It was also alleged that, whereas on the morning of 14 March 2007 G.M. had only had oral authorisation from the applicant's mother, that afternoon his legal trainee had presented a written power of attorney from the applicant's father (see paragraph 16 above).

91. Thus, the applicant, through his own actions and those of his lawyer, clearly drew attention to the circumstances in which G.M. had attempted to contact him prior to his questioning by the police.

92. Against this background, the Court finds it sufficiently established that G.M. had been retained by one or both of the applicant's parents, that he attempted on more than one occasion on 14 March 2007 to see the applicant in Rijeka Police Station and that the police officers there told him to leave, without informing the applicant that G.M. had come to see him. The Court is further satisfied that G.M.'s visits and requests to see the applicant at the police station occurred before the questioning of the applicant by the police had started.

93. Therefore, while the applicant had formally chosen M.R. to represent him during police questioning, that choice was not an informed one because the applicant had no knowledge that another lawyer, retained by his parents, had come to the police station to see him, presumably with a view to representing him.

(b) Were there relevant and sufficient reasons in the interests of justice to restrict the applicant's access to G.M.?

94. The Court notes that the only reason cited by the Government for not allowing G.M. access to the applicant was the fact that G.M., in the Government's view, did not have a proper power of attorney to represent him. At the same time, the Government did not dispute that the applicant was not informed at the relevant time that G.M. had been trying to see him at the police station.

95. The Court notes, however, that G.M. alleged before the national authorities that he had in fact been provided with a written power of attorney by the applicant's parents on 14 March 2007. It would appear that

these allegations have never been convincingly refuted in the domestic proceedings. Moreover, a written power of attorney was included in the case file compiled by the investigating judge on 15 March 2007, when the applicant was brought before him by the police.

96. The relevant domestic law is clear on the fact that a defence lawyer may be instructed by a suspect himself or by his relatives, including his parents (see Article 62 of the Code of Criminal Procedure, paragraph 60 above). In accordance with Article 62 § 6, a suspect may orally authorise a lawyer to act on his behalf during the proceedings. The purpose of Article 62 § 4, of the Code of Criminal Procedure, which provides that a defence lawyer may be instructed by the accused's close relatives but that the accused may expressly refuse the lawyer chosen, cannot be achieved unless the accused is informed that his or her close relatives have instructed a lawyer to represent him or her. This, in any case, obliged the police to at least inform the applicant that G.M. had come to the police station and that he had been authorised by his parents to represent him. However, the police omitted to inform the applicant of this and also refused G.M. access to him.

97. That omission and refusal could hardly be explained by the fact that the applicant had later signed a power of attorney authorising M.R. to be present during his questioning by the police. As already mentioned, he had done so while being at all times unaware of G.M.'s attempts to assist him after being instructed by his parents.

98. Nor do the documents in the criminal case file reveal any justification for the omissions and actions of the police that resulted in the applicant being denied the opportunity to choose whether he wished to be assisted by G.M. during questioning. Moreover, according to a written record of the applicant's oral evidence given to the investigating judge on 15 March 2007, the day after his arrest, the applicant stated that his chosen lawyer was G.M. and that the police officers had denied him access to G.M. He also said that he had not instructed M.R. as his lawyer (see paragraph 23 above).

99. In these circumstances, the Court is not convinced that the impugned restriction, resulting from the conduct of the police, of the applicant's opportunity to designate G.M. to represent him from the initial phase of police questioning was supported by relevant and sufficient reasons (for instances of relevant and sufficient reasons, see *Meftah and Others*, cited above, § 45; *Mayzit*, cited above, § 68; *Popov v. Russia*, no. 26853/04, § 173, 13 July 2006; and also *Zagorodniy*, cited above, § 53, relating to the representative's lack of qualifications; *Vitan*, cited above, §§ 59-63, where the lawyer of the defendant's choosing did not appear at the trial, without a justified reason; *Croissant*, cited above, § 30, concerning the appointment of an additional lawyer for securing the proper conduct of the proceedings; *Prehn v. Germany* (dec.), no. 40451/06, 24 August 2010, concerning the replacement of a lawyer who was not practising in the same court and was

located far away, thereby impeding the proper conduct of the proceedings; and *Klimentyev*, cited above, § 118, where the defendant was represented by a number of lawyers, not all of whom were able to take part in the proceedings).

(c) Whether the applicant waived his right to be represented by a lawyer of his own choosing

100. The Court has held that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II), and it must be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A).

101. In this connection, it may be reiterated that the right to counsel, being a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the guarantees set forth in Article 6 of the Convention, is a prime example of those rights which require the special protection of the "knowing and intelligent waiver" standard established in the Court's case-law (see *Pishchalnikov v. Russia*, no. 7025/04, §§ 77-79, 24 September 2009). Such a standard ought in the Court's view to apply to the applicant's choice of lawyer in the instant case.

102. As the Court has already observed, the applicant had no knowledge that G.M., instructed by his parents to represent him, had come to the police station to see him. The Court also notes that the applicant challenged what he characterised as the "imposition" of M.R. on him during police questioning, first of all during his initial examination by an investigating judge and subsequently throughout the entire proceedings. In these circumstances, it cannot be maintained that, by signing the power of attorney and providing a statement to the police, the applicant unequivocally waived, either tacitly or explicitly, any right that he had under Article 6 of the Convention to be represented by a lawyer of his own informed choice.

(d) Whether the fairness of the proceedings as a whole was prejudiced

103. Turning next to the question whether the resulting restriction on the applicant's exercise of his informed choice of lawyer adversely affected the fairness of the proceedings as a whole, the Court notes at the outset that the applicant's statement to the police was used in convicting him, even though it was not the central platform of the prosecution's case (see, by contrast, *Magee v. the United Kingdom*, no. 28135/95, § 45, ECHR 2000-VI). It is also true that the trial court viewed his statement in the light of the complex body of evidence before it (compare *Bykov v. Russia* [GC], no. 4378/02,

§ 103, 10 March 2009). Specifically, in convicting the applicant, the trial court relied on the statements of a number of witnesses cross-examined during the trial, numerous expert reports and the records of the crime-scene investigation and searches and seizures, as well as relevant photographs and other physical evidence. In addition, the trial court had at its disposal the confessions made by the applicant's co-accused at the trial, and neither the applicant nor his co-accused ever argued that any of their rights had been infringed when they had made those statements.

104. Nor did the applicant ever complain during the criminal proceedings that M.R. had failed to provide him with adequate legal advice. Furthermore, in her closing arguments at the trial, the applicant's representative asked the court – in the event of its rejecting her client's plea of not guilty – to take into consideration in sentencing the applicant his confession to the police and his sincere regret (see paragraph 48 above).

105. As to the manner in which M.R. was chosen to represent the applicant, the Court refers to Article 177 § 5 of the Code of Criminal Procedure, which requires that an accused should first be invited to instruct a lawyer of his or her own choosing (see paragraph 60 above). Only where the lawyer initially chosen by a suspect is unable to attend police questioning within a certain period of time should a replacement lawyer be chosen from the list of duty lawyers provided to the competent police authority by the county branches of the Croatian Bar Association. However, there is no conclusive evidence in the documents submitted to the Court as to whether these procedures were followed in the applicant's case. The Court finds it unfortunate that the procedures used and decisions taken were not properly documented so as to avoid any doubts raised about undue pressure in respect of the choice of lawyer (see, *mutatis mutandis*, *Martin*, cited above, § 90, and *Horvatić v. Croatia*, no. 36044/09, §§ 80-82, 17 October 2013).

106. The Court notes that the record of the applicant's questioning by the police indicates that M.R. arrived at the police station at around 7.45 p.m. on 14 March 2007 and that the questioning of the applicant commenced at 8.10 p.m. (see paragraphs 21-22 above). There is no indication of the exact time the applicant and M.R. actually commenced the consultation, nor is there any explanation of why that information was not provided in the record of the questioning. The Court notes also that the statement from D.H., the Rijeka County State Attorney, indicates that M.R. talked to the applicant in private for about ten minutes (see paragraph 26 above). The judgment of the Rijeka County Court indicates that M.R. came to the police station at 7.45 p.m. and that the questioning started at 8.10 p.m. (see paragraph 51 above). This was confirmed in the judgment of the Supreme Court (see paragraph 55 above). In the Court's view, without speculating as to the effectiveness of the legal assistance provided by M.R., this period appears to have been relatively short, bearing in mind the scope

and seriousness of the accusations, involving three counts of aggravated murder and further counts of armed robbery and arson. Regard should also be had in this context to the requirement in Article 6 § 3 (b) that an accused should be afforded adequate time and facilities for the preparation of his or her defence.

107. G.M. would already have been available to assist the applicant in the morning, long before the questioning started, and was a lawyer whom the applicant knew from a previous case. Had he been informed by the police of G.M.'s presence and had he actually chosen G.M. to represent him, the applicant would have had considerably more time to prepare himself for the questioning.

108. In this connection, the Court again emphasises the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Salduz*, cited above, § 54), and emphasises that a person charged with a criminal offence should already be given the opportunity at this stage to have recourse to legal assistance of his or her own choosing (see *Martin*, cited above, § 90). The fairness of proceedings requires that an accused should be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support for an accused in distress and checking of the conditions of detention (see *Dayanan*, cited above, § 32).

109. Where, as in the present case, it is alleged that the appointment or the choice by a suspect of the lawyer to represent him has influenced or led to the making of an incriminating statement by the suspect at the very outset of the criminal investigation, careful scrutiny by the authorities, notably the national courts, is called for. However, the reasoning employed by the national courts in the present case in relation to the legal challenge mounted by the applicant concerning the manner in which his confession had been obtained by the police was far from substantial. Neither the trial court nor the investigating judge nor any other national authority took any steps to obtain evidence from G.M. or the police officers involved in order to establish the relevant circumstances surrounding G.M.'s visit to Rijeka Police Station on 14 March 2007 in connection with the applicant's questioning by the police. In particular, the national courts made no real attempt to provide reasons supporting or justifying their decision in terms of the values of a fair criminal trial as embodied in Article 6 of the Convention.

110. In these circumstances, having regard to the purpose of the Convention, which is to protect rights that are practical and effective (see *Lisica v. Croatia*, no. 20100/06, § 60, 25 February 2010), the Court is not

convinced that the applicant had an effective opportunity to challenge the circumstances in which M.R. had been chosen to represent him during police questioning.

111. In determining whether, taking the criminal proceedings as a whole, the applicant received the benefit of a "fair hearing" for the purposes of Article 6 § 1, the Court must have regard to the actions of the police in effectively preventing the applicant, at the very outset of the investigation, from having access to the lawyer chosen by his family and from freely choosing his own lawyer, and to the consequences of the conduct of the police for the subsequent proceedings. In the abstract, if a suspect receives the assistance of a qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair – subject to the proviso that there is no evidence of manifest incompetence or bias (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). In the instant case, it can be presumed that the consequence of the police's conduct was that in his very first statement to the police, instead of remaining silent, as he could have done, the applicant made a confession, which was subsequently admitted in evidence against him. It is also significant that during the investigation and ensuing trial the applicant did not subsequently rely on his confession, save by way of mitigation in relation to the sentence, but took the first opportunity, before the investigating judge, to contest the manner in which the confession had been obtained from him by the police (see paragraphs 23-24, 31, 48, 52 and 54 above). Although there was other evidence against him, the significant likely impact of his initial confession on the further development of the criminal proceedings against him cannot be ignored by the Court. In sum, in the Court's view, the objective consequence of the police's conduct in preventing the lawyer chosen by the applicant's family from having access to him was such as to undermine the fairness of the subsequent criminal proceedings in so far as the applicant's incriminating initial statement was admitted in evidence.

(e) Conclusion

112. The Court has found that the police did not inform the applicant either of the availability of G.M. to advise him or of G.M.'s presence at Rijeka Police Station; that the applicant, during police questioning, confessed to the crimes with which he was charged and that this confession was admitted in evidence at his trial; and that the national courts did not properly address this issue and, in particular, failed to take adequate remedial measures to ensure fairness. These factors, taken cumulatively, irretrievably prejudiced the applicant's defence rights and undermined the fairness of the proceedings as a whole.

113. The Court therefore finds that in the circumstances of the present case there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. 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

115. The applicant claimed 1,795,200 Croatian kunas (HRK) in respect of non-pecuniary damage and an additional amount of HRK 400 for each day starting from 26 December 2011 until his release from prison, to compensate for the distress caused to him by the criminal proceedings and his imprisonment.

116. The Government did not make any observations in this respect.

117. The Court cannot speculate as to the outcome of the proceedings against the applicant. The finding of a violation of Article 6 §§ 1 and 3 (c) in the present case does not imply that the applicant was wrongly convicted. The Court considers that the finding of a violation constitutes sufficient just satisfaction. It notes that Article 502 of the Code of Criminal Procedure allows for the possibility of the reopening of proceedings (see paragraph 61 above). It therefore rejects the applicant's claim (see *Moser v. Austria*, no. 12643/02, § 108, 21 September 2006; *Maresti v. Croatia*, no. 55759/07, § 75, 25 June 2009; *Baloga v. Ukraine*, no. 620/05, § 38, 16 September 2010; *Hanif and Khan v. the United Kingdom*, nos. 52999/08 and 61779/08, § 155, 20 December 2011; *Gürkan v. Turkey*, no. 10987/10, § 26, 3 July 2012; *Denk v. Austria*, no. 23396/09, § 24, 5 December 2013; and *Aras v. Turkey (no. 2)*, no. 15065/07, § 62, 18 November 2014).

B. Costs and expenses

118. Before the Chamber the applicant claimed HRK 5,000 in respect of the costs of lodging his constitutional complaint. He further claimed HRK 15,683 in respect of the costs incurred before the Court.

119. The Government objected to the claim in respect of the costs in the domestic proceedings.

120. On 31 July 2014 and 21 January 2015 the applicant submitted a further claim for costs and expenses in addition to that submitted before the Chamber. The additional claim concerned the cost of preparing for and being represented at the hearing of 21 January 2015. The additional costs totalled HRK 29,279.60.

121. 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 were actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court notes that the applicant's constitutional complaint lodged in connection with the criminal proceedings in issue was aimed at remedying the violation the Court has found under Article 6 §§ 1 and 3 (c) of the Convention. Regard being had to the documents in its possession and to its case-law, the Court considers the sum of 6,500 euros to be reasonable to cover costs under all heads, and awards it to the applicant, plus any tax that may be chargeable to him on that amount.

C. Default interest

122. 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

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

2. *Holds*, by sixteen votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

3. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 October 2015.

Lawrence Early	Dean Spielmann
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Zupančič;

(b) joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković;

(c) concurring opinion of Judge Silvis joined by Judge Spielmann;

(d) dissenting opinion of Judge Vehabović.

D.S.
T.L.E.

CONCURRING OPINION OF JUDGE ZUPANČIČ

1. I agree with the outcome in this case. Nevertheless, I would like to raise a point referring to the domestic enforcement of this judgment – in so far as it is, obviously, the trial *de novo* that is the natural remedy for the finding of the procedural violation by the Court.

2. Article 502 of the Croatian Code of Criminal Procedure, as amended in 2011, provides that the reopening of the proceedings shall be applicable upon a request for a revision of any final domestic judgment due to the finding of a violation by the ECtHR. This request for a reopening may be lodged within a thirty-day time-limit starting from the date on which the Court's judgment becomes final (see paragraph 61 of the present judgment)[1].

3. The question, however, in all similar cases is not the mere reopening of the proceedings. Clearly, the purpose of the domestic trial *de novo* in such circumstances is to correct the fatal faults, akin to "absolutely essential procedural errors" in domestic law that led to our finding of violation in the first place. Admittedly, the case at hand is a borderline situation concerning the suspect's right to a lawyer of his own choosing. Nonetheless, this does not detract from the domestic duty to correct the procedural errors that led to our finding of a violation. The majority judgment establishes the presumption of the privilege against self-incrimination and places an emphasis on the retrial, but it does not specify the procedural parameters within which the new procedure is to be attempted.

4. In this case the unassisted interrogation error was committed in the so-called critical stage of the pre-trial criminal procedure, that is, in the stage whose outcome may predetermine the outcome of the trial itself. As George Feifer put it: "The Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as 'an appeal from the pre-trial investigation'." (Feifer, *Justice in Moscow*, 1964, p. 86.) The metaphor was repeated by the U.S. Supreme Court Justice A.J. Goldberg in the famous case of *Escobedo v. Illinois*, 378 US 478 (1964), a precursor to *Miranda v. Arizona*, 384 US 436 (1966). Forty-two years later our own case of *Salduz v. Turkey* ([GC], no. 36391/02, § 50, ECHR 2008) also maintained:

> "The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially

1. See in this respect the decision of the Croatian Constitutional Court U-III-3304/2011 of 23 January 2013 and the presentation of the decision in the article by Zoran Burić entitled *Obaveza izvršenja konačnih presuda Suda za ljudska prava – u povodu odluke i rješenja Ustavnog suda Republike hrvatske broj U-III/3304/2011 od 23. Siječnja 2013*.

> paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions ... As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1 ..."

5. At this juncture we encounter the question of the adequate procedural remedy to be applied by the domestic courts upon the retrial of the case. What to do with the evidence, which would not have been obtained by the police, were it not for the absence of the suspect's legitimate counsel during these interrogations? The question will also be to what extent the evidence obtained during the trial of the applicant is the fruit of the poisonous tree of the obvious primary violation of the applicant's Convention rights. As implied above, the test to be applied is a *sine qua non*, namely, the query applies to all of the evidence stemming directly or indirectly from the irregular interrogation at the critical beginning of this domestic procedure.

6. The issue, therefore, is the exclusionary rule. In the new trial, for the right to counsel to have any meaning, the previously obtained contaminated evidence – "contaminated" because it was obtained in the absence of legitimate counsel – should be conscientiously expunged from the dossier concerning the applicant and, moreover, the new court dealing with the case ought to have no knowledge of the contaminated evidence on which to rely during the subsequent trial.

7. In the Continental legal system this is not so easy to do, given that the criminal procedure does not operate the so-called *voir-dire* procedure for the selection of the members of the jury. In the *voir-dire* procedure the jurors may be peremptorily excluded and they may be excluded for a cause. For example, in our case the jurors, who had on the basis of previous knowledge of this notorious case formed an opinion concerning the criminal liability, etc., of the defendant, would be excluded for a cause. The end result of this would then be the composition of a jury that would have, as far as *Dvorski* is concerned, a virgin mind.

8. In domestic law, the case will presumably be assigned to a new formation of judges some of whom would be professional judges whereas others would be the lay assessors – both of them selected according to the defendant's constitutional right to the natural judge. However, given the notoriety of the case, there is no guarantee that these judges would have no hitherto formed opinion and would be, accordingly, capable of seeing the case with a fresh mind. Once the genie is let out, it is impossible to squash it back into the bottle.

9. On the other hand, the exclusionary rule derives from the system, the common law, in which the verdict of guilty or innocent is rendered by a jury. The jury is privy to particular pieces of admissible evidence. If evidence is inadmissible, also according to the exclusionary rule, the jury will never see it or hear of it. The procedural role of the judge in the

common-law system is to watch over the admissibility of evidence according to a well-developed doctrine of the law of evidence.

10. In the Continental system this body of law concerning admissibility of evidence simply does not exist. Instead, we have the ruling principle called "the free discernment of evidence" that was the historical rejoinder to the preceding mechanical rules governing the value of a particular proof. The famous Croatian professor and legal theorist Vladimir Bayer maintained, many decades ago, that the attempt to introduce the jury system in the Continental-law system, had failed precisely because there had been no body-of-evidence law regulating the admissibility of evidence during the criminal trial.

11. Clearly, this presents us with the problem of excluding the contaminated evidence, that is with the exclusionary rule, during the given trial, because once the evidence has been presented, there is no way to exclude it from the cognitive range of the sitting judges.

12. The German rule to the effect that the judge cannot rely on such evidence in his or her reasoning and motivation of his or her judgment is, to say the least, naïve to the extent that this presupposes the ability of the judges to ignore the contaminated or otherwise inadmissible evidence.

13. The wrong assumption, unmasked by Bishop Berkeley, to the effect that the description of the proof of an idea explains the means by which the very idea was arrived at, underlies the proscription of citing in the motivation of the judgment the evidence subject to exclusionary rule. This is obviously not going to prevent the judge from *ex post facto* rationalising his "*intime conviction*", as the French call it.

14. If the effectiveness of the exclusionary rule in this reopening of the trial has not been assured, the only solution would seem to be for the applicant to again submit the case to the Court. If that were to be the case, clearly, the Court would then have to deal with this difficult question. This problem, *nota bene*, is not specific to Croatia; most other Continental jurisdictions without a jury would have the same problem. This is the reason I am raising the question here: in anticipation of the problem of exclusion of inadmissible and of contaminated evidence.

JOINT CONCURRING OPINION OF JUDGES KALAYDJIEVA, PINTO DE ALBUQUERQUE AND TURKOVIĆ

1. We concur with the opinion of the majority that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in this case, but we do not agree entirely with their reasoning. In our view, the present case raises four important questions which merit a principled approach. Firstly, whether the right of access to a lawyer entails in itself a right to have recourse to legal assistance of one's own choosing from the initial stages of the proceedings. Secondly, what is the content of the right to choose a lawyer. Thirdly, whether the right to a lawyer of one's choosing should be subject to a lesser standard of protection than the right to have access to a lawyer. Fourthly, whether the Court should evaluate the fairness of the trial as a whole and apply the balancing test (harmless-error analysis) in a situation in which an applicant has been denied the right to choose a lawyer during a police investigation in the course of which he or she has made self-incriminatory statements. We will deal with these questions, taking into account the Court's case-law and the current standards of international human rights law and international criminal law.

The right of access to a lawyer of one's own choosing from the initial stages of the proceedings

2. In *Salduz v. Turkey*[1] the Court stated that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police, unless it could be demonstrated in the light of the particular circumstances of the case that there were compelling reasons to restrict that right. Even in cases where a suspect has remained silent and has not been questioned in detention, a restriction of his or her right to legal assistance from the time of the arrest may fall short of the requirements of Article 6 §§ 1 and 3 (c) of the Convention[2]. The reason for this is that it is not for the Court to speculate on the impact which the applicant's access to a lawyer while in police custody would have had on the ensuing proceedings[3]. However, the *Salduz* judgment left open the question whether and to what extent in such circumstances the right of access to a lawyer might involve the right to a lawyer of one's own choosing. Since *Salduz*, the right to a lawyer of one's choosing during pre-trial proceedings has been discussed, but never as a

1. *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008.
2. *Dayanan v. Turkey*, no. 7377/03, §§ 32-33, 13 October 2009.
3. See *Salduz*, cited above, § 58, and *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 172, 26 July 2011.

central issue[4]. We welcome the finding by the majority (in paragraphs 78 and 108 of the present judgment) expressly recognising the right to a lawyer of one's own choosing from the initial stages of the proceedings and thereby interpreting the text of Article 6 § 3 (c) in accordance with international legal standards. However, we believe that this conclusion warranted more detailed reasoning.

3. In comparable international instruments to the Convention, such as the International Covenant on Civil and Political Rights ((ICCPR) Article 14 § 3 (b)), the American Convention on Human Rights (Article 8 § 2 (d)) and the African Charter on Human and People's Rights (Article 7 § 1 (c)), a suspect's right to the assistance of a lawyer of his or her own choosing in pre-trial proceedings has not been expressly set out, but it has been acknowledged in practice.

4. The United Nations Human Rights Committee (UNHRC) has found in a number of cases that the assignment of a lawyer by the court during the pre-trial investigation (even for one day) contravenes the principle of a fair trial if a qualified lawyer of the accused's own choice is available and willing to represent him or her[5] and if investigative acts are carried out[6].

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4. See *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013, and *Erkapić v. Croatia*, no. 51198/08, §§ 82-89, 25 April 2013.

5. See, for example, *Kasimov v. Uzbekistan*, Communication No. 1378/2005, CCPR/C/96/D/1378/2005, 30 July 2009, paragraph 9.6, and *Aleksandr Butovenko v. Ukraine*, Communication No. 1412/2005, CCPR/C/102/D/1412/2005, 19 July 2011, paragraph 7.8. Of particular interest in relation to the present case is *Lyashkevich v. Uzbekistan* (Communication No. 1552/2007, CCPR/C/98/D/1552/2007, 11 May 2010, paragraph 9.4), where the author alleged that her son's right to defence had been violated, in particular because the lawyer she had hired privately on 11 August 2003 had been prevented from defending her son on that day, notwithstanding the fact that important investigative acts were being conducted at that precise moment. The Human Rights Committee noted that the State Party had only affirmed that all investigative acts in respect of Mr Lyashkevich had been conducted in the presence of a lawyer, without specifically addressing the issue of Mr Lyashkevich's access to his privately hired lawyer. In the circumstances, and in the absence of any other information from the parties, the Human Rights Committee concluded that denying the author's son access to legal counsel of his choice for one day and interrogating him and conducting other investigative acts with him during that time constituted a violation of Mr Lyashkevich's rights under Article 14 § 3 (b), of the ICCPR.

6. See, by contrast, *Pavel Levinov v. Belarus*, Communication No. 1812/2008, CCPR/C/102/D/1812/2008, 25 August 2011, paragraph 8.3. The author alleged a violation of his defence rights under Article 14 § 3 (b), of the ICCPR, submitting that immediately after his arrest, the police had refused to allow a relative or acquaintances of the author to act as his representative, despite their having been present at the police station after his arrest, or to give him the opportunity to designate a lawyer. The Human Rights Committee noted that the author had been represented by counsel at his trial, and that it did not appear from the material before it that any investigative acts had been carried out before the beginning of the author's trial. Hence, the UNHRC considered that Mr Levinov's defence rights had not been violated in that case.

Furthermore, the UNHRC in its General Comment No. 32[7] emphasised that the right to communicate with counsel required that the accused be granted prompt access to counsel. In addition, the UNHRC has stated that "all persons who are arrested must immediately have access to counsel"[8]. Likewise, this right has consistently been affirmed in the case-law of the Inter-American Court of Human Rights[9] and the African Commission on Human and Peoples' Rights[10].

5. European Union Directive 2013/48/EU guarantees that all suspects have the right to be advised by a lawyer from the first stage of police questioning and throughout all subsequent stages of criminal proceedings and European Arrest Warrant proceedings, and that, on arrest and during detention, they may communicate with their family and with consular authorities, if they are outside their home country[11].

6. The right of access to a lawyer of one's choosing in pre-trial proceedings is also found both in European soft law (see paragraphs 62-65 of the present judgment)[12] and in universal soft law[13]. This is fully in line

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7. General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007).

8. See the Concluding Observations of the UNHRC, Georgia, CCPR/C/79 Add.75, 5 May 1997, § 27. See also the Report of the Special Rapporteur on the independence of judges and lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, E/CN.4/1998/39/Add.4, 5 March 1998, § 47.

9. See for example, *Barreto Leiva v. Venezuela* (merits, reparations and costs), judgment of 17 November 2009, paragraphs 58-64, and in particular paragraph 62: "If the right to defense arises as of the moment in which an investigation into an individual is ordered (*supra* para. 29), the accused must have access to a legal representation from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from being advised by a counsel means to strictly limit the right to defense, which leads to a procedural unbalance and leaves the individual unprotected before the punishing authority."

10. See for example, *Avocats sans frontières (on behalf of Bwampamye) v. Burundi*, October/November 2000. The Commission concluded (in paragraph 30) that it was in the interests of justice for the accused to have the benefit of the assistance of a lawyer "at each stage of the case".

11. Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

12. Following its visit to Turkey in July 2000, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a report, reiterating "once again the recommendation that all persons deprived of their liberty by the law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted as from the outset of their custody the right of access to a lawyer. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice; however, in such cases, access to another independent lawyer should be arranged" (CPT/Inf (2001) 25, paragraph 61).

with Principle 1 of the UN Basic Principles on the Role of Lawyers, which affirms that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings"[14]. Principle 5 of the Basic Principles on the Role of Lawyers and Principle 17 of the Body of Principles on the Right to a Fair Trial and a Remedy[15] specifically provide that when a person is arrested, charged or detained he or she must be promptly informed of the right to legal assistance of his or her choice. Finally, Principle 7 of the Basic Principles on the Role of Lawyers requires governments to ensure that all persons who are arrested or detained should have access to a lawyer within forty-eight hours from the time of their arrest or detention.

7. In international criminal law, the right to choose a lawyer in pre-trial proceedings is well established, both in the Statutes and Rules of Procedure and Evidence of the various international courts and in practice. On the basis of Article 21 § 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 20 § 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), Article 17 § 4 of the Statute of the Special Court for Sierra Leone (SCSL) and Article 55 § 2, Article 56 and Article 67 § 1 (d) of the Statute of the International Criminal Court (ICC), the practice has been that only a small percentage of accused persons are represented by privately funded lawyers chosen by themselves. In the majority of cases, the courts provide the defendant with a list of approved lawyers from which he or she may choose. In such cases, the courts are obliged to assign a lawyer expeditiously for the entire duration of the proceedings, including during any interrogation of the defendant[16]. When the right to a lawyer is not observed, the resulting evidence must be excluded[17].

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13. In its General Comment No. 2, the Committee against Torture (CAT) stated: "Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon the States Parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia, ... the right promptly to receive independent legal assistance" (CAT General Comment, 24 January 2008 (CAT/C/GC/2), § 13).

14. Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

15. Annex II, HRC, Final Report, 46th Session, E/CN.4/Sub.2/1994/24, 3 June 1994.

16. See ICTY Appeals Chamber, *Prosecutor v. Prlić et al.*, 5 September 2008, paragraph 14; ICTR Appeals Chamber, *Prosecutor v. Nahimana et al.*, 28 November 2007, paragraphs 172-74; and ICC Appeals Chamber, *Prosecutor v. Lubanga*, 20 April 2007, paragraph 6.

17. See ICTY Trial Chamber, *Prosecutor v. Delalić, Mucić, Delić and Landzo*, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, paragraphs 43 and 55; ICTR Trial Chamber, *Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October

Informed and free choice of lawyer

8. In our view, the central issue in *Dvorski* is whether the authorities took the necessary active steps to ensure effective enjoyment of the applicant's right to legal assistance of his own choosing – in other words, to provide him with information known to them which in the context of domestic law was necessary for him to make an informed choice of lawyer. As the majority have concluded, "the police did not inform the applicant either of the availability of G.M. to advise him or of G.M.'s presence at Rijeka Police Station" (see paragraph 112 of the present judgment) and thus, as the judgment emphasises (see paragraph 93), "while the applicant had formally chosen M.R. to represent him during police questioning, the choice was not an informed one".

9. In accordance with the Croatian Code of Criminal Procedure, the police are obliged to assist suspects in acquiring the information necessary to make an informed choice of representative by providing them with a list of eligible lawyers. In the light of the domestic legal provisions which authorise defendants' relatives to instruct lawyers for them and in turn authorise defendants to refuse to engage a lawyer retained by their relatives and also to grant a power of attorney to a lawyer orally before the authority conducting the proceedings, it was necessary – once the applicant expressed a wish to instruct a lawyer – to inform him that his parents had already retained one for him (see paragraphs 60 and 105 of the present judgment).

10. The Government never disputed that the police had failed to inform the applicant about the lawyer retained by his parents, nor did they provide any objectively reasonable justification for this failure, while the applicant rejected the lawyer chosen by him and retracted his self-incriminatory statement as soon as this was possible – the very next day. Nor did the Government satisfy the burden of proof in demonstrating that the applicant had been secured a fair opportunity to exercise his right to a lawyer of his own choosing.

11. The only reason cited by the Government for not informing the applicant that his parents had instructed G.M. to represent him was the fact that G.M., in the view of the police and the domestic courts, did not have a proper power of attorney to represent the applicant at the relevant time. In this connection the Court has noted that G.M. alleged before the national authorities that he had in fact held a written power of attorney granted by the applicant's parents on 14 March 2007 (see paragraph 24 of the present judgment). This was refuted in the domestic proceedings, although not convincingly (see paragraphs 55 and 95 of the present judgment). Be that as

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2004, paragraph 21; and *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on the Prosecution Motion for Admission into Evidence of Post-arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, paragraphs 23-32.

it may, the withholding of such information for purely formalistic reasons – for example, because the lawyer did not have a written power of attorney – in circumstances in which the lawyer had represented the applicant in a previous case and had been in contact with the applicant's mother in Italy by telephone, and all this had been made known to the police, could not have been objectively and reasonably justified.

12. Finally, the Government also alleged that the applicant had had the opportunity to choose from a list of lawyers on duty on 14 March 2007, but they did not provide the Court with a copy of the list. The applicant maintained that there was no such list in the first place. The Government replied that the archives of the police station did not keep such lists. Instead, they submitted a list with allegedly the same contents as the 2007 list. In view of the existence of two contradictory statements about the existence of the 2007 list, we believe that the burden of proof should have been on the Government in respect of their contention that such a list existed and was provided to the applicant. It was up to the Government to prove the positive fact that the list existed and that the applicant had chosen a lawyer from that list; it was not up to the applicant to prove the negative fact that the list did not exist and that he had not had the opportunity to choose a lawyer in this way. The Government have failed to make the relevant evidence available to the Court.

13. In our view, this is sufficient to warrant the conclusion that the failure to provide relevant information to the applicant was a wrongful omission, as a result of which the applicant was erroneously deprived of his first-choice counsel. In other words, there was an interference with his right to a free and informed choice of lawyer. Such interference inevitably raises doubts that the police might not have acted in good faith and thus might have failed to secure the effective exercise of the applicant's defence rights under Article 6 § 3 (c) and the fairness of the trial under Article 6 § 1.

Erroneous deprivation of choice of lawyer

14. The purpose of the right to a lawyer of one's own choosing is to guarantee the fairness of the criminal proceedings through adequate professional assistance. In the absence of proof to the contrary, an unjustified denial or restriction of, or interference with, this right will always leave the inevitable impression of an attempt by the authorities to influence the suspect's choice of professional assistance so as to impose on him a lawyer who is "convenient" for the police or the accusatory party, and will raise doubts and suspicions that its purpose was to trick or mislead the suspect with a view to obtaining evidence in breach of the principles of

fairness[18]. The mere appearance of bad faith on the part of the police is sufficient to cast doubt on whether a self-incriminatory confession given in such circumstances was truly voluntary.

15. For this reason we do not regard an unjustified or erroneous "denial of choice" as "less serious" in comparison with an unjustified or erroneous "denial of access". Thus, contrary to the majority, we believe that the situation in *Dvorski* ought to have been analysed along the same lines of argument as the situation in the *Salduz* case. Consequently, we respectfully disagree that *Croissant v. Germany*[19] and *Klimentyev v. Russia*[20], which deal with alleged situations of justified "denial of choice" of lawyer, are applicable in the present case.

Impact of structural errors on the fairness of criminal proceedings

16. In criminal procedure, there are some procedural rights so basic to a fair trial that their infringement can never be viewed as fair[21]. The infringement of these rights results in a structural error, which affects the framework within which the trial proceeds[22].

17. The Court has already accepted that such structural errors may arise in relation to confessions obtained in breach of Article 3 and to real evidence obtained as a direct result of torture[23] and of the erroneous denial of access to a lawyer[24]. As the Court pointed out in *Salduz*, the evidence obtained during the investigation stage determines the framework within which the offence charged will be considered at the trial, and therefore any such procedural errors committed during this stage will necessarily have an impact on the fairness of the proceedings[25]. Since the "exclusionary rule"

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18. For the defendant it might sometimes be more damaging to have a lawyer imposed by the State in whatever form (either because there was no choice at all or no meaningful choice, or because the choice was unjustifiably restricted) than not to have a lawyer at all. For telling examples see the above-cited cases of the CCPR, Inter-American Court of Human Rights and African Commission.

19. *Croissant v. Germany*, 25 September 1992, Series A no. 237-B.

20. *Klimentyev v. Russia*, no. 46503/99, 16 November 2006.

21. In the words of United States Supreme Court, "their infraction can never be treated as harmless error". See *Chapman v. California*, 386 US 18 (1967), citing the cases of a biased trial judge, a coerced confession and the denial of the right to counsel at trial as examples of structural errors.

22. *Arizona v. Fulminante*, 499 US. 279 (1991), 309-10.

23. See *Jalloh v. Germany* [GC], no. 54810/00, §§ 99 and 105, ECHR 2006-IX; *Harutyunyan v. Armenia*, no. 36549/03, § 63, ECHR 2007-III; and *Gäfgen v. Germany* [GC], no. 22978/05, § 176, ECHR 2010.

24. *Salduz*, cited above, § 58.

25. Ibid., § 54, and *Dayanan*, cited above, § 33. This same approach was repeated in *Huseyn and Others* (cited above, § 172): "... it appears that, in the first few days of their detention, the first, third and fourth applicants were questioned without the benefit of legal

has been established for the protection of the privilege against self-incrimination, the use of evidence collected in breach of this basic privilege will always render a trial unfair, irrespective of any other circumstances of the case. Thus, the Court found in *Salduz* that any conviction based on an admission or statement given in violation of the right of access to a lawyer constituted a violation of the general right to a fair trial guaranteed under Article 6 § 1 of the Convention[26]. In other words, *Salduz* introduced an automatic exclusionary rule for self-incriminatory statements obtained without a lawyer being present during questioning when there were no compelling reasons for denying access to a lawyer (that is, in situations of unjustified denial of access to a lawyer).

18. We submit that the erroneous denial of choice of a lawyer constitutes another example of a structural error in criminal proceedings which should result automatically in the exclusion of all self-incriminatory statements tainted by that error[27]. If a tainted self-incriminatory statement is not excluded prior to trial, such an error in itself should be seen as a violation of the Convention without there being any need to assess the overall fairness of the proceedings. If that tainted evidence comes to the knowledge of the judges sitting in the case, the conviction should automatically be quashed. No other legal remedy could rectify such errors and ultimately ensure the fundamental right to a fair trial. In our opinion, the use of any balancing test in such situations threatens to subordinate the fundamental guarantee to

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assistance and made certain statements that were included in the criminal case file. It does not appear that any of them had expressly waived their right to a lawyer after their arrest. Having regard to the information available on this matter, the Court cannot speculate on the exact impact which the applicants' access to a lawyer during that period would have had on the ensuing proceedings and whether the absence of a lawyer during that period irretrievably affected their defence rights."

26. See *Salduz*, cited above, §§ 55 and 58.

27. As Judge Scalia put it: "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds', *Fulminante*, *supra*, at 310 – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings ... Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe" (*United States v. Gonzalez-Lopez*, 548 US 140 (2006)). Such structural errors include the denial of counsel (see *Gideon v. Wainwright*, 372 US 335 (1963)), the denial of the right of self-representation (see *McKaskle v. Wiggins*, 465 US 168, 177-78, n. 8 (1984)), the denial of the right to public trial (see *Waller v. Georgia*, 467 US 39, 49, n. 9 (1984)) and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction (see *Sullivan v. Louisiana*, 508 US 275 (1993)).

legal assistance of one's own choosing to other interests that have less, if any, significance in terms of the Convention.

19. When read carefully, paragraphs 111 and 112 of the present judgment only pay lip service to the principle of the assessment of the overall fairness of the proceedings, because ultimately the majority consider that the "significant likely impact" of the applicant's confession on the further development of the criminal proceedings against him must be taken into account. That means that the majority do not take the view that the prejudice caused to the applicant by being wrongly deprived of the choice of lawyer needs to be assessed in the context of the other evidence presented in order to determine whether the error was harmless and the proceedings were fair as a whole. The "likely impact" of the procedural error suffices for the majority to find a violation of Article 6. This language is not far away, in substance, from that of *Salduz* or *Huseyn and Others*[28].

20. Thus, assessing the overall fairness of proceedings by relying on a balancing test is too malleable an approach. There is a potential danger that this will give rise to excessive discretion in the manner in which breaches of basic procedural rights, such as the right to a lawyer of one's own choice, are weighed against other procedural interests. Like the harmless-error assessment, the assessment of the overall fairness of proceedings can produce very nefarious results when, for example, highly persuasive evidence, such as a confession made by a defendant without independent legal assistance, finds its way into the criminal case file and ultimately into the trial. To think otherwise would be either pure ignorance of the unique role that the lawyer plays in criminal procedure as the "watchdog of procedural regularity" or purposeful denial of a rule-of-law based State[29]. In the words of Andrew Ashworth[30], "the fair trial criterion is flexible enough that, with so many factors in the balance, each judge can put his or her own stamp on what is a 'fair trial'". Hence, the majority should have expressly rejected any balancing of the erroneous denial of choice of lawyer against other interests, as the Court has consistently concluded in *Salduz*, *Dayanan* and *Huseyn and Others* in comparable situations of unjustified "denial of access" to a lawyer.

Conclusion

21. We are of the view that the right of access to a lawyer does entail a right to have recourse to legal assistance of one's own choosing from the

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28. See *Salduz*, cited above, § 58, and *Huseyn and Others*, cited above, § 172.
29. *Ensslin, Baader and Raspe v. Germany*, nos. 7572/76 and 2 others, Commission decision of 8 July 1978, Decisions and Reports 14, p. 64, at p. 114.
30. Andrew Ashworth, "Excluding Evidence as Protecting Rights" (1977), *Crim. L. Rev.* 723.

initial stages of the proceedings, which implies the right to an informed and free choice. Consequently, knowingly withholding relevant information from a suspect when he or she is choosing a lawyer constitutes an erroneous denial of the choice of lawyer. The denial of choice of lawyer is not a "less serious issue" than the denial of access to a lawyer in terms of legal consequences. Thus, both the erroneous denial of access to a lawyer and the erroneous denial of choice of a lawyer constitute a structural error in criminal proceedings which should result automatically in the exclusion of self-incriminatory statements tainted by that error prior to trial. If the defendant is convicted after such tainted evidence has come to the knowledge of the judges sitting in the case, the conviction must be automatically quashed. If the offence is not yet time-barred, a retrial with the exclusion of all tainted material may follow.

CONCURRING OPINION OF JUDGE SILVIS JOINED BY JUDGE SPIELMANN

1. I do agree with the finding of a violation of Article 6 §§ 1 and 3 (c) in this case. However, I respectfully disagree with an essential part of the reasoning of this judgment.

2. The heart of the matter to be addressed in this opinion is the way the Court applies the distinction between two situations: (a) denial of access to a lawyer, requiring that there should be "compelling reasons" and that defence rights should not be unduly prejudiced (see *Salduz v. Turkey*[1]), and (b) "denial of choice" of lawyer, requiring that there should be "relevant and sufficient" reasons and that the overall fairness of the proceedings should not be undermined (see *Croissant v. Germany*[2]). In paragraph 81 of the present judgment the Court states that denial of choice is "the less serious issue" and considers that the case under scrutiny is to be classified in such terms. To my mind, in supporting that view the majority are missing an essential characteristic of this case, which is that the police apparently sought to orchestrate the defence during the initial stage of the proceedings, contrary to the provisions of domestic law, as well as the Convention. In my view the combination of the police hindering the access of a retained lawyer to the applicant and simultaneously interfering with the applicant's free choice of a lawyer by withholding relevant information is not at all "the less serious issue" in comparison to transparent denial of access to a lawyer.

3. The facts of the case may be summarised as follows. The applicant was arrested as a suspect in relation to three murders, an armed robbery and arson. Before the beginning of the police questioning, the applicant's parent(s) instructed a lawyer (G.M.) who was prepared to defend the applicant, a possibility which is accorded legal status in Croatian law. The thus instructed lawyer immediately reported to the police station to meet his client. However, he was refused access to the applicant by the police, allegedly because he had not submitted a written power of attorney. The applicant was not informed either of the presence of the lawyer at the police station or of the action that his parent(s) had undertaken. The applicant confessed to having committed the crimes during the initial police questioning in the presence of another lawyer, who happened to be a former chief of police of the district in which the applicant was being held in custody. The Government argued that the applicant had picked this lawyer from a list presented to him by the police, which would mean that he had a lawyer of his own choosing. According to the domestic courts, the applicant

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1. *Salduz v. Turkey* [GC], no. 36391/02, § 55, ECHR 2008.
2. *Croissant v. Germany*, 25 September 1992, § 31, Series A no. 237-B.

confessed in the presence of a lawyer of his own choosing. The initial confession was used as evidence.

4. At the outset it is important to observe that the Croatian Code of Criminal Procedure (CCP) regulates the choice of a lawyer in such a way as to afford the defendant's parent the possibility of instructing a lawyer for the defendant, unless the defendant expressly refuses this (CCP, Article 62 §§ 1 and 4). Paragraph 6 of Article 62 states that the defence lawyer must present his power of attorney to the authorities conducting the proceedings. The defendant may also grant a power of attorney to a lawyer orally before the authority conducting the proceedings, in which case this must be entered in the record. Article 177 § 5 provides that, at the request of the suspect, the police authorities must allow him to instruct a lawyer and for that purpose they must stop interviewing the suspect until the lawyer appears or at the latest three hours from the moment the suspect asked to appoint the lawyer. If the circumstances indicate that the chosen lawyer will not be able to appear within this period of time, the police authorities must allow the suspect to appoint a lawyer from the list of lawyers on duty provided to the competent police authority by the county branches of the Croatian Bar Association.

5. The Court has observed that the only reason cited by the Government for not allowing G.M. access to the applicant was the fact that G.M., in the Government's view, did not have a proper power of attorney to represent him. At the same time, the Government did not dispute that the applicant had not been informed at the relevant time that G.M. had been trying to see him at the police station. The Court has noted, however, that G.M. alleged before the national authorities that he was in fact in possession of a written power of attorney granted by the applicant's parents on 14 March 2007. This allegation was never convincingly refuted in the domestic proceedings. Moreover, a written power of attorney was included in the case file compiled by the investigating judge on 15 March 2007, when the applicant was brought before him by the police.

6. The principle of the right to legal assistance is laid down in Article 6 § 3 (c) of the Convention: "Everyone charged with a criminal offence has [the right] to defend himself in person or through legal assistance of his own choosing ..." The protection to be afforded to a person charged with an offence is not limited to court proceedings. In *Imbriosca v. Switzerland*[3] the Court stated:

> "Certainly the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', but it does not follow that the Article has no application to pre-trial proceedings."

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3. *Imbriosca v. Switzerland*, 24 November 1993, § 36, Series A no. 275.

Article 6 § 3 (c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6 § 1 (see *Correia de Matos v. Portugal*[4], and *Foucher v. France*[5]). This sub-paragraph guarantees that the proceedings against an accused person will not take place without adequate representation of the case for the defence (see *Pakelli v. Germany*[6]). The guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair hearing set forth in Article 6 § 1 which must be taken into account in the evaluation of this matter[7]. Their intrinsic aim is to contribute to ensuring the fairness of the criminal proceedings as a whole[8]. But they are not an end in themselves: compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of the isolated consideration of one particular aspect or incident.

7. In distinguishing between cases concerning "denial of access" and "denial of choice", the Court refers to three cases where the free choice of a lawyer was restricted or denied (*Croissant*, cited above; *Klimentyev v. Russia*, no. 46503/99, 16 November 2006; and *Martin v. Estonia*, no. 35985/09, 30 May 2013). I propose to take a closer look at those cases.

(a) In *Croissant*, the applicant contested the refusal to replace a lawyer in whom he had no trust but who had nonetheless been appointed by the domestic court at a time when the applicant was already assisted by two lawyers in whom he had shown trust. In that context the Court found that the domestic courts had had relevant and sufficient grounds for overriding the wishes of the defendant.

(b) In *Klimentyev* the applicant complained of the domestic court's refusal to admit another lawyer for the defence. The Court observed that there was no indication that the applicant's defence team, consisting of a lawyer and a civil defender, could not adequately represent him and participate effectively in the hearing. Therefore, the Court was unable to conclude that the applicant had been inadequately represented at the hearing

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4. *Correia de Matos v. Portugal* (dec.), no. 48188/99, ECHR 2001-XII.
5. *Foucher v. France*, 18 March 1997, § 30, *Reports of Judgments and Decisions* 1997-II.
6. *Pakelli v. Germany*, no. 8398/78, Commission's report of 12 December 1981, unreported; it is interesting to note that in its judgment in the same case (*Pakelli v. Germany*, 25 April 1983, § 42, Series A no. 64) the Court found a violation of Article 6 § 3 (c) of the Convention while holding, as it has only very rarely done: "The finding of a breach of the requirements of paragraph 3 (c) dispenses the Court from also examining the case in the light of paragraph 1 (see, *mutatis mutandis*, [*Deweer v. Belgium*, 27 February 1980, § 56, Series A no. 35])".
7. See *Imbrioscia*, cited above, § 37; and also, after the *Salduz* case, *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 94, 2 November 2010.

and that the trial court's refusal to admit the lawyer requested by him, with reference to the fact that the applicant did not need advice on international law, constituted an unreasonable and disproportionate limitation on the applicant's right to represent himself through legal assistance of his own choosing.

(c) *Martin* concerned the following complaints: counsel of the applicant's own choosing was denied access to the applicant, who was pressured into terminating his services; the legal-aid lawyer served the interests of the authorities rather than those of the applicant; the applicant's conviction on a murder charge was based on the evidence obtained in the pre-trial proceedings in violation of his defence rights; and, even though the Court of Appeal had declared that evidence to be inadmissible, it still relied on it. The Court was not satisfied that the applicant's wish to replace counsel of his own (his parents') choosing could be considered genuine in the circumstances of the case. It considered that there had been an infringement of the applicant's right to defend himself through legal assistance of his own choosing. The Court expressed concern in this case about the failure to respect the applicant's defence rights and privilege against self-incrimination. Whether there had been relevant and sufficient grounds for limiting the choice of lawyer – a test that, indeed, was cited by the Court – was, as I see it, not at all the essential issue in that case.

8. To my mind the cases of *Croissant*, *Klimentyev* and *Martin* grouped together do not form a category of cases into which *Dvorski* would fit. *Croissant* and *Klimentyev* may be classified as dealing with the sufficiency of the *reasoning* underlying the denial or restriction of the choice of lawyer. *Martin* is not about the reasoning underlying such decisions but about the failure to respect the applicant's defence rights and privilege against self-incrimination in view of the course of events. This issue was analysed by our Court mainly along the lines set out in *Salduz*. In *Martin* the Court concluded that the applicant's defence rights had been adversely affected despite the domestic courts' acknowledgment of a violation of his right to have a lawyer of his own choosing, and despite the formal exclusion of his confession. The lack of domestic scrutiny in ensuring the removal of any adverse consequences for the outcome of the proceedings, following the acknowledgment of the violation of the applicant's defence rights, was the essential point for the Court in finding a violation. The Court's analysis in *Martin* should not be reduced to a simple application of the test whether the outcome of the proceedings was adversely affected as a result of the denial of the applicant's choice of lawyer. Such a reductionist characterisation unjustifiably ignores the important aspect of the domestic courts' recognition of the failure to respect the rights of the defence.

9. In *Dvorski* the applicant was deliberately held in a state of ignorance regarding his options in choosing a lawyer, while the lawyer retained by his parent(s) was denied access to him. When there is, on the appearance of

such facts, reason to believe that the police sought to orchestrate the defence and then obtained a confession that was used as evidence by the domestic courts without any serious examination of the alleged violation of the applicant's defence rights, the question should not be whether the police could possibly have had relevant and sufficient reasons, or even compelling reasons, to deny or restrict the right to choose a lawyer, because the Court should not accept such a lack of respect for the rights of the defence in the first place, whatever the reasons or motives behind it. Such a matter does not belong to the category of "denial of choice", labelled as a less serious issue – not even in comparison with a situation involving absolute denial of access of a lawyer.

10. Finally, to my mind the Court should have steered clear of accepting as a legitimate indication of the applicant's guilt (in paragraph 104 of the present judgment) his lawyer's subsidiary plea for clemency, by which she asked for her client's initial confession to be interpreted as a sign of his sincere regret or remorse.

DISSENTING OPINION OF JUDGE VEHABOVIĆ

I am unable to share the view of the majority of the Grand Chamber that the facts complained of by the applicant disclose a violation of Article 6 §§ 1 and 3 (c) of the Convention, which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 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;
>
> ..."

The relevant part of the record of the applicant's questioning by the police officers on 14 March 2007 reads as follows:

> "I have been informed of the reasons for my arrest, the criminal offences of which I am accused, my rights, the right not to answer and the right to be legally represented, as well as the right to have members of my family informed about my arrest. I have chosen and authorised a defence lawyer from Rijeka, M.R., to represent me in these proceedings, and I have consulted him in private; following the consultation with [M.]R. I have decided to give my evidence."

The applicant concluded his statement as follows:

> "I am not experiencing any withdrawal symptoms or any other crisis. I have given my evidence voluntarily in the presence of my lawyer and a County State Attorney. I have read the entire statement and am signing it as truthful."

During the trial in the Rijeka County Court, the applicant was given an opportunity to put forward all his arguments concerning the circumstances in which he had given his statement and, after he had raised the argument that he had never signed the record of the statement, he was afforded an effective opportunity to challenge the authenticity of his signature. However, the evidence adduced, namely the handwriting expert's report, conclusively confirmed that the applicant had signed the statement by which he had given his confession to the police.

On the other hand, the Court established that the lawyer, G.M., had been denied access to the applicant while he was in police custody, even from the moment when G.M. had obtained a power of attorney signed by the applicant's father.

Article 6 § 3 (c) secures the right for *the applicant* to have a lawyer of his own choosing but *not the lawyer of his parents' choosing*.

The applicant submitted that throughout his detention in Rijeka Police Station the lawyer retained by his parents, G.M., had been unable to contact him.

In view of the applicant's complaints, it is evident that the central issues arising in this case are the applicant's right to retain counsel of his own choice and whether, as a result of "not having had" that opportunity, he was prevailed upon in a coercive environment to incriminate himself without the benefit of effective legal advice.

I have no reason to doubt the Government's arguments that the applicant was provided with the official list of lawyers of the Croatian Bar Association and that from that list he chose M.R. as his lawyer. Accordingly, similarly to the Chamber, I consider that the present case does not concern a situation in which the applicant was provided with a legal-aid lawyer by the police, but rather a situation in which he was offered an official list of lawyers by the police, from which he selected M.R. as the lawyer of his own choice[1].

I fully agree with the majority that the behaviour of the police in making any contact between G.M. and the applicant impossible raises initial concerns as to the manner in which the domestic authorities dealt with the applicant's pre-trial detention, and consequently possible doubts as to whether the proceedings as a whole satisfied the requirements of a fair trial under Article 6 of the Convention.

For these reasons this case must be clearly distinguished from the main principle set out in *Salduz*, to the effect that an accused in the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings should normally be allowed to benefit from the assistance of a lawyer (see *Salduz v. Turkey* [GC], no. 36391/02, § 52, ECHR 2008). The Court (in paragraph 78 of the present judgment) also refers to the case of *Martin v. Estonia* (no. 35985/09, 30 May 2013), in which it held that a person charged with a criminal offence who did not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing.

Obviously, the present case as a whole is about two basic questions: whether the applicant's choice was made free of any pressure or duress by the police; and, if no pressure or duress was applied by the police, whether the applicant should have been represented by the lawyer of his own choosing, or one chosen by his parents or any third party, even in

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1. For these reasons I find it completely irrelevant to mention (in paragraph 21 of the present judgment) that the applicant agreed to be represented "by a lawyer, M.R., *a former chief of the Primorsko-Goranska Police*" in circumstances in which there is no evidence that M.R. acted in any way contrary to the applicant's interests. M.R. left the police in 2000 and this event took place in 2007, seven years later.

circumstances where the applicant, probably under considerable emotional pressure, decided to give a statement confessing to the crimes.

The Court notes (see paragraph 81 of the present judgment) that unlike in *Salduz* (cited above), where the accused, who was being held in custody, had been denied access to a lawyer during police questioning, the present case concerned a situation where the applicant was afforded access to a lawyer from his first interrogation, but not – according to his complaint – a lawyer of his own choosing. On that account the Court has decided to assess whether, in the light of the proceedings as a whole, the rights of the defence have been "adversely affected" to such an extent as to undermine their overall fairness.

Without going into all the details of that test, I consider that the applicant's wish to have a lawyer of his own choosing was respected throughout the criminal proceedings against him. It is undisputed that he changed his representative several times. The nature of the proceedings against the applicant was serious, on account of his alleged offences, but that does not mean that there should be different requirements for a fair hearing depending on the seriousness of the nature of proceedings. It is true that one of the items of evidence used against the applicant was his statement given at the police station in the presence of the public prosecutor, but that statement was not the only evidence against him. When the applicant gave his first self-incriminatory statement in the present case, the fact is that he did so of his own free will, in the absence of any signs of physical or psychological pressure being exerted by the police. This statement was signed by the applicant, as was confirmed by a handwriting expert before the domestic courts.

I would have shared the view of the majority of the Court that the applicant suffered irreparable damage leading to a violation of Article 6 § 1 of the Convention in respect of the fairness of the proceedings as a whole if it had been proved that the applicant's self-incriminatory statement was given in violation of Article 3, or without any legal representative present, or even in the presence of a representative whom he had not chosen of his own free will; however, I did not find any of these elements to be substantiated by the applicant in his application and I found his complaint to be completely unsupported by relevant arguments.

During the trial before the courts dealing with his case, the applicant put forward all his arguments in respect of the circumstances in which his statement had been given, as well as his argument that he had never signed the statement. However, the handwriting expert's report conclusively confirmed that the applicant had indeed signed the statement. Therefore, it cannot be said that the applicant's objections regarding the admissibility of his statement as evidence were ignored by the trial court (see, by contrast, *Desde v. Turkey*, no. 23909/03, § 130, 1 February 2011).

Throughout the court proceedings the applicant had the benefit of effective legal advice, and the trial court afforded him an adequate opportunity to participate in the proceedings and to put forward his arguments in respect of the charges and all the relevant evidence adduced; his arguments were duly taken into account. It should be mentioned that in his closing arguments at the trial the applicant, through his representative, presented the confession he had given to the police while represented by M.R. as proof of his sincere regret for the crimes committed, in the hope that it would be taken into account as a mitigating factor in the sentencing procedure.

Furthermore, the applicant's confession was not the central platform of the prosecution's case (see, by contrast, *Magee v. the United Kingdom*, no. 28135/95, § 45, ECHR 2000‑VI), and the trial court relied on his statement, interpreting it in the light of a complex body of evidence assessed by the court (compare *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009). Specifically, when convicting the applicant, the trial court relied on the statements of a number of witnesses cross-examined during the trial, numerous expert reports and the records of the crime-scene investigation and searches and seizures, as well as relevant photographs and other physical evidence. In addition, the trial court had at its disposal the confessions made by the applicant's co-accused at the trial, and neither the applicant nor his co-accused ever argued that any of their rights had been infringed when they had made those statements.

In such circumstances it would be difficult for me to conclude that the proceedings as a whole were unfair (compare *O'Kane v. the United Kingdom* (dec.), no. 30550/96, 6 July 1999), since all the applicant's rights were adequately secured during the trial and his confession was not the sole, let alone the decisive, evidence in the case and as such did not call into question his conviction and sentence (compare *Gäfgen v. Germany* [GC], no. 22978/05, § 187, ECHR 2010, and, by contrast, *Martin*, cited above, §§ 95-96).

Against this background, and in view of the principle that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (see, for example, *Zagorodniy v. Ukraine*, no. 27004/06, § 51, 24 November 2011) and the requirement to evaluate the fairness of the criminal proceedings as a whole (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011), I consider that it has not been shown that the applicant's defence rights have been irretrievably prejudiced or that his right to a fair trial under Article 6 has been adversely affected (see, *mutatis mutandis*, *Mamaç and Others v. Turkey*, nos. 29486/95 and 2 others, § 48, 20 April 2004, and *Sarıkaya v. Turkey*, no. 36115/97, § 67, 22 April 2004; and, by contrast, *Martin*, cited above).

I wonder why the applicant never took any steps against M.R. if he considered his representation by that lawyer to be inadequate or contrary to his own free will, even though he had various opportunities to do so. He never complained in the subsequent criminal proceedings that M.R. had failed to provide him with adequate substantive legal advice. Neither he nor his new lawyer ever submitted any complaint against M.R. by instituting disciplinary proceedings before the relevant bodies of the Croatian Bar Association, an option they were perfectly entitled to pursue. Neither the applicant nor his lawyers took any action in that respect. I wonder how he can then dispute the professional attitude of M.R. in his case?

Furthermore, on what basis can the applicant claim that his initial statement, given over the course of several hours – during which time he never refused to provide further information, and following which he acknowledged the accuracy of the information provided by signing the record of the statement – raises any issue under the Convention, in view of the clear absence of any ill-treatment contrary to Article 3 of the Convention at the hands of the police? I fully agree with the Chamber's conclusion that "there are no grounds to believe that any pressure was exerted on him or that there was any defiance of his will" (see paragraph 102 of the Chamber judgment).

Just for a moment, let us imagine a hypothetical situation in which the police had allowed G.M. to be present during their questioning of the applicant. I assume that the applicant's complaint would then have been that the lawyer of his own choosing was not G.M. but M.R. and that the police or his parents had imposed G.M. as his lawyer, in defiance of his free will as clearly expressed in the statement he had given without any sign of abuse by the police. For these reasons the Court missed a chance to draw a clear line between two distinctive periods of the proceedings – one with M.R. and the other with G.M. as the lawyer of the applicant's choosing in respect of his complaint. In the absence of any ill-treatment or of any other relevant factors that might have rendered the proceedings as a whole unfair, the applicant's complaint is without solid foundations.

Finally, I am very curious to find out how the case-law will develop in future regarding the fairness of criminal proceedings and the question of legal representation across Europe today in the light of this judgment.