Illegal Evidence in Criminal Procedures

LEGAL ANALYSIS

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Authors:
Professor Gordan Kalajdziev, Ph.D.
Full-time Professor of Criminal Law at the Jusitiusan Primus Faculty of Law, Skopje

Professor Besa Arifi, Ph.D.
Professor of Criminal Law at the Faculty of Law at the South East European University, Tetovo

Docent Aleksandar Maršavelski, Ph.D.
Docent at the Faculty of Law at the Zagreb University

Adrej Bozhinovski, M.Sc.
Legal Advisor at the Association for Criminal Law and Criminology, Skopje

Editor:
Artan Murati, M.Sc.
National Rule of Law Officer at the OSCE Mission to Skopje

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1. INTRODUCTION

The fair trial principle is one of the fundamental human rights guaranteed under a number of international instruments.\(^1\) Today, excluding illegally obtained evidence is considered an element of the right to a fair trial. However, in comparative and international law, there is a series of exceptions to this rule, which facilitates striking a balance between the desire to treat defendants correctly and fairly, and the interests of society to convict perpetrators of crimes. The issue of illegal evidence has been the subject of many discussions among the scientific and professional communities, especially in the context of the unlawful interception of communications and the mandate of the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications - Special Prosecutor’s Office (SPO). The provisions of the national criminal procedural law have been assessed as too strict, considering the fact that they do no allow for an assessment of the gravity of the interests, i.e. the protection of the public interest as opposed to the violation of the rights or freedoms of the defendant.\(^2\) The Croatian legislation justifies the application of the principle of proportionality in regulating the issue of illegal evidence, with the argument that it is necessary to strike a balance between protecting human rights and freedoms, on one hand and ensuring effective criminal prosecution on the other. The problem of defining the scope of the prohibition of illegal evidence and defining eventual exceptions from such a prohibition is not new and is not a feature only of evidentiary prohibitions, but it also features other rules and principles governing the criminal procedure and it arises from the complexity of transposing legal concepts and rules from one to another legal system. In this regard, it is usually a matter of transposing concepts developed under the Anglo-Saxon law in the continental European mixed criminal procedures. An unavoidable impression in this context is that the start of the work of SPO\(^3\) has prompted certain interpretations and views about procedural solutions in the national court practice, which previously have never been a subject of any dilemmas. A possible solution considered in this regard was the solution contained in the then Croatian Law on Criminal Procedure (LCP), which adopted a variation of the German "balancing doctrine", according to which in serious crimes there are certain possible limitations to the strict rule of not admitting illegal evidence.\(^4\) However, this solution was not accepted, since

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2. See L. Trpenoski, Can the Special Public Prosecutor’s Office win the battle against the court decisions excluding evidence as illegally obtained, Journal of Criminal Law and Criminology No 2/2017 www.journal.mack.mk
3. See Law Establishing the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications (2015, 9 15) Official Gazette No 159/2015.
there was the prevailing opinion that it is exactly in serious criminal cases in which the strongest guarantees are needed. Hence, it was left to courts to define the scope of the prohibition, led by comparative law and practice. As it is well known, for almost two decades this issue has not been subject of any major discussions, until the publication of the contents of the wiretapped telephone conversations and court cases instituted based on the contents of the illegally intercepted communications by the SPO, established with the specific purpose of prosecuting such cases. Consequently, this issue has become one of the most topical burning issues in the history of the national justice system thus far.

In the national criminal procedural law, the regime for establishing the legality of evidence recognizes two possibilities: ex lege illegal evidence and ex iudicio illegal evidence. Thus, the system governing illegal evidence is developed through the development of the jurisprudence, based on the international and domestic constitutional and legal framework within which the jurisprudence is to manoeuvre in assessing whether a piece of evidence will be admitted or it will be dismissed as illegal. Dilemmas regarding the definition and scope of illegal evidence are caused by evidence, which is illegal, but has not been obtained by illegal means, such as torture or inhuman treatment, but by violating the provisions of procedural law. Despite the fact that such evidence has a different status, it does come within the wider scope of inadmissible evidence. In this context, evidence exclusionary rules are a set of rules, which prohibit in the principle the use of certain pieces of evidence in the criminal procedure.

According to the national LCP, the prohibition of evidence rests upon three exclusionary rules:

1. Absolutely inadmissible evidence, i.e. exclusionary rules of absolute character in light of methods, which may never be applied in obtaining evidence, such as for example statements obtained by way of torture, as set for in Article 142 of the Criminal Code;

2. Evidence obtained by violating procedural rules governing the proper application of certain procedural activities for obtaining evidence, i.e. evidentiary exclusion rules of relative character since it is a matter of admissible evidence. However, evidence gathered in this manner is not assessed as appropriate to be used in a criminal procedure, owing to the fact that in their gathering certain grievous mistakes have been made due to negligence or lack of professionalism or by abuses by parties to the procedure; and

3. Evidence upon which the judgment may not be based, i.e. according to Article 93 of the LCP when it is envisaged that the judgment may not be based on a certain piece of evidence, the court, ex officio or upon the proposal of the parties to the procedure, issues a decision setting aside such evidence, i.e. separating such evidence from the case file.

Today, rules on exclusion and admissibility of illegal evidence in the criminal procedural laws in the Western Balkan region and South-Eastern Europe more widely are largely under the influence of the Anglo-Saxon and German legal standards. This Analysis makes a review of the case law of the European Human Rights Court (ECtHR), of regional legislations and of the national legislation, while examining the prerequisites governing the legal treatment and admissibility of unlawfully obtained evidence in criminal cases and the possible approaches to applying the proportionality test, which in certain situations allows admission of illegal evidence, while at the same time ensuring sufficient protection of the human rights of the defendants.

2. EXECUTIVE SUMMARY

The criminal procedural law theory does not have a uniformed terminology about exclusionary rules, and the general term exclusionary rules covers all legal norms envisaging limitations on the presentation of certain evidence in a criminal case, which can be divided in two basic groups: 1. Prohibition of use of certain evidence and means of gathering evidence and 2. Prohibition of evaluating certain evidence, i.e. prohibition of the use of the results of certain pieces of evidence. However, some countries in the Region, such as Croatia, have legislation, which despite the absolute prohibition of use of unlawfully obtained evidence, allow for the use of the proportionality test in certain cases, or allow for the application of the doctrine of measuring or balancing (Abwägungsllehre), according to which minor violations of the legality, i.e. of rights are tolerated in serious criminal cases. In defining the amendments to the LCP such an approach was dismissed, based on the opinion that it is exactly in serious criminal cases that the defendants need more guarantees. Today, there is a growing resistance to the extensive interpretation of certain ultraliberal procedural safeguards established in the United States of America (USA) in the course of the “due process” revolution. In this context, inter alia, it is underscored that the idea behind the exclusion of relevant evidence is clear and its essential purpose is to sanction the unlawful work of the police and other law enforcement bodies, with a view to protecting the integrity of the legal system. Namely, the scientific debates organized by the Association for Criminal Law and Criminology on this topic reaffirmed the position of the scientific community, according to which regardless of the fact whether the evidence has been gathered “illegally” or the evidence has been gathered by “violation of freedoms and rights”, the genuine problems with evidence exclusionary rules are not related to the formal norms of the criminal.

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5 See: G. Kalajdziev, Fair Proceedings, Ph.D. dissertation, Faculty of Law - Skopje, 2004

procedural law, but are instead related to the philosophy of the criminal procedure, human rights law, constitutional law, and guarantees regarding the status of the individual within the system and the relations between individual dignity, inalienable rights and freedoms and the public interest. This is owed to the fact that evidence exclusionary rules must be observed as an extension of the procedural safeguards against abuse of power by state authorities and there must be a distinction made between evidence illegally obtained by public authorities (the police) or by citizens, i.e. the "horizontal" impact on rights and freedoms must be taken into consideration.

The issue of admitting illegal evidence is very topical and has prompted great interest, having a divisive effect on the public. In this regard, the primary subject of analysis is Article 12 of the LCP, which envisages that illegal evidence may not be used at all in the procedure. This is the position of the defence counsels of persons indicted in cases instituted by the SPO, being also the position supported by a decision a judge adopted in a preliminary procedure, at the Skopje I First Instance Court and by the paper of the President of the Supreme Court on the use of illegally obtained evidence issued upon a filed motion for protection of the legality. According to such a position, the recordings of wiretapped conversations may be used as indications, but may not be used in the trial procedure, nor may a judgment be based on such evidence. On the other hand, it is considered that it is exactly the Law Establishing the Special Public Prosecutor’s Office that justifies the interpretation according to which evidence illegally obtained by third persons may be used in criminal procedures, since any opposing interpretation of Article 12 would be illogical. If accepted, such an interpretation would mean that any unlawful gathering of evidence is prohibited, as is the evidence deriving from such gathering of evidence, which runs contrary to the international practice, being in contravention as well of the establishment and work of the SPO, becoming thus illogical. The majority of the academic circles have accepted this interpretation of the LCP, as related to the Law on the Special Public Prosecutor’s Office.  

Despite the lack of comprehensive legislation in the country and in other legal systems in the Western Balkans and South-Eastern Europe, this Analysis will be a useful tool for legal practitioners, offering them answers to questions regarding a harmonized legal framework in the region about the evidence exclusionary rules and inadmissibility of evidence, as well as to questions about the influence of the ECHR case law on prompting legal amendments. The Analysis will also attempt to answer the question about possible initiatives to facilitate the application of the proportionality test, as part of the “balancing” doctrine, in the jurisprudence in the country.

3. THE CONCEPT OF ILLEGAL EVIDENCE

Today criminal procedures are seen as a forum for the application of the human rights protection regime, designed to limit the state authorities’ competences on a wider scale. The list of fair trial safeguards is enriched with the rights protecting the physical and moral integrity and especially the protection against arbitrary interference in the freedom and privacy of the individual. State authorities’ competences in applying force, making arrests, conducting searches and monitoring today are elaborated as factors that affect fundamental human rights and freedoms, protected under constitutional and international human rights instruments. Violation of any of such rights may provide the grounds for excluding unlawfully obtained evidence from criminal trials, despite the fact that the evidence per se might be authentic. This confirms the fact that contemporary criminal procedures are designed to serve as a forum to ensure efficient human rights protection. If authorities abide by the correct rules, the respect for the rights of defendants should not raise any obstacles in establishing the truth. In this context, although trials might seem as a competition of unequals, trials indeed are not unfair towards the authorities, since human rights protection mechanisms provide for proper control of the authorities, which is to be expected and accepted in any democratic society.

The issue of use of evidence obtained through violation of the domestic or international law, and especially the use of evidence obtained by directly violating the rights of defendants, has been one of most burning issues in the practice and court trials in the last two decades. As it has been the case with many other issues related to human rights and the right to a fair trial, the use of such evidence has undergone its first “revolution” in the USA, in the second half of the last century, while this debate started in Europe quite belatedly, i.e. about two or three decades later.

In any case, almost all modern states have established rules, which exclude certain evidence owing to its problematic nature, despite that fact that there is no dispute about its evidentiary value. It is a bit surprising that neither the case law nor the theory have succeeded in providing a full answer to the question regarding the relation between the human rights based criminal procedure and illegally obtained evidence, i.e. they have not succeeded it clearly determining when the use of such evidence would undermine the fairness of the procedure. Therefore, it is not surprising that accordingly international human rights courts have demonstrated a certain resistance to developing relevant principles to regulate the use of evidence. This does not mean that courts have not dealt with such issues. On the contrary, this means that their theory is still far from being consistently and fully developed.

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2 In this context, the term "indications" is used wrongly to indicate some initial unexamined evidence.
3 See: L. Trpenoski, Can the Special Public Prosecutor’s Office win the battle against the court decisions excluding evidence as illegally obtained, Journal of Criminal Law and Criminology No 1/2016, Skopje.
The resistance of the ECtHR to establish stricter evidentiary rules is partially linked to the on-going differences between Council of Europe Member-States regarding the regulation of evidence in criminal cases. However, the theory growingly focuses on the trend of such differences being reduced and on the ever-growing degree of accord that certain evidence can indeed compromise the fairness of a criminal procedure.

Theory has long ago indisputably established that not all evidence, regardless of its character or the way it has been obtained, may be used in the court procedure, and that there is certain evidence upon which the judgment may not be founded. On the other hand, such rules are not that old, and in addition there is the widely spread misinterpretation in the country that contemporary concerns regarding human rights have always been an element of the Anglo-Saxon law. On the contrary, the rights of persons suspected of a crime and well-elaborated evidentiary rules occur in the course of the XVIII century. Hence, under traditional common law, the manner in which evidence has been obtained has not been given relevance in terms of the admissibility of the evidence at the trial. On the contrary, what has been of paramount importance has been the issue whether the evidence is truthful and authentic. In such a setting, the common law system in England was essentially for many years quite close to the main ideas of continental law, as well as to the well-known principles of material truth and the closely related free assessment of evidence.

In addition to establishing the veracity and authenticity of evidence, modern criminal procedure has been developed through the affirmation of other relevant values. Thus, in the last two centuries a series of limitations have been set up under constitutional and procedural law of modern democracies. In addition, in the XX century, new international obligations imposed upon states to respect human rights have added to such limitations. There is extensive literature about the development of the contemporary human rights based criminal procedure and about the promotion of international human rights law and this Analysis will make a brief pertinent references in this regard. The Analysis will also briefly elaborate upon the case law relating to the causes and principles supporting the prohibition of use of illegally obtained evidence.

One of the arguments justifying the prohibition of the use of certain illegally obtained evidence is the necessity to guarantee the authenticity / credibility of evidence. According to such an argument, it would be necessary to exclude certain evidence in light of the risk that such evidence is not authentic, i.e. if such evidence would be admitted for assessment by a judge or by a jury, a serious risk would arise of a mistake being made. An often used argument in support of the above stated refers to evidence obtained by use of torture, although the authenticity of such evidence is not the only reason for its exclusion, other reasons being linked to the integrity of the criminal law system, deterring the police and other state authorities from the application of such morally suspicious and legally unacceptable methods.

Considering its far-reaching impact, the doctrine developed in the US literature and case law, and especially the case law of the US Supreme Court, is of the greatest importance. Namely, in the USA it is considered that evidence exclusionary rules are the only efficient manner of preventing violations of the Fourth Amendment of the US Constitution. The rule is thus directly (and exclusively) aimed at state authorities and has the goal of deterring investigators and prosecutors from illegal and amoral practices of gathering evidence, by sanctioning them. In this context, the deterrent effect of the rules is emphasised (deterrent effect theory). Of course, there are those who criticize such a theory, who mainly claim that the deterring effect has been underestimated, especially owing to the fact that the judiciary very rarely in fact sanctions inappropriate police investigations, considering that most of the cases end with out of court settlement. Indeed, this is only partially true since in making their calculations in

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12 See: Jackson, J. D., Summers S. J., op.cit., 152.
19 See: L. Martinović, D. Kos, Nezakoniti dokazi, supra.
20 See: D. Osborn, Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia, Murdoch University School of Law, Volume 7, Number 4 (December 2000).
21 See: Daška, Procesne posljedice upotrebe dokaza dobivenih na nedoroljeni način, Naša znanost, 3-6/1960, p. 228.
settling the case, both the defence and the prosecution take into consideration the fact that the court will not admit some of the evidence.23

A theory, which is essentially very close to the deterring theory or the theory of sanctioning police officers, is the **theory of legitimacy**, i.e. **integrity of the criminal law system**, according to which the use of illegally obtained evidence undermines the moral authority of court judgements and the legal system in its entirety. In the British literature and case law, there are many supporters of this theory, but equally there are those who criticize it.24

This brings us to the fourth, i.e. latest theory, which primarily focuses on protecting the **human rights** of the defendant, claiming that the use of illegally obtained evidence and evidence obtained by violating human rights cannot be married to the contemporary concept of supremacy of individual human rights vis-à-vis the interests of the state and of the community.25 In this regard, it is considered that the best way of protecting human rights and of eliminating the consequences of their violation is to exclude evidence obtained by violating fundamental human rights.26

According to the authors of this Analysis, the latter three groups of theories are alternative interpretations of the same logic, which brings us back to the initial fundamentally controversial relationship or the balancing of the interests of the individual, the person accused of the crime, and the interests of the state, or the community, in efficiently dealing with crime - a dilemma elaborated in tones of literature, yet to no avail since there is still not a satisfactory and single answer.27

Illegal evidence in a criminal procedure is a complex differentiated criminal-procedural law concept, the contents of which undergo a continual evolution and development, to a lesser or to a greater extent owing to the frequent legal amendments, or predominately owing to their practical value and causal nature.28

Today, illegal evidence is part of the legal reality of almost all contemporary legislations, as envisaged by different legal solutions relating to the admissibility of their use. Mainly there are three types of inadmissible (illegal) evidence: evidence obtained by the use of torture, evidence obtained illegally, i.e. contrary to the provisions of procedural laws and evidence obtained by violating fundamental human rights and freedoms, as guaranteed under national and international legal instruments. Hence, one can find such provisions in the pertinent laws on criminal procedure of Croatia (Article 9),29 of Serbia (Articles 9 and 16)30, of Montenegro (Articles 11 and 17)31 and many others. In nemo-technological terms, there are two approaches to regulating illegal evidence, such as integral regulation of evidence obtained by tort: re and evidence obtained illegally and by violating human rights and freedoms in a single article and the second approach, which regulates these categories of evidence under two separate articles.

The purpose of exclusionary rules is to strike a certain balance between the desire for legality and the rule of law in the functioning of criminal justice, which requires that defendants are treated properly and justly, and with full respect for human rights and freedoms, which serves the interests not only of the individual, but the interests of society overall.32

Evidence exclusionary rules in principle prohibit the use of certain pieces of evidence in a criminal procedure. These are evidence sources, which due to certain reasons, such as lack of ethics, strict legal prohibition, or due to their criminal character or their insufficiently established certainty may not be used to establish the facts in a criminal case, nor can a judgment of the court deciding in the case be based upon them.

On the other hand, the same rules apply to evidence and pieces of evidence, which are in principle admissible in a criminal procedure, in which the obtained results, owing to certain procedural omissions in the evidence gathering, i.e. presentation of such evidence, lack the required evidentiary credibility and may not serve as the basis for the adoption of a judgement in a procedure (search without a warrant, taking a statement from the defendant without respecting the right to a lawyer and similar).33

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29 See: https://www.zakon.hr/s/174/3/10332/kazneni-prav-i-praksu

30 See: http://www.paragraf.org/propisi/kazneni-o_krvivom_postupku.html

31 See: http://www.pravda.gov.mrup/biblioteka/zakoni

32 See: L. Trpenoski, _Can the Special Public Prosecutor's Office win the battle against the court decisions excluding evidence as illegally obtained_, Journal of Criminal Law and Criminology No 2/2017.
The first set of exclusionary rules prescribes prohibitions of absolute character, since certain methods of gathering evidence can never be allowed. Any violence is prohibited and punishable, as is extorting confessions or any other statements from persons deprived of their freedom or from persons whose liberty has been limited, with violence against the defendant or any other person involved in the criminal procedure being prohibited as well.

The second set of exclusionary rules proscribes a prohibition of a relative nature, since it is a matter of admissible and legal pieces of evidence, however the resulting evidence is not valued as suitable to be used in a criminal procedure.

In evidentiary terms, such evidence is excluded considering that in its obtaining certain grievous mistakes have been made due to negligence or lack of expertise or the evidence has been collected by abuse of the parties to the procedure (for example when the defendant in cases in which he/she must obligatorily have a defence lawyer has been heard without the presence of a defence counsel). In such a case, the statement would have no evidentiary credibility in the criminal procedure and the statement may not serve as basis for a court judgment.

In this context, today the legislations in the Western Balkan region are guided by two leading principles or theories of admissibility of illegal evidence in criminal procedures. According to the German legal doctrine, spread in continental law countries, i.e. in the classical continental procedure, the guiding principle in evaluating illegal evidence in the German criminal procedure is founded on the principle of ‘measuring’ or ‘balancing’ (Abwägungslehre). According to this principle the judge balances the conflicting interests in a specific case, and if the judge assesses (for example in organized crime cases) that the interests of the criminal prosecution outweigh other interests (for example the right to privacy and similar), the judge will allow the presentation of evidence obtained illegally.

The German Federal Supreme Court has on several occasions attempted to resolve these legal dilemmas by developing the theory of spheres of legality or ‘legal circles’ (Rechtskreistheorie). According to this theory, the decisive factor is whether certain exclusionary rule seriously violates the rights of the defendant or such a violation is of a minor relevance. Accordingly, the theory establishes three legal spheres of exclusionary rules: inner intimate sphere of the individual, private sphere and the business sphere. Hence, the obtaining and use of illegal evidence falling in the first inner (intimate) sphere is absolutely prohibited with a view to protecting the intimate or inherent human rights. The use of illegal evidence belonging to second or private (personal) sphere is allowed only in cases in which the interests of the criminal prosecution outweigh the personal interests of the defendant in the criminal procedure.

Illegal evidence pertaining to the third (business) sphere may always be used in a criminal procedure. However, the practical application of this theory is not always limited to these three spheres. For example, in a case of witness testimony by a witness who has not been warned that his/her statement may be used against him/her in a criminal procedure, the legal sphere of such a witness will be violated only if the statement is used against him/her in a separate criminal procedure for another crime.

In any case, the case law on admissibility of illegal evidence in a criminal procedure requires comprehensive assessment of the proportionality of the right to defence of the defendant and the interest of the criminal prosecution in order to make a decision on the admissibility of such evidence. In this context, the criteria followed by courts in deciding on the admissibility of illegal evidence are the following: the seriousness of the crime, the seriousness of procedural violations in the context of evidence gathering and the intention to bypass evidentiary rules before the court. If in individual cases, the rights of the defendant outweigh the interests of the criminal prosecution, then the use of evidence collected illegally is strictly prohibited.

Several attempts have been made in the Region to introduce clear provisions for exclusion of illegal evidence from criminal procedures. However, in the absence of theoretical research on this matter, the provisions have remained fragmented and incomplete in terms of absolute prohibition of presenting illegal evidence in criminal procedures. Croatia is an exception from the countries in the Region by embarking upon the second most important reform of its procedural legislation, when it accepted the German principle of measuring or balancing the interests by applying the proportionality test.

Contemporary criminal procedures are characteristically featured with the evidentiary concept of the so-called “fruit of the poisonous tree doctrine”. However, this doctrine is an expansion of the initially generally accepted legal

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37 See: Federal Supreme Court of Germany, BGHSt 11, 213.
38 See: Federal Supreme Court of Germany, BGHSt 38, 214, BGHSt 11, 213.
39 See: Federal Supreme Court of Germany, BGHSt 38, 302.
41 See: M. Damaška, Dokazno pravo u kaznenom postupku: oris novih tendencija, Pravni Fakultet u Zagrebu, No. 4, pp. 753-774.
doctrine in the United States of America represented by the institute of exclusionary evidentiary rules, i.e. rules for exclusion of evidence, which envisage exclusion of evidence obtained in the course of investigations and evidence obtained through seizure of items during searches conducted without respecting the legal guarantees set forth in the Fourth Amendment. In pursuance with this doctrine, "the fruit of the poisonous tree" is a natural extension of the previously adopted exclusionary rules, the purpose of which is to expand the scope of evidence that is to be excluded; because the pieces of evidence derive from evidence that has been illegally obtained. This doctrine allows legal inadmissibility of evidence which per se is legal, but which has been derived indirectly from illegal evidence sources. In the US case law, the fruit of the poisonous tree doctrine has been later successfully applied also in cases of evidence illegally obtained in the course of application of special communication interception measures. Thus, in the case of Olmstead v. United States of 1928, the Supreme Court of the United States of America considered for the first time the issue of wiretapped telephone conversations. In this case, the US Supreme Court took the position that activities of law enforcement agencies do not violate the Fourth Amendment of the US Constitution. Two arguments were offered in providing reasoning for such a position: 1. The wiretapping was done without entering the home or business premises of the accused; therefore such non-entry i.e. non-search is not covered by the Fourth Amendment of the US Constitution; and 2. In wiretapping the contents of the conversations are "seized" and not a physical possession; therefore, such items are not covered by the term seizure, as set forth in the Fourth Amendment of the US Constitution. The Court was of the opinion that although the wiretapping procedure itself ran contrary to laws of any federal state, the evidence obtained during the wiretapping would not be considered as inadmissible in federal courts, since federal state laws do not have the legal effect of establishing rules for admissibility of evidence in federal courts.

The US Supreme Court later revised this position offering the argument that "any unlawful infringement of the privacy of the individual done by the authorities, regardless of the means employed, must be considered as a violation of the Fourth Amendment of the US Constitution.

In the jurisprudence of today's mixed continental criminal procedures, evidentiary rules on use of illegal evidence in criminal procedures are most often explicitly defined and either proscribe a prohibition of the use of illegal evidence or directly define the type of evidence, which is considered as inadmissible or indirectly define it by referring to the type of violations incurred in obtaining the evidence. However, when applying a broader ranging approach to establishing the exclusionary rules for the use of illegal evidence, evidently the large number of evidentiary limitations (some which can be removed, some of which cannot be removed) present in the LCP need to be taken into consideration.

The national legal system does not have Constitutional provisions prohibiting the use of illegal evidence in criminal procedures. This issue is regulated under the provisions of the LCP. Provisions of Article 12 of the LCP regulate the principle of legality of evidence, which is one of the fundamental principles governing the criminal procedure. Hence, this principle, along with other principles, ensures a fair trial of the defendant in the framework of the application of the fundamental constitutional principle of rule law. These provisions prohibit the following: 1. to extort from the defendant or from any other person who participates in the procedure a confession or any other statement or to use such a statement as evidence in the criminal procedure; and 2. Any evidence collected in an unlawful manner or by violation of the rights and freedoms established in the Constitution, laws and international agreements, as well as any evidence resulting thereof, may not be used and may not provide the ground for a judicial verdict. In principle, evidence in the criminal procedure serves the purpose of determining the facts of essential importance to establish criminal liability of the defendant and to order and mete out the type and duration of the criminal sanction. In the context of the issue of what may be used as evidence in a criminal procedure, the national legislator has opted for a negative approach, i.e. evidence that may not be used and upon which a court judgement may not be based. The term used in this approach ("collected in an unlawful manner") has opened more dilemmas than the meaning of the entire article. It is clear that the legislator is focused on the manner of obtaining evidence, and not on the manner of making the evidence. This is a very important difference in regard to the assessment of evidence in a criminal procedure. Furthermore, it is not by case that the focus is exactly on the gathering of evidence and not on its making. However, in the wider scope interpretation of this provision, it is important to determine whether there is a difference between constitutional rights that have been violated with the making of the evidence. Hence, evidence resulting from violation of the right to protection against torture and inhuman treatment and punishment is not the same as the evidence resulting from violation of the right to privacy, which will be elaborated bellow.

See: Olmstead Case 1928.


Ibid.

Ibid.

4. ILLEGAL EVIDENCE IN THE CASE LAW OF THE ECHR

The case law of the ECHR in Strasbourg on this issue is extensive. In the case of Schenk v. Switzerland, the Court presented for the first time its doctrine according to which the Court has a position of reservations regarding evidentiary rules in general, including the issue of legality of evidence, deeming it to be an issue, which is to be primarily dealt with by domestic courts. However, the ECHR reserves the right to assess whether the trial overall, including the manner the evidence has been produced, is in compliance with the fair trial concept, under Article 6 of the European Human Rights Convention (ECHR).

4.1. Evidence Obtained by Torture, Inhuman and Degrading Treatment

Today, it is considered that under international law torture is subject of an absolute prohibition. A number of international global instruments explicitly prohibit torture, prohibiting as well the use of evidence gathered by application of torture in criminal procedures. The most important documents in this context are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. The UN Human Rights Committee has developed relevant case law under these two instruments. A convention of even greater relevance in the regional setting is the European Human Rights Convention, which does not explicitly envisage such a prohibition, yet this issue has been treated in the rich ECHR case law, while legality of evidence in legal theory is considered to be one of the implicit elements of the fair trial concept.

The Strasbourg Court has no dilemmas that the use of evidence obtained with torture in a criminal procedure, torture being the most serious form of violation of Article 3, is so grievous violation of human rights that it would automatically trigger a violation of the right to a fair trial under Article 6. Thus, in the case of Harutyunyan v. Armenia, the applicant complained that he, as a suspect in the case, and another two persons in their capacity as witnesses were subjected to torture, and their statements were later used in the trial. What is of interest in this context is that in the proceedings before the ECHR, the Armenian authorities made efforts to justify the use of the confession of the applicant by underlining the fact that he gave his confession to the investigators and not to the police officers that ill-treated him. Such an argument is often used in the national court practice, with defendants often claiming that the confession they gave before a prosecutor or a judge in a preliminary procedure was given as a consequence of the treatment and the threats against them while they had been in police custody. However, the Court was categorical and concluded that "...where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter." Furthermore, the Court concluded that "the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings" and that "regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of such evidence rendered his trial as a whole unfair."

The Court applied a similar approach in the case of Levinta v. Moldova, in which the Court established that the applicants as suspects in domestic criminal proceedings were subjected to torture with the aim of extorting their confession, which was later used in the criminal proceedings against the applicants. An additional aggravating circumstance in the given case is the fact that in the period when the applicants gave their confessions, they were not able to confer with their defence. Hence, the use of such evidence amounts to violation of Article 6, despite the fact that there was other evidence against the applicants. In the specific case, since the applicants in the present case have been subjected to torture, the Court considers it unnecessary to determine the extent to which the domestic courts relied on evidence obtained as a result of torture and whether such evidence had been determinative to the applicants' conviction. The mere fact that the domestic courts actually relied on evidence obtained as a result of torture rendered the entire trial unfair. In this regard, the absolute prohibition of use of evidence obtained with torture is not linked to the lack of veracity of the evidence, although this too can be a relevant factor, being instead linked to the principled position that the use of such illegal evidence obtained with torture

49 See: Khan v. the United Kingdom, no. 35394/97, § 34, ECHR V; R.G. and J.K. v. the United Kingdom, no. 447/87/98, § 76, ECHR 2001-IX; Allan v. the United Kingdom, no. 48359/99, § 42, ECHR 2002-IX.
53 Ibid, paragraph 104.
54 Ibid, paragraph 105.
irreversibly damages the fairness of the proceedings and in principle undermines the legitimacy of the criminal law system. In these circumstances, such evidence is absolutely prohibited regardless of their evidentiary value. It is interesting that in making such statements on the principle, the ECHR explicitly refers to the case law of the US Supreme Court, quoting the case of *Rochin v. California*.59

In the case of *Jalloh v. Germany*, the applicant was accused of having swallowed a plastic bag (so called bubble) full of drugs, so police officers took him to a hospital and applied physical force so that the doctor could administer the emetics in order to provoke regurgitation of the plastic bag with drugs. The ECHR established that such a treatment was inhuman owing to the serious violation of the physical and psychological integrity of the applicant. Considering that the evidence was obtained by applying a procedure, which is in violation of Article 3 of the ECHR, the Court considered that such evidence may not be an evidence of guilt in criminal proceedings.57

In the case of *Haci Özen v. Turkey*, the Court established that the statements of the applicant given to the police were a result of coercion, which the Court considered amounted to inhuman and degrading treatment. Claiming that the use of such evidence means a violation of Article 6, the Court especially took into consideration that this was the main evidence against the applicant, and the fact that the statements were given without the presence of a defence lawyer.58

Similarly, in the case of *Gladyshev v. Russia*, it was established that the applicant made a confession while in police custody as a result of serious beating, which ended with several fractured ribs.59 Despite the serious injuries, the Court established that there was inhuman treatment and not torture. Although the confession was not the only evidence against the applicant, still it had great importance in finding him guilty. In this case, considering that a sufficient number of elements have been established in support of finding a violation of Article 6, the Court did not consider it necessary to examine separately the applicant’s argument that the use of a confession, which is a result of coercion, breached his right not to incriminate himself.

These cases show that in establishing whether there is a violation of the right to a fair trial under Article 6, what the Court considers is of critical importance is whether the disputed statements have had any influence at all on convicting the applicant, which significantly differs from the test the Court applies with respect to Article 6, para. 3(d), which relates to limitation to procedural rights in examining witness statements by the defence. In the latter case, in assessing whether the limited possibility to examine evidence at the trial has had an impact on the overall fairness of the trial, the Court considers that it is important whether the impugned evidence (from anonymous witnesses and similar) has been the only evidence or evidence of central importance to convict the applicant.

It is interesting that our country has lost a similar case before the Strasbourg Court. Thus, in the case of *Hajirulahu*, the applicant was convicted based on confessions given during his police custody, which violated the strictly defined constitutional and legal limit of 24, i.e. 48 hours police custody, having been kept in police custody longer than legally allowed, and having been transferred to several different police stations. This is the only judgment of the Court finding unfair criminal proceedings, resulting from the fact that the applicant was convicted, *inter alia*, based on his confession, which was clearly illegally obtained, i.e. it was a result of coercion by torture to which he was subjected in the course of his secret *incommunicado* police custody.60 Despite the claims of the applicant made during the proceedings before the domestic courts, that his confession to an investigative judge was given as a result to the fear caused by the previous torture by the police, the domestic courts based their findings of decisive importance for convicting the applicant of terrorism on his confession, which according to the Court renders the proceedings unfair.

The ECHR has firmly assumed the position that the manner in which evidence has been obtained in the course of the investigation can have an impact on the fairness of the trial. However, the Court’s doctrine encounters certain difficulties in regulating the use of legally obtained evidence and in explaining why the use of such evidence would violate the fairness of the procedure.61

It can be noticed that in the case law of the Court, but also in the relevant evidentiary law literature and the European Convention, as regards the issue of illegally obtained evidence, there is a tendency to place the focus on the nature of the substantive violation of a certain right guaranteed under the Convention, considering this to be of key importance in finding whether the right to a fair trial has been violated. The fact that the evidence has been obtained by violating certain rights protected under the Convention, will not necessarily result in finding a violation of the right to a fair trial, as guaranteed under Article 6 of the Convention. The focus on substantive rights is less evident when the exclusion of certain evidence is justified by the issue of legitimacy, especially in the context of Article 3 of the Convention where the Court explains the necessity of excluding evidence by referring to the meaning of the general concepts of integrity.

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55 Supra, footnote 11.
56 See: *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX.
60 See: *Hajirulahu v. FYROM*, judgment of 29 October 2015.
and legality of the criminal procedure. In the above referred to case of *Jalloh v. Germany*, it is important to focus not only on the specific right in question, but it is also necessary to assess the manner in which such activities have *de facto* impacted the right of the defendant to a fair trial. The only way of determining whether the right of the defendant to a fair trial has been violated is to focus on the manner in which the violation of another right has *de facto* influenced the defendant’s rights during the trial. According to this theory, the exclusion depends on the arguments in support of the need to guarantee legitimacy of the procedure. However, as different from traditional theories of legitimacy, the focus is not on the moral unacceptability of the activities of state authorities, being placed instead on the effect of such activities on the possibility of the defendant to defend himself/herself, in accordance with requirements for a fair trial.

With a view to establishing the circumstances under which the use of illegally obtained evidence could amount to violation of the right to a fair trial, it is first necessary to determine what the concept of fairness requires. The first requirement is that the person accused of a crime has the possibility and the opportunity to challenge the evidence against him/her and to produce his/her own evidence in an accusatory procedure. This primarily implies the possibility of the defendant to be represented by a legal counsel in a public and adversarial trial before an independent and impartial court, since these are the fundamental requirements ensuring that criminal justice could enjoy certain degree of trust. In order for illegal evidence to be able to influence the legality of the procedure, there must be an evident link between the inappropriate, i.e. illegal manner in which the evidence has been obtained and the right of the defendant to be heard in an accusatory procedure. According to this approach, it is not of key importance whether the evidence has been obtained in manner that violates other Convention rights. Quite the contrary, such an approach implies that the violation of another right would not automatically amount to a violation of the right to a fair trial, but also implies the opposite, i.e. that there is a possibility that certain unlawful activity that *per se* does not suffice to find a violation of a Convention right, could still amount to a violation of Article 6.

In the case of *Allan v. the United Kingdom* the Court examined closely the privilege against self-incrimination and the right to remain silent, which leads to the fact that the manner in which evidence has been obtained may have an impact on the fairness of the trial, turning thus the attention to the significance of preliminary investigative activities on the overall assessment of the fairness of a criminal procedure. However, it must be said that the relation between the trial and the preliminary investigation has not been fully elaborated, i.e. developed under the Court’s case law. In any case, the literature suggests that criminal
procedures must be seen as a continual process, and not as a simple series of consecutive stages. Consequently, the overall fairness of the procedure can be compromised by a certain form of unfairness occurring in earlier stages of the procedure, which includes the illegality of the manner in which evidence has been obtained. Namely, activities undertaken by the police and by prosecutors have the potential of negatively influencing the fairness of the ensuing trial, especially if certain omissions or limitations in the preliminary procedure have a substantive impact on the possibility to efficiently test all evidence at the trial.

The use of torture or other form of inhuman or degrading treatment in the investigative stage as a way of obtaining evidence, will necessarily undermine the possibilities of the defendant to challenge the charges, by which this violates the defendants' procedural rights and impedes the possibility to present their case in a manner they have chosen in an accusatorial public procedure. In the context of certain inappropriate police practices, such as deception, entrapment and similar, it will be necessary to determine to what extent such activities have compromised the ensuing trial. Of course, it must be born in mind that many cases will not reach the trial stage. Therefore, it is important that excluding evidence at the trial is not the only tool used in sanctioning unlawfulness in the work of the police and other investigative bodies.

4.2. Wiretapping and Covert Surveillance

For quite some time now wiretapping and covert surveillance have been applied as universally accepted methods in countering crime and corruption. Despite all the threats of possible abuses that such measures are inherently featured with, such measures are not only exposed to possible abuses and arbitrariness in their application, but in principle, they are also problematic since they deny certain long established liberal principles of contemporary criminal law. Therefore, almost all countries pay great attention to these measures and as a result they endorse them only as an exception, mainly in detecting serious forms of crime or in organized crime cases. In addition, there is the internationally accepted principle that the measures are to be applied only as subsidiary measures, i.e. only if traditional operative criminal measures do not bear fruit.

The very nature of the special investigative measures creates a situation of a constant tension between such measures and the right to privacy and other human rights. Therefore, it is logical that the ECHR has dealt with this issue in a number of cases before it. For the purposes of this Analysis, only landmark cases will be referred to or cases in which the Court’s doctrine regarding this issue is more or less clearly elaborated. The best-known case is undoubtedly the case of Schenk v. Switzerland, in which the applicant who was convicted of incitement to murder, i.e. commissioning another person to kill his wife, complained against the infringement of his right to a fair trial. The facts of the case seem like excerpts from a screenplay: Mr. Schenk had an advertisement published in which he stated that he was looking for a former member of the Foreign legion for occasional assignments and he stated his address. After several people answered the advertisement, the applicant chose a person with whom he arranged that his wife be killed. However, instead of killing the wife the chosen person called her and told her about her husband's plans. After this, they both went to the police and reported the applicant, against whom an investigation was instituted. Going beyond this almost feature film like story, what is of primary interest for this Analysis is yet to come. Namely, the hired killer recorded the telephone conversation he had with the applicant. Mr. Schenk, talking about the commissioned murder. An issue of importance, which was not clarified before the Swiss courts, or before the ECHR, is the issue whether he recorded the conversation upon his own initiative or as Mr. Schenk claimed upon the order or the initiative of the police. In any case, the Swiss Federal Criminal Code prohibits covert recording. Thus, the applicant claimed that the use of the recording was not in accordance with the right to a fair trial under the ECHR, similarly to his claims before the domestic courts that the recording ran contrary to the domestic laws. It is interesting that the Court did not consider it necessary to distinguish between the fact whether the illegality of the evidence can be linked to the state authorities (which would also cover recordings made by a third person, but upon the orders or the initiative of the police) considering that it does make a difference whether state authorities acted unlawfully in obtaining the evidence, and the fact whether the authorities used evidence illegally obtained by a third person. The difference in this regard is more than evident and this is an especially important issue from the viewpoint of the problematic nature of evidence that the SPO uses before the national domestic courts. Instead, the Court resolved the case by negatively focusing on the fact that the defendant had the opportunity to challenge the authenticity of evidence and that the recorded conversation was not the only evidence upon which the judgment was based. Therefore, it seems logical that some of the judges were critical of the position of the majority of the Court Chamber, claiming in their dissenting opinions that for a trial to be qualified as a fair trial, the judgments must not be based on illegally obtained evidence. They also claimed that regardless of the fact that the judgment was based also on other evidence, in addition to the disputed recording, yet the recording was taken into consideration as important evidence. Therefore, the judgment was indeed at least partially based on the disputed evidence. It is peculiar that even dissenting judges have not made a difference between the source of the illegality, i.e. whether it is a matter of illegal

72 In this respect, it seems it was of importance that the police did not instruct the unlawful recording, although in its analysis the Court has never underlined this. However, in some other cases in which the police has instigated or instructed the recording done by another person, the Court considers that by this the police are indirectly involved. (M. M. v. the Netherlands (Appl. N°39339/98), the judgment of 8 April 2003; A. v. France, judgment of 23 November 1993, Series A no 277-B).
activities of state authorities or it is just a matter of use of evidence obtained illegally by a third person.\textsuperscript{13}

Another often-quoted case of covert wiretapping is the case of Kahn v. the United Kingdom\textsuperscript{14}. In this case, the applicant (the accused in the domestic proceedings) and his cousin were searched upon their arrival at the Manchester Airport. The cousin was found to be in a possession of significant quantities of heroin and was immediately arrested and later charged. Nothing was found on the applicant when searched and was released. After a certain period, he went to visit a friend and in their conversation, the applicant admitted to his friend that he was involved in the importation of drugs found on his cousin. This conversation was recorded by the police that had previously installed listening devices in the home of the friend with a view to obtaining evidence of involvement of the friend in dealing in drugs. The police neither expected nor foresaw that the applicant, Mr. Khan, would visit this man. In any case, the applicant was later arrested and charged along with his cousin. It is interesting that the applicant never made admissions of being involved in drug dealing. Therefore, the only piece of evidence against him was the conversation recorded by application of special investigative measures. Before the ECHR, he invoked the right to privacy under Article 8 of the ECHR, referring to the fact that in the period when the recording was made this measure was not envisaged by law. In this respect, the Court agreed that there was a violation of Article 8 of the Convention, since the special purpose listening devices had been installed without a clear legal framework that is to regulate under a law the use of such devices and methods. It remained to consider the claim of the applicant that the use of evidence obtained by the violation of his privacy means violation of his right to a fair trial in accordance with Article 6 of the Convention.\textsuperscript{15} The Court accepted that account must be taken of the fact that the contested recording in effect was the only evidence against the accused (applicant), while explaining that the "relevance of the existence of evidence other than the contested matter depends on the circumstances of the case." In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.\textsuperscript{16} The Court states that it is true that, in the case of Schenk, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. Instead, in the Khan case the Court attached importance to the fact that the domestic court took into consideration that the contested evidence had an influence on the outcome of the proceedings. It would thus seem that

this time the Court somewhat changed its own position also in the Schenk case with respect to the issue whether the weight of the evidence has been the key issue in the adoption of the Court's judgement. Instead of considering the issue whether the contested evidence was the only evidence or at least whether it was important or not for the outcome of the case against the background of other evidence, the Court focused on the issue whether the proceedings in general were fair, and especially whether the accused has the opportunity to challenge the authenticity and the use of the evidence before the domestic courts. In the specific case, the Court especially took into consideration the fact the UK legislation allows domestic courts to exclude illegally obtained evidence, if such evidence would make the proceedings significantly unfair.

Considering the fact that in the specific case the applicant (accused) had the opportunity to contest the evidence, while despite having the possibility of excluding the contested evidence, the domestic court did not exclude it, the ECHR found no violation of the right to a fair trial under Article 6, but the Court did establish violation of Article 8 (the right to privacy). It can be seen that such findings of the Court are a reflection of the principled position that the Court has repeated on a number of occasions according to which the assessment of evidence is primarily an issue to be dealt with by domestic courts of original jurisdiction, for it is the national courts that have the most detailed and direct insight into the evidence material and are best positioned to assess the authenticity and legality of evidence. Another reason for stepping away from the position taken in the Schenk case, which at first glance might seem unprincipled, is most probably connected with the fact that in this case the wiretapping was not explicitly illegal according to the domestic legislation; instead the violation of the right to privacy is a result of the Court's findings that the overall domestic legal framework does not fully satisfy the standards established under the Convention case law. Admittedly, the summary finding of the Court in this case that the Court might have established a violation of Article 6 if the manner of producing the evidence had run contrary to the domestic laws, is not consistent, since as it can be seen in the Schenk case, the Court refused to establish a violation of Article 6 of the Convention, despite that fact that in that case the Swiss Government openly admitted that the evidence had been illegally obtained. As already mentioned, according to the authors of this Analysis the critical question in that case is related to the fact that the evidence had been illegally obtained by a third person, and not by the law enforcement bodies. This issue will be elaborated in detail below.\textsuperscript{17}

An interesting case of application of special investigative measures is the case of P.G. and J.H. v. the United Kingdom\textsuperscript{18}, in which again, the legality of evidence obtained with covert surveillance and by placing a covert listening

\textsuperscript{13} The case law of the US Supreme Court explicitly states that the so-called exclusionary rule does not apply to cases in which the evidence has been illegally obtained by a third (private) person, and not by the police.

\textsuperscript{14} See: Khan v. the United Kingdom, no. 35394/97, ECHR 2000-V, paragraph 22.

\textsuperscript{15} See: J. D. Jackson/ S. J. Summers, op. cit., 172-173.

\textsuperscript{16} Ibid, paragraph 37.

\textsuperscript{17} See: G. Kalajdzic, Unlawful Evidence in the Criminal Procedure, Journal of Criminal Law and Criminology No. 2/2017, p. 39.

\textsuperscript{18} See: P. G. and J. H. v. the United Kingdom, no. 44787/98, ECHR 2001-D.
device, and how such evidence influenced the fairness of the ensuing criminal procedure were contested. Namely, the police was informed that the applicants (the accused) were planning an armed robbery, for which both suspects were later arrested. In the course of the proceedings, they both refused to make any statements and refused to give any speech samples to the police in order to compare with the voices on the tapes, containing recordings as a result of the implemented special investigative measures. Despite the expressed refusal of the suspects to make any statements, aiming at overcoming this problem, the police installed covert listening devices in the police holding cells used by the suspects. Similarly as in the Khan case, the Court relatively easily established a violation of the right to privacy under Article 8, by referring to the fact the applied measures have not been sufficiently elaborated, i.e. regulated under relevant national laws. As regards the question whether the use of evidence obtained in this manner implies a violation of the right to a fair trial under Article 6, the applicants argued that their case differs from the Khan case, owing to the fact that expert witnesses were not strongly convinced that their voices are the same voices that could be heard on the tapes recorded by the application of special investigative measures. In any case, the Court again found that the right to a fair trial was not violated. The Court rejected the argument of the applicants to place the focus on the authenticity of the evidence, giving credence to the arguments of the Government of the UK that there was other evidence the legality of which was not contested, and which pointed to the guilt of the suspects, i.e. showed their involvement in the armed robbery, and considered that the fairness was not infringed by the fact that it was left to the jury (domestic courts) to decide on the value and significance of presented evidence (which, in accordance with the domestic law, the judge presented to the jury as a summary). Thus, the Court maintained the position in principle that the issue of assessment of evidence is primarily an issue to be considered by domestic courts, which corresponds to the position presented in the Khan case. However, the referral to the importance of the existence of other evidence is a bit confusing, considering the fact that in the Khan case, the Court rejected such a test of the significance of the evidence (i.e. whether the contested evidence is the only evidence or at least important evidence, or there was other evidence as well). 79

In the case of Allan v. the United Kingdom,80 the applicant was suspected of a murder of a store manager during an armed robbery at a supermarket. The applicant was arrested and in accordance with the law was advised of his right to remain silent, which he exercised. The police attempted to examine the applicant in the presence of a defence lawyer, but he consistently exercised his right to remain silent and thus refused to answer any questions. In lack of sufficient evidence, the police decided to request that the remainder of the applicant and the visiting area be “bugged”, justifying the request with the argument that all other investigative measures have failed. Hence, the applicant was audio and video recorded while he was having a conversation with one of the other suspects in the same case with whom he shared the cell. The conversations between the applicant and a woman who came to visit him were also recorded. Such covert surveillance and recording were applied for several weeks. The police was not satisfied with the evidence obtained in this manner. Therefore, the police arranged for a police informant to be placed in the same cell for the purpose of eliciting information from the applicant about the event. Later at the trial, the police informant presented one of the main evidence, asserting that the applicant had made a confession before him. The defence disputed the legality of such evidence. However, the court admitted the evidence and the applicant was convicted of murder. Similarly as in other cases versus the United Kingdom, the ECHR, having no dilemmas, found that the right to privacy under Article 8 was violated, stating similar arguments as in the previous cases, i.e. that the contested audio and video recordings were made without a precise legal framework. Also as in the other cases, the plot thickens when it comes to the question whether the contested recordings may be used in a criminal procedure without thus violating the right to a fair trial. In this respect, the Court found that the decision on this issue depends on a number of circumstances in the case, and especially on the fact as to what type of “illegality” it was at hand, while in case of a violation of another Convention right, this would depend on the nature of the violation. Furthermore, a series of other factors were referred to as relevant, especially factors related to the issue whether the rights of the defence were respected i.e. whether the defence had the opportunity to challenge the authenticity of the evidence and to oppose its use, and whether the defence had the opportunity to examine all other evidence, including the witnesses. In the specific case, the Court also examined whether the admissions by the applicant obtained during the covertly recorded conversations, were made voluntarily or there was some form of coercion or fraud and finally the Court examined the quality of the evidence, i.e. including whether the circumstances in which it was obtained cast doubts on the evidence reliability or accuracy.81 In conclusion, similarly as in previous of its judgments, the Court found that while no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.

It is interesting that despite having found a violation of Article 8, the Court took into consideration that the material obtained by audio and video recordings was not unlawful in the sense of being contrary to domestic criminal law. On the other hand, a mitigating circumstance was that the there is no suggestion that any admissions made by the applicant during the taped conversations were not voluntary in the sense that the applicant was coerced into making them or that

80 See: Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX.
there was any entrapment or inducement. Indeed, the applicant has stated that he was aware that he was possibly being taped while in the police station. It is more than evident that such statements are not quite the same as the statements that the applicant would voluntarily make before the police, as confirmed by his persistent refusal to make any statements, yet it seems that the Court approves such measures relying on the logic or arguments, which justify the application of any special investigative measure. In any case, the Court did not find a violation of the right to a fair trial under Article 6 of the Convention in the context of the recordings made in the cell and in the visiting area.

However, the Court found that there was an evident problem with the use of informants as witnesses. The Court considered the issue of use of informants in the context of the right to remain silent and the privilege against self-incrimination. These rights are not explicitly set forth in the Convention. However, the Court (in a number of cases) derives them from the fair trial concept, emphasizing them as important (implicit) guarantees. According to the Court, the purpose of these principles is to protect the freedom of a suspected person to choose whether to speak or to remain silent under police questioning or when questioned by other law enforcement bodies with special competences. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities used subterfuge to elicit from the suspect confessions or other statements of an incriminatory nature. In this case, the admissions made by the applicant were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of the witness (informant), which according to the Court could be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. The Court concluded thus that the evidence obtained in this manner essentially was not volunteered, by which the applicant's right to silence and his privilege against self-incrimination were violated. The Court did not go into substantive elaboration as to why this type of involuntary admissions are different from admissions made by the applicant when he was audio and video recorded in the same case.

The judgment in the Allan case differs significantly from the positions of the Court taken in another very similar case, that of Portman v. Switzerland. In this case, similarly as in the Allan case, the applicant consistently refused to make any admissions, defending himself with silence. At one point, two police officers entered his cell attempting to convince him to talk. On that occasion, allegedly the applicant made some admission. The two police officers made a written statement about what the applicant told them, which was later used to convict that applicant. When the applicant objected that the admissions were not made voluntarily, the Strasbourg Court referred to the Khan case, i.e. that the admissions of the applicant were volunteered and that they were not given under direct pressure of the police. The Court assumed such a position despite the claims of the applicant that he was kept for a longer period in police custody, under serious psychological pressure and therefore his admissions should not be considered as voluntarily made. It would seem that the Court rejects the idea that more or less any questioning in a police station is made under certain pressure, which gives rise to the idea that it is necessary to more strictly respect the right of the suspect, - an ideology supported by the liberal criminal procedure as early as the judgment in the case of Miranda v. Arizona, in which the US Supreme Court established the well-known concepts about advising suspects of their rights and other special guarantees for suspects during police questioning in order to counterbalance the pressures inherent to being kept in police custody. In more recent times, this position has been supported by a movement in Europe in favour of the rights of suspects in police custody, which has resulted in a number of Directives adopted by the European Union relating to the rights of suspects. Theory seriously criticizes the conclusions of the Court on this issue, stating that the Court does not make a clear difference between the facts whether the admissions in the police were made under duress or have been made as a result of some deception. In the Allan case, it was established that there was no duress. Instead, the suspect was evidently deceived into making admissions that he would not otherwise make before the police. However, if admissions obtained in this manner could be considered as not being voluntary, it is not clear why the ECHR differentiates such admissions from admissions obtained with covert surveillance and recordings, as special investigative measures. According to Professor Trelawny from Fribourg, Switzerland (former President of the European Human Rights Commission), every covert recording of conversations that individuals have the right to consider protected and private, can hardly be in accordance with the privilege against self-incrimination.

The case of Bykov v. Russia is illustrative of the often used police practice of eliciting statements or confessions indirectly by the use of police informants or, as of lately with the growing practice of using agents provocateurs. Using agents provocateurs has quickly become widely spread international practice, as part of the growing practice of use of special investigative measures, reaffirmed inter alia with international treaties. This case versus Russia is rather indicative of the usual problems that occur in the application of such methods. The case against Bykov, a well-known businessperson and a politician, was opened on suspicions of conspiracy to murder, after a member of his entourage reported with the police that Bykov had ordered him to kill Bykov's former business associate. In addition to reporting the case, the man (the hitman) handed over to the police the gun, which he had allegedly received from the applicant. The
Police designed a feature film like operation, staging the discovery of two dead men, of which, the man who was to be murdered and who was indeed murdered, was Bykov’s business partner and informed the media about a double murder, which allegedly took place in the home of the Bykov’s business associate and that he was one of the murdered men. The hitman was then equipped with a hidden radio-transmitting device and was instructed to go to talk to Bykov. He did meet Bykov and told him how he committed the murder. The recordings of this conversation were later used in the criminal procedure against Bykov. In Strasbourg, similarly as in the cases versus the United Kingdom, the Court, having no dilemma, had no problem in concluding that in light of the non-existence of a relevant domestic legal framework, the right to privacy guaranteed under Article 8 of the Convention was violated. Also as in the other cases, the more complex issue was whether the use of such illegally obtained evidence, which is also in violation of the European Convention, infringed upon the right to a fair trial of the accused. Deciding yet again that the accused could have a fair trial, (the Court did not find a violation of Article 6), despite the fact that the evidence was obtained in a manner which violates the right to privacy under Article 8 of the Convention, the Court emphasized several circumstances. First, the accused (the applicant) could contest before domestic courts both the covert operation and each piece of evidence obtained with such a covert operation, under an accusatory procedure before a court of original jurisdiction, as well as in the appeals procedure. In addition, the Court took into consideration the claims of the applicant that he was tricked by the police and thus his right to a fair trial had been violated, considering the illegal manner of obtaining the substantive evidence, which issue was indeed considered by the domestic courts. Considering possible violation of the privilege against self-incrimination and the right to silence, the Strasbourg Court found that the Bykov case differs significantly from the Allan case owing to the fact that the suspect was not already involved in a formal procedure, and was neither questioned nor detained, while the contested statements given to a former member of his entourage (which at the critical time acted in the capacity of a police informant) were not given under any pressure. It has been already seen that the circumstances in the Allan case were indeed different, since Allan was in police custody, consistently refusing to make a statement and defended himself by remaining silent. Consequently, the covert recording comes closer to wiretapping. This is a remark of the authors of this Analysis, and refers to a similarity the Court has never mentioned nor analyzed. As usual, not all judges in Strasbourg agreed with such reasoning. Hence, in his partly dissenting opinion, judge Costa claims that the right to remain silent would be truly “theoretical and illusory” if it were accepted that the police had the right to “make a suspect talk” by using a covert recording of a conversation with an informant assigned the task of entrapping the suspect. In addition, the authors of the analysis find judge Costa’s position presented in his partially dissenting opinion that in fact there is no significant difference between the case of Allan and the case of Bykov to be a more acceptable position.

Later the Court assumed a similar position in the case of Heglas v. the Czech Republic in which the applicant was suspected of a crime in which a woman was attacked and her handbag was stolen. After the event, the police arrested another person, who was later placed in police custody, while an order was issued to place the applicant’s mobile phone under surveillance. Furthermore, the police organized a meeting between the applicant and the girlfriend of the person who was already in police custody. The girl was fitted by the police with a listening device. In their conversation, Heglas confessed that he and the person in police custody together organized the robbery. In the ensuing court procedure, the applicant was convicted based on records of telephone conversations made between him and the person already in police custody immediately prior and after the event and based on the transcripts of the conversation between him and the girlfriend of the person already in police custody. The applicant was sentenced to nine years in prison. Similarly, as in the Bykov case and in some cases versus the UK, the illegal grounds of covert operations were sufficient to amount to a violation of Article 8 of the Convention. However, the use of evidence obtained in such a manner, according to the Court was not sufficient to find a violation of the right to a fair trial under Article 6 of the Convention. The main reason for this seems to be fact that the accused had an opportunity to challenge the use of the contested evidence before the domestic courts.

Recent cases versus Croatia relating to legality of evidence obtained by the application of special investigative measures are especially interesting in the national context, particularly in light of the similarities between the national and Croatian criminal procedural law. In the case of Dragojević v. Croatia in 2007, upon the Prosecutor’s motion, the investigative judge of the Zagreb County Court authorized the tapping of the phone of the applicant (suspected of drug trafficking). Based on evidence collected by the application of these measures, (in 2009) the applicant was found guilty of drug trafficking and money laundering and was sentenced to nine years imprisonment. In 2010, the Supreme Court confirmed his conviction, while in 2011 the Constitutional Court dismissed the applicant’s constitutional complaint.

In pursuance with the domestic law, the covert surveillance was approved in advance, but the orders issued by the investigative judge were founded only on a statement relating to a request of the Public Prosecutor and the claim that “the investigation could not be conducted in any other manner” lacking information whether less intrusive measures were available. The Court in Strasbourg could
hardly accept such an interpretation of the domestic LCP. Thus, the Court considers that in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law. This can accordingly be observed in the present case, where the competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant’s Article 8 rights. Furthermore, the Court found that the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure ordering the interception of the applicant’s telephone was not shown to have fully complied with the requirements of lawfulness, nor did it restrict the interference with the applicant’s right to respect for his private life and correspondence to what was “necessary in a democratic society.” According to the Court, there has therefore been a violation of Article 8 of the Convention. However, the Court did not find a violation of Article 6, para. 1, upon the applicant’s claims of alleged lack of impartiality of the trial bench and the use of evidence obtained by secret surveillance.

In the case of Bašić v. Croatia, the applicant (the accused), who defended himself by remaining silent contended that his secret surveillance had been unlawful because it had not been based on orders containing proper reasoning by the investigating judge, as required under the relevant domestic law and the case-law of the Constitutional Court. In addition, the police report concerning the applicant’s surveillance did not contain any recordings accompanying that report. The Strasbourg Court found that the investigative judge too easily concluded that the “the investigation could not be conducted by other means, or would be extremely difficult,” without offering a reasoning in the specific case, especially focusing on the fact that the investigation could not be pursued by the application of other less intrusive means.

Similarly as in the Dragović case, the Court found that the lack of reasoning underlying the investigating judge’s order did not in practice secure adequate safeguards against various possible abuses. The Court thus considered that such practices were not compatible with the requirements of lawfulness nor were they sufficient to keep the interference with an applicant’s right to respect for his private life and correspondence to what was “necessary in a democratic society”, as required under Article 8.

In respect of the right to a fair trial under Article 6, the Court also strictly referred to its findings in the Dragović case (and a series of other previous judgments). Thus, the claim of automatic violation of the right to privacy does not pose a problem in the application of illegally obtained evidence. Instead, it is examined whether procedural safeguards established with the previous case law of the Court are respected. Furthermore, again there is an emphasis on the public interest in the context of investigating and punishing crimes, vis-à-vis the interest of the individual (as in other previous judgments, the Court avoids the use of the term “rights”), that the evidence against the accused by obtained in a legal manner.

The first issue to be examined in this context is whether the defendant (applicant) was given the opportunity to challenge the authenticity of the evidence and the use thereof. The Court notes that the applicant was given, and effectively used, such an opportunity during the proceedings before the first-instance court, and in both his appeal and the constitutional complaint. The domestic courts examined his arguments on the merits and provided reasons for their decisions. The fact that the applicant was unsuccessful at each step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use.

With regard to the quality of the evidence in question, which is a further element for the Court’s consideration, the Court notes that the applicant’s objection to the use of the evidence obtained by means of secret surveillance concerned the formal use of such information as evidence during the proceedings. He never contested the authenticity of the recordings reproduced at the trial and all the defence’s doubts as to the accuracy of the recordings were duly examined and addressed by the trial court.

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

Lastly, as regards the importance of the disputed evidence for the applicant’s conviction, the Court notes that the contested material was the decisive evidence on the basis of which criminal proceedings were instituted against him and it was likewise of decisive relevance for his conviction. However,
this element is not the determining factor in the Court’s assessment of the fairness of the proceedings taken as a whole. The Court reiterates that the relevance of the existence of evidence other than the evidence, which is contested, will depend on the circumstances of the particular case. In the present circumstances, where the substance of the recordings provided accurate and reliable evidence, the need for supporting evidence was correspondingly weaker.

In view of the above, the Court considers that there is nothing to substantiate the allegation that the applicant’s defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary. In conclusion, the Court finds that the use of the impugned recordings in evidence did not as such deprive the applicant of a fair trial. There has therefore been no violation of Article 6, para. 1 of the Convention.

5. LEGAL TREATMENT OF ILLEGAL EVIDENCE IN THE REGIONAL LEGISLATIONS

The collision of principles in the legal treatment of illegally obtained evidence is usually treated as evidence that lies between the free assessment of evidence by the Court on one hand, and legal evidentiary rules, on the other. From the practical point of view, the legislator needs to be made aware of these leading principles in order to be able to strike a relevant balance between effective law enforcement, establishing the truth and punishing the perpetrator.

When the legislator does not take into consideration these guiding principles in shaping the evidentiary rules, the burden of resolving the collisions is transferred to the court (i.e. the judge) that is to decide in the specific case, in which the illegally obtained evidence is the key to the resolution of the case. In democratic systems there is a third element to be taken into consideration when resolving this conflict – the human rights. On one hand, there are the fundamental human rights of the defendant, such as prohibition of torture, prohibition of inhuman and degrading treatment (Article 3 of the ECHR), and the right to a fair trial (Article 6 of the ECHR), which are elaborated in detail in section 4 of this Analysis, while on the other, similarly fundamental rights are guaranteed to victims of crimes, such as the right to life (Article 2), the right to liberty and security (Article 5) and protection against torture, prohibition of inhuman and degrading treatment (Article 3), which also ensures the right of the victim to effective protection.

The inadmissibility of evidence obtained by application of absolutely prohibited means, such as torture and similar is a must and does not leave room for use of such evidence, even if the evidence was elicited with a view to protecting the greater good (for example to save a life). The best manner of overcoming such conflict of interests and the practical tensions in the treatment of illegal evidence is to establish the prevailing interest in each case individually. Consequently, this Chapter offers legal comparison of the legal treatment of illegal evidence under the legislations of a number of countries in the Region in order to establish and compare various approaches to this issue. However, there can be no contextual understanding of the regional legislative provisions without explaining the theory and the comparative legal models which determine the exclusionary rules in procedural laws in the countries of the Region.

5.1. Exclusionary Rules and Admissibility of Illegal Evidence in Procedural Legislations under Comparative Law

The historical basis of evidentiary law in the Region can be traced back to the model of medieval procedural legislation. According to Đamaška, the existing provisions envisaging dismissal of illegally obtained evidence have their roots in the medieval canon law, from the times of Pope Clement V, entitled as Pastoralis Cura. That legislation envisaged that all evidence would be excluded if it had been obtained by violating procedural provisions of natural law. Furthermore, these exclusionary rules were interpreted and further elaborated by influential lawyers (Farinačius and Karpov). They developed the relevant provisions and stated that also evidence deriving from the initial evidence that was obtained by violation of procedural rules will be considered as null and void, which is contrary to the modern belief about the creation of the doctrine of the fruit of the poisonous tree by Judge Felix Frankfurter, judge at the US Supreme Court, more than 6 centuries later. The doctrine of the fruit of the poisonous tree has been generally accepted in modern procedural law, and the application of the doctrine is a subject of a comprehensive scientific and expert debates.

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94 This is the well-known case of Magnus Gafgen who kidnapped 11-year-old child in order to blackmail the child’s parents. At the time of his arrest, the child was already dead, and he refused to make any statements to the police. After the police threatened him with torture, instructed by the Chief of the police Wolfgang Daschner, he confessed to the murder and told the police where the body was buried.

95 Except for the limited influence of the French law on criminal procedure of 1808, not only that the inquisitorial model had influence on the countries of the Adriatic coast (via Venice), but it shaped to a great extent the Austrian inquisitorial criminal procedure, which was dominant in the Northern and in the Western Balkans, by which the evidentiary law of the Ottoman Empire that dominated for centuries the Southern and Eastern Balkans disappeared completely. For further reading on these historical developments see V. Bayer, (1995) Kazneno procesno pravo – odabrana poglavlja, Vol. II, Povijesni razvoj kaznennog procesnog prava, Zagreb.


97 Ibid.

98 Ibid.

99 See: Nardone v. United States, 308 U.S. 338 (1939). The doctrine underlying the name was first described American case law in Silvertone Lumber Co. v. United States, 251 U.S. 385 (1920).

100 For example Croatia. See B. Obradović / I. Zupan „Ploviot otrovec vocke“ u hrvatskom i poredbenom pravu, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), Vol. 18, No. 1, pp. 113-142.
The theory about illegal evidence in the Anglo-Saxon law serves as an important inspiration for legislative reforms of evidentiary rules in the countries in the Region. Despite the fact that certain standards regarding evidentiary rules from countries with continental law have been accepted, the rules on the legal treatment of illegally obtained evidence in the Balkans are greatly influenced by the model adopted in the German legal doctrine. As different from common law countries, which rely on legal precedents and which have a complex developed system of evidentiary prohibitions and exclusionary rules under their case law, Germany and the legislations of the Balkan Region countries regulate this area primarily under law, containing strictly defined provisions in the procedural laws. However, not all countries in this Region follow this legal doctrine. Some of the countries apply a mixed approach, i.e. their evidentiary rules are a hybrid combining the continental system of legally defining the rules and the established case law in this area.

German evidentiary rules are guided by the doctrine of Beweisverbote of 1950, as a reaction to the Nazi repressive criminal procedure. The present day federal LCP in Germany sets forth an absolute prohibition on the use of evidence obtained by torture and other inhuman and degrading treatment of the defendant, by which his/her fundamental rights have been violated. However, the German law also incorporates the so-called doctrine of measuring or balancing (Abwägungslehre) i.e. the "proportionality" test, a theory that has been adopted in the Croatian criminal procedural law. According to this doctrine, minor violations of the legality will be tolerated in more serious criminal cases. The principle of proportionality in regulating the system of illegal evidence in the Croatian law is supported by the need to ensure a balance between human rights and freedoms protection, on one hand and effective criminal prosecution, on the other.101

Thus, in pursuance with the principle of proportionality, the intensity and nature of the violation of rights is significantly minor compared to the gravity of the crime in the proving which of the evidence obtained by violating such rights may be used. Therefore any violation of the proscribed procedure in obtaining and producing the evidence may not be considered a reason on which grounds such evidence will be always, as a rule, assessed as illegal. Instead, the evidence will be assessed in each individual case.102

The first absolute prohibitions of certain evidence appeared for the first time in the criminal procedural legislation of former Yugoslavia in 1967.103 The exclusion of evidence obtained in an illegal manner was regulated under Article

218, para. 10 of the LCP. The criminal procedural laws of the countries of former Yugoslavia took over the absolute prohibition of use of evidence obtained in an illegal manner, as a legal heritage from former Yugoslavia: Bosnia and Herzegovina (Article 10, para. 1 104), Croatia (Article 10, paras. 1 and 2), Kosovo105 (Article 155), Montenegro (Article 11) Serbia (Article 85, para. 5) and Slovenia (Article 237).

However, neither the German nor the former Yugoslav criminal procedural laws did provide a fully comprehensive legal framework regarding the exclusionary rules for illegally obtained evidence. Maintaining the continuity of codifying the criminal procedural law as of 1877, Germany even today does not have a fully comprehensive system of legal rules governing the issue of exclusion of illegal evidence. In fact, most of the standards have been developed under the case law of German courts, which have rejected the automatic legal prohibition of the use and the presentation of illegally obtained evidence, envisaged in the law and introduced a new approach to this issue.106 The reasons for this are related to the primary goal of the exclusionary rules of illegal evidence. Namely, in the accusatory system of Anglo-Saxon law, the primary goal of the rules excluding evidence from a criminal procedure is to prevent the law enforcement bodies from obtaining evidence in an illegal manner, while the German procedure places the emphasis on the principle of establishing the material truth by the court. Accordingly, the German legal doctrine is based on the theory that the adoption of an increasing number of rules for exclusion of evidence results with diminished chances of establishing the truth in each individual case. This is why the German Federal Court has dismissed the doctrine of the fruit of the poisonous tree. The Court is of the opinion that all proposed evidence should be used regardless of their origin, and if it is established that certain evidence has been obtained illegally, then the proportionality test is to be applied.

This doctrine has been applied in the Croatian legislation. Thus, the fundamental rule for excluding evidence is set forth under the Croatian Constitution, which in Article 29, paragraph 4 envisages that "Evidence obtained illegally may not be admitted in court proceedings." As set forth under the Constitution, this rule is of absolute character and was transposed in Article 9 of the LCP of Croatia of 1997. However, this created great many practical problems, i.e. it limited the efficiency of the criminal prosecution in cases of organized crime and corruption in Croatia. Taking into consideration that enhancing the efficiency and effectiveness of criminal prosecution was one of the main conditions for the integration of Croatia in the European Union, the second most important reform of the procedural legislation introduced a fundamental change in the rules

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103 See: D. Krapac, Nezakoniti dokazi u kaznom postupku prema praksi Europskog suda za ljudska prava, Zbornik Povrog fakulteta u Zagrebu, Vol. 60 (2010), No. 6, p. 1210.

104 There is the same provision in the Federation of Bosnia and Herzegovina, in Republika Srpska and in the Brcko District.

105 All references to Kosovo, whether to the territory, institutions or population, in this text should be understood in full compliance with United Nations Security Council Resolution 1244.

excluding evidence from a criminal procedure. Therefore, the 2008 LCP introduced for the first time the model of “balancing” or “measuring” to be applied to all types of evidence, except for evidence, which according to the German doctrine is a part of the first (intimate) sphere, i.e. this being evidence obtained by torture, inhuman and degrading treatment. However, this provision was annulled by the Constitutional Court of Croatia, with the reasoning that the rule of “balancing” or “measuring” and the proportionality test must not be applied in cases of violation of the human dignity.107

After the adoption of amendments to the LCP of Croatia, the relevant provisions were amended and in practice the application of this doctrine is regulated by dividing the illegal evidence in four categories of illegal evidence, as follows: 1. illegal evidence obtained with torture, inhuman and degrading treatment; 2. illegal evidence obtained by violating the rights to defence of the defendant; damaging the reputation or honour; infringing upon the principle of inviolability of the personal and family life, except in cases of obtaining evidence in cases of organized crime in which the interests of the criminal prosecution prevail over the violated right. However, in the context of this category of evidence the principle of proportionality may be applied with regard to evidence obtained by violating the three referred to fundamental rights, but the judgment must not be based only on such evidence (Article 10, para. 3 of the LCP). 3. The third category of evidence consists of evidence obtained by violating provisions governing the criminal procedure and, in these cases, the doctrine of “balancing” may not be applied, since the interests have already been weighed out by the legislator that has proscribed the provisions of the criminal procedure.108 4. The fourth category of illegal evidence is evidence deriving from the doctrine of the “fruit of the poisonous tree”, the application of which, according to Croatian literature109 and the case law of the Supreme Court of Croatia110 is rather limited.

The Ruling of the Supreme Court of Croatia in the case involving the former Mayor of Vukovar, who was convicted of actively bribing two council members from the opposition party (HDZ), can serve as an example of how the doctrine of balancing is applied in the Croatian legal system. One of the two council members secretly recorded the conversation and the prosecution presented the recording as evidence before the court. After the first instance court excluded the recording as inadmissible evidence, the Ruling of the Supreme Court stated that the recording is to serve as valid evidence considering the prevailing public interest in this case.

110 See: Supreme Court of Croatia, Ruling of 7 March 2007, Case No. 1K2-55/06.

In the case it is undisputed that person B. recorded [...] the conversation [...] between her and the accused taking place in his office on [...] and that the recording was made without a court order in a preliminary procedure and without the knowledge or consent of the defendant, on the basis of which the first instance court found that the recording represented illegal evidence within the meaning of Article 10, para. 2, sub-para. 2 of the LCP [...]. The Court decided that the circumstances in the specific case, and taking into consideration the public interest of the Croatian society, and the prohibition of trading in mandates of city council members, justify the fact that the conduct of the defendant amounts to a serious crime in respect of which the interest of the criminal prosecution and the punishment of the perpetrator prevail over the violation of his rights [...] by unauthorized recording of the conversation without a court order and without his knowledge or consent. In light of the above stated, the evidence excluded by the first instance court as illegally obtained [...] in the further procedure shall not be considered as illegal, within the meaning of Article 10, para. 3 of the LCP.”

This landmark decision of the Supreme Court of Croatia sets the legal standard that political corruption, even at the local level, shall be considered as a serious crime, in respect of which it shall be allowed to apply the doctrine of “balancing” of illegally obtained evidence.

However, the Croatian exclusionary rules regarding illegally obtained evidence are unique in South-Eastern Europe. Procedural laws of all other legal systems in the region do not envisage explicit rules allowing “balancing”. Instead, they set forth only the absolute rule of excluding illegally obtained evidence.

According to Article 10, para. 2 of the LCP of Bosnia and Herzegovina, the Court may not base its decision on evidence obtained through violation of human rights and freedoms proscribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of the provisions governing the criminal procedure.111 Upon first reading, it might seem that this provision does not allow the application of the doctrine of “balancing” in cases involving illegally obtained evidence. However, the first part of this provision may be interpreted as cracking the door open for the application of this doctrine in exceptional cases, especially in light of the fact that the Court is to take into consideration guaranteed rights of victims in the criminal procedure according to the Constitution and international treaties.112 The second part of this provision concerns the exclusion of evidence obtained by substantive violation of the provisions governing the criminal procedure, while one of the substantive violations of the LCP, according to Article 297, para. 1, item
Proceedings." The first part of this provision may be interpreted as a possibility to apply the proportionality test under the doctrine of "balancing" or "measuring" in exceptional cases, especially having in mind that the court is to take into consideration the rights of the victim. The second part of the Article excludes illegal evidence under the "fruit of the poisonous tree" doctrine. It is, however, important for the courts to also take due account of the preceding paragraph of the same Article, which states that courts shall appraise evidence at their discretion (Article 17, para. 1 of the Criminal Procedure Code), which introduces flexibility in the use of directly or indirectly obtained illegal evidence.\footnote{Montenegro has ratified the ECHR, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.}

According to Article 18, para. 2 of the **Slovenian LCP** "The court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which under this Act may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence." The first part of this provision may be interpreted as facilitating the application of the proportionality rule under the "balancing" doctrine, with the possibility of separating this provision into three parts. First, as stated previously, considering that often the constitutional rights of victims in the criminal procedure are affected, the first part of this provision may be interpreted as a possibility for applying the proportionality test. The second part of this provision excludes the use only of evidence obtained in contravention of the provisions of the Criminal Procedure Act, for which the Act explicitly stipulates that the judgment may not be based on, which in principle allows the use of other evidence, in spite of same procedural violations in obtaining such evidence. The third part excludes evidence of the "fruit of the poisonous tree", but such "fruits" depend on the fact whether the court will admit or not the evidence, which makes up the "tree". Similarly, it is also important to take into due account the preceding paragraph of the same article, which states that the right of courts to evaluate the facts presented shall not be bound, or limited by any specific formal rules of evidence. Thus, Article 18, para. 1 of the Criminal Procedure Act potentially enables flexibility with respect to admissibility of evidence.

Under the procedural law of **Kosovo**, the general prohibition of illegal evidence is set forth in Article 257, para. 2 of the LCP, which reads as follows: "Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Law or other provisions of the law expressly so prescribe." Paragraph 3 of this Article envisages that the court may not base a decision on inadmissible evidence. The **LCP of Kosovo**\footnote{Ibid} does set forth explicit exceptions from this rule, which is accepted as an absolute prohibition. However, Article 294, para. 1 of the LCP and the extensive interpretation of this provision

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\footnote{The Courts do not share this opinion: Supreme Court of Bosnia and Herzegovina, Ruling of 16 May 2012, Case No. 58 X 05/9937 12 KZ.}

\footnote{Supreme Court of Republika Srpska, Ruling of 27 March 2007, Case No. 118-0-K-07-000 006.}

\footnote{See: Advokatska komora Srbije, Projekat reforme krivičnog zakonodavstva: konacan izvjeestaj 2016 godina, Beograd, p. 48.}
in legal theory state that admitting illegal evidence is only possible if neither of the parties in the criminal procedure files a motion objecting to admitting such evidence, except in cases when such evidence would violate constitutional rights of the defendant.

5.2. Challenges Related to the Substantive Criminal Law

One of the principles of continental legal systems, which stems from the German legal doctrine, is the principle of unity of the legal order (Einheit der Rechtsordnung). This principle, incorporated in the legal systems in the Western Balkans and South-Eastern Europe, means harmonization of the legal system, i.e. the legal system is to avoid conceptual and systemic differences between different legal areas. The unity of the legal order requires that what one branch of law justifies (for example the criminal law) must also be justified in other branches of law.\(^{119}\)

For example, according to Article 143, para. 4 of the Croatian Criminal Code, communication surveillance is justified if it serves “the public interest or other interest that prevails over the interest of protecting the privacy.” This provision is founded on the “balancing” doctrine, i.e. the theory of proportionality. The Croatian legislator has resolved this problem by setting forth explicit procedural provision, which allows the application of the proportionality test in deciding on the exclusion of evidence (Article 10, paragraph 3 of the Criminal Procedure Act). Yet, what is the judge to do if there is no such a procedural provision?

This type of a situation can be encountered in Kosovo. Thus, Article 205, para. 4 of the Criminal Code of Kosovo, does not envisage criminal liability if the photographing or recording is conducted to discover a criminal offence or the perpetrators of a criminal offence, or to present as evidence to the police, prosecution or court, and if the photos or recordings are submitted to these authorities. Despite the fact that procedural provisions explicitly do not allow admission of such evidence, it is clear that the Criminal Code of Kosovo justifies the use of such evidence before courts. Thus, not only the justifications exclude the illegality of crimes, but also represent the rights of individuals.

This leads to the general conclusion that if the evidence has been acquired by committing a crime, the illegality of which is excluded based on the grounds for justification set forth under the LCP, such evidence may be used in court. For example, if the evidence has been obtained for purpose of self-defence - for example person A starts recording as of the moment when person B starts to threaten him/her. In such a case, this evidence must be allowed to be admitted in court. The grounds for the justification need not be regulated at all in substantive criminal law. For example, consent has not been regulated as a ground for

justifying in the criminal codes in the Western Balkans, but it is an indisputable ground for justification. Furthermore, if a person gives his/her consent to be recorded, such a recording may be used as evidence in a criminal procedure, since the given consent excludes the illegality of the recording.

Considering that the criminal codes in the region (with the exception of Croatia, as well as in the Kosovo legal framework) have not explicitly regulated the grounds for justification of unauthorized recording, at the theoretical level, it is still possible to apply supra-legal grounds for justification in such cases, and then to consider the admission of the contents of such evidence in the criminal procedure. In the context of transitional justice in the Western Balkans, and having in mind that in some of these countries the previous regimes obstructed justice and suppressed the rule of law, perhaps it would be possible to apply the Radbruch formula to ensure justification and recognize certain, otherwise illegal evidence, with a view to preventing “unbearable injustice.”\(^{120}\)

In the end, exclusionary rules and rules on admissibility of illegal evidence in the criminal procedural laws in the Western Balkan legal frameworks today are greatly influenced by the Anglo-Saxon and German legal standards. Despite the fact that these models have not ensured a fully comprehensive legal framework for exclusion of illegally obtained evidence, some of the authorities in the region have successfully developed such comprehensive legislation, which elaborates these rules. The best example is Croatia, which fosters a combined approach, applying the proportionality test, which does accept in certain situations illegal evidence, yet it succeeds in securing sufficient protection of the human rights of the defendant.

Despite the lack of such comprehensive regulations in other places in the Western Balkans, rules of interpretation could be developed to enable the application of the proportionality test and to help establish the truth in criminal procedures by expanding the rules on admissible evidence. In such a setting, there are three options for judges, First, insufficiently clearly defined provisions on evidence need to be pointed out and then initiatives need to be raised to interpret the rules in a way that enables the application of the proportionality test on the constitutional rights of the defendant against the background of other interests, while focusing on the human rights of victims. Courts should not interpret the rules for excluding evidence as rules that are isolated from the rest of the legal norms. The judges’ interpretation of these rules must rely on the fundamental evidentiary principles, especially considering that all Western Balkan legal systems have integrated the principle of free assessment of evidence. This means that the courts are not bound by any specific formal evidentiary rules which mean that the exclusion of evidence must be treated as an exception from the general principle. Furthermore, courts are allowed to take account of the grounds for justification as


\(^{120}\) See G. Radbruch, Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristenzeitung, 1946 p. 107.
set forth in substantive criminal law, as grounds for admissibility of evidence. In this respect, they are not limited to rely only on written laws, being able to bridge the gap with pertinent case law.

In any case, the right to privacy and the privilege against self-incrimination do not exclude the application of unlawful communication interception. These human rights, widely recognized in contemporary legal systems, do not incorporate a general prohibition that would preclude that some of the statements of the defendants not be used against them. Otherwise, it would not be possible to use a letter that the defendant wrote to another person, as part of their private communication, as evidence in a criminal procedure.

In regard to crimes that have been covertly recorded there must be another general consideration made. Such evidence must not be excluded, because any different approach or position on this issue would lead to the absurd conclusion that the defendant has the right to privacy while committing a crime. In any case, this is subject to the proportionality test. It is important, however, to emphasize that if the proportionality test under the “balancing” doctrine starts being applied by courts in the regional countries, this could loosen the legislative framework, which at first glance seem to exclude all evidence obtained by violating procedural rules.

6. LEGAL TREATMENT OF ILLEGAL EVIDENCE IN THE NATIONAL LEGISLATION AND JURISPRUDENCE

Legality of evidence is regulated by the fundamental principles of the 2010 LCP. Thus, the first paragraph of Article 12 of this Law emphasizes the illegality of extorting a confession or any other statement from the defendant or any other person who participates in the procedure. In this paragraph, the legislator has very clearly proscribed the prohibition of extorting a confession or any other form of statements from the defendant or any other person involved in the criminal procedure. This position is a response to the requirements deriving from international documents, especially the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The intention of the Council of Europe, but also of other international institutions working on this issue is clear, meaning that states are to guarantee their citizens the right to be protected against torture and inhuman or degrading treatment. It is evident that one of the ways of ensuring such a protection is to qualify evidence produced and obtained with such a treatment as illegal or inadmissible, and prohibited to be used in a criminal procedure.

In the second paragraph of Article 12 of the LCP, the legislator stipulates that any evidence obtained in an unlawful manner or by violation of the rights and freedoms established with the Constitution, laws and international agreements, as well as any evidence resulting thereof, may not be used and may not provide the ground for a judicial verdict.

The term used in this paragraph (“obtained in an unlawful manner”) has opened more dilemmas than the meaning of the entire article. It is clear that the legislator is focused on the manner of obtaining evidence, and not on the manner of making the evidence. This is a very important difference in regard to the assessment of evidence in a criminal procedure. Furthermore, it is not a coincidence that the focus is exactly on the gathering of evidence and not on making evidence. Thus, making evidence illegally does not automatically make the piece of evidence illegal if it has been obtained in accordance with the Constitution, laws and international documents. For example, if a person acquired a fire arm in an illegal manner and used the fire arm to kill another person and in the course of the search of the house of the suspect, conducted in full compliance with the provisions of the LCP and with a court warrant to that effect, the fire arm is found, the court will not dismiss that exhibit of evidence as illegal, because the fire arm has been acquired illegally. The fact that the fire arm has been acquired illegally is of no relevance for the legality of the procedure of gathering evidence, instead it makes the grounds for criminal prosecution of the suspect, not only for murder, but also for the crime of Manufacture and acquisition of weapons and means intended for committing a crime under Article 395 of the Criminal Code.

On the other hand, it is very important to determine whether there is a difference between the constitutional rights that are violated while making the evidence. For example, the evidence gathered by violating the right to protection against torture and inhuman treatment and punishment is not the same as evidence gathered by violating the right to privacy. The ECHR has an interesting case law regarding this issue under which there is a clear difference, as elaborated in the other sections of this Analysis. As explained above, the first paragraph of Article 12 clearly prohibits extorting a confession or any other type of statement, while the second paragraph of the same Article places the emphasis on how the evidence was obtained and not on how the evidence was made. Thus, if a teleological approach is applied to interpreting the said provisions, it could be said that according to the national LCP evidence made by application of torture

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121 Extorting a confession or any other statement from the defendant or any other person who participates in the procedure shall be prohibited.” LCP (2010) Article 12, para. 1.

122 See: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2002).

123 See LCP (2010), Article 12, para. 2.

124 Lawyer Aleksandar Godzo delivered an elaborate comment on this topic at the scientific debate entitled “Open issues regarding evidence and proving in criminal procedures”, held on 10 March 2017, in the Arka Hotel, in Skopje, organized by the National Association of Criminal Law and Criminology and the Strategic Research Centre at the MANU.
or extortion is prohibited and inadmissible, both in terms of making and in terms of gathering the evidence. However, evidence that was made in an illegal manner, by violating the right to privacy, but which has been obtained in a legal manner and by abiding by the provisions of the LCP, may not be automatically rejected as inadmissible and illegal evidence, if such evidence fulfils certain conditions defined under the case law of the ECHR.

As a result of the political crisis in the country, which was exasperated following the publication by the then leader of the opposition of conversations between high-ranking government officials that were illegally intercepted, in September 2015 a SPO was established. It was formed as a result of lack of will within the regular public prosecution offices to initiate investigations for high government officials and because of the selective approach of the public prosecution, which had filed charges only in relation to “the acts related to the creation, obtaining, disclosure and publication of intercepted communications, but not in relation to many potentially criminal or unlawful acts revealed by the content of the intercepted conversations themselves.”

The purpose of the establishment of this independent institution was for this institution to investigate and establish who ordered and conducted the illegal interception of communications, which covered more than 20,000 citizens of the country and to establish the criminal liability for this gross violation of the rights of citizens, as well as for the crimes exposed with the illegally intercepted conversations.

However, the SPO many obstacles in its work, owing to the fact that many state institutions (such as the Central (Company) Register, the Council of Public Prosecutors, courts, the Security and Counterintelligence Directorate and others) refused to cooperate and to hand over to the SPO the requested case files, information and evidence.

Basic Court Skopje I declared the illegally intercepted communications as indications and in each case instituted by the SPO, such evidence was set apart from other evidence and was labelled as illegal evidence that may not be used in a criminal procedure. Such position of the Basic Court Skopje I runs contrary to the hitherto jurisprudence of the courts in the country, and it also runs contrary to the ECHR case law. Furthermore, this decision of the Basic Court Skopje I runs contrary to Article 12 itself and its interpretation, especially taking into consideration the teleological approach to its interpretation explained above. In addition, the Supreme Court has discussed this issue on a number of occasions with a view to defining a position in answer to the question whether evidence obtained illegally may be used as evidence in court procedures.  

A landmark judgment featuring the case law elaborating upon this dilemma is Ruling No. KOKZ-35/15 of the Skopje Appellate Court on 26 September 2016. It is a landmark judgment owing to several reasons. Namely, part of the appeal of the defendants in the case called Shpion-Spy was related to the fact that the first instance court judgment against them was founded on illegally made audio recordings, which were made without a court warrant authorizing the application of special investigative measures. According to the defence, in this case, evidence made in such a manner (i.e. the audio recordings and the transcripts made illegally by one of the co-defendants having made the recordings) may not be used as evidence in the procedure, and as such this evidence should be set aside from other evidence. The defence argued that the fact the first instance court accepted such, according to to the defence “illegal evidence”, the court has incurred a substantive violation of the provisions of the criminal procedure under Article 381, para. 1, subpara. 8 of the LCP, having “based the judgment on evidence upon which according to the provisions of the LCP a judgment must not be based.” The Skopje Appellate Court found this part of the appeal to be without any grounds and in this respect it referred exactly to Article 12 of the LCP (identical to Article 15 of the previous LCP), offering an interpretation of this Article, which is of essential importance:

“In pursuance with Article 15, para. 2 of the LCP, evidence obtained illegally or by violation of freedoms and rights set forth under the Constitution of the country, the law and international treaties and the evidence resulting from such violations may not be used in court procedures and the court judgment may not be based upon them. It is evident from the wording of these provisions that the legislator places the emphasis on the manner in which the evidence has been obtained and not on the manner in which such evidence was made. The obligation that evidence is obtained legally applies exclusively to authorities participating in the procedure and if any of those authorities obtain evidence illegally, it is indisputable that such evidence may not be used in the procedure. In the specific case, the contested audio recordings of conversations between the defendant Efremov and some of the other co-defendants have been obtained through the application of special investigative measures of inspection and search of a computer system, seizure of a computer system or part thereof and seizure of the computer database, under Article 146, para. 1, sub-para. 2 of the LCP, which were ordered and executed in accordance with the provisions of the LCP, which means that the referred to evidence has been obtained legally. The use of such evidence in the procedure is not in contravention of Article 15, para. 2 of the LCP, for as this Court assesses, and as stated in the written motion of the Prosecutor, there must be a difference made between the manner in which evidence has

123 See: Independent Group of Senior Experts, “The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts Group on Systemic Rule of Law Issues Relating to the Monitoring of Communications revealed in the spring of 2015”, June 8, 2015 (hereinafter “Priebe Report 2015”), p. 9, noting that “the group was informed by several sources that there is an atmosphere of pressure and insecurity within the judiciary. This is confirmed by the discoveries that came through the leaked recorded conversations. Many judges believe that advancement within judicial ranks is reserved for those whose decisions go in favor of the political establishment.”

126 See: Paper by the President of the Supreme Court (2017).

This Ruling of the Skopje Appellate Court, establishes a very important practice of determining the difference between the terms making of evidence and obtaining evidence, in which respect the Court has established that if the evidence was made illegally (for example recordings made privately and without any authorization, without a court warrant for application of a special investigative measure under Article 252 of the LCP), does not automatically make that item of evidence (the recorded conversation) illegal. In addition, if such evidence has been obtained legally (by legally applied special investigative measure under Article 252 of the LCP or in another manner set forth under the LCP) then such evidence may be freely used as legal and admissible evidence in a criminal procedure.

It should be underlined that the difference between the term “making” and “obtained” evidence is not made in the above quoted Croatian LCP, nor is such a difference made in the ECHR case law. Thus, the Croatian LCP clearly defines what is illegally obtained evidence, and clearly sets the exception allowing illegally obtained evidence that may be used as admissible evidence in the criminal procedure, when the public interest prevails. As already underlined, the ECHR case law establishes that the use of illegally obtained evidence in a criminal procedure does not automatically amount to a violation of Article 6 of the ECHR protecting the right to a fair trial.

The case law produced by the Skopje Appellate Court in fact establishes a situation in which illegally made and legally obtained evidence may always be used and is allowed in a criminal procedure, owing to the fact that the legislator has placed the emphasis on the obtaining and not on the making of evidence. Based on this established rule, there is no obstacle that illegally intercepted communications, which are at the heart of the mandate of the established SPO, be used as legal and admissible items of evidence, taking into consideration that the evidence has been obtained legally in compliance with the provisions of the Law on SPO.

It is interesting that the Skopje I First Instance Court has a similar practice of accepting such evidence in criminal procedures, and based on such evidence it has ordered the pre-trial detention and has adjudicated in cases involving persons caught in flagrante. In this context, there is the well-known case in which a baby sitter was sentenced to prison exactly by the Skopje I First Instance Court, based on a video recording made without authorization of any authority by the

father of the child, showing how the baby sitter ill-treats and beats the baby she was supposed to provide care for. The Skopje I First Instance Court accepted as evidence the video recording made without authorization, to which the defence objected and requested that this item of evidence be set aside and proclaimed as inadmissible and illegal.129

6.1. From Formal Qualifications to the Principle of Protecting the Public Interest

The illegally recorded audio materials were challenged as evidence, only in cases instituted by the SPO before the Skopje I First Instance Court. However, later the Appellate Court deciding upon an appeal filed by the SPO on this issue adopted a Ruling according to which illegally recorded audio materials are accepted as evidence in the procedure, after they have been initially set aside and treated only as indications by the first instance court. Part of the Report of the SPO of 15 September 2017 elaborated upon this issue:

“Furthermore, as regards the work of this Special Public Prosecutor’s Office, it is important that I underline that deciding upon our appeal against a court decision under which the recordings were set aside and it was established that they may not be used as evidence in the procedure, the Skopje Appellate Court established that the audio recordings were to remain part of the overall evidence material and that they may be used as evidence in the procedure. This Ruling of the Appellate Court is of exceptional importance and is in line with the opinions of large number of university professors and legal experts, who in their public statements have stated that considering the specific legal mandate of this Special Public Prosecutor’s Office, the materials related to or arising from the contents of the illegally intercepted communications may be used as evidence in the procedure. In addition, the Ruling of the Skopje Appellate Court confirms the fact that the adoption of the Law establishing the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications, per se, incorporates the audio recordings of the intercepted communications in the legal order of the country and based on the said Law, this Public Prosecutor’s Office has the mandate, but also the obligation to investigate crimes and prosecute perpetrators of crimes related to or deriving from the contents of the illegally intercepted communications.”130

In its Report, the SPO refers to a Ruling of the Appellate Court of 4 August 2017, regarding the case of Nasilstvo vo opština Centar / Violence in the Municipality of Centar, in which the Appellate Court accepted the appeal of the SPO against the decision of the First Instance Court to set aside the conversations

128 Ibid.

129 See: Judgment No. K 3574/15, of 26 January 2016 of the Skopje I First Instance Court, Skopje, confirmed with a Ruling of the Skopje Appellate Court No. K2 197/1.2016, the case of the baby sitter beating up a baby in Skopje.

130 See: Report about the activities of the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications covering six months (period from 15 March to 15 September 2017), published on 15 September 2017, in Skopje.
recorded without authorization and not to admit them as evidence in the criminal procedure. The ruling in question is Ruling KZ No. 729/17, in which the Appellate Court vacated the decision of the Skopje I First Instance Court No. K 1904/16, dated 16 December 2016. In the reasoning of the Ruling, the Appellate Court underlined the following:

"It is the opinion of the Chamber of this Court that the appeal claims are founded, based on the following reasons:

Article 12, para. 1 of the LCP prohibits the extorting of a confession or any other statement from the defendant or any other person who participates in the procedure. This provision relates to personal evidence, i.e. evidence given by individuals, which can be divided into statements by the defendant, by the witness and by an expert witness. In order for such statements be qualified as evidence, they must be taken in pursuance with the strict rules governing the criminal procedure. In addition to stipulating the rules on the obtaining of evidence, the LCP, also stipulates a procedure for setting such statements aside from the case file, qualifying them as illegal evidence in case the strict evidentiary rules have been violated, which is in accordance with Article 3 of the ECHR.

Article 12, para. 2 of the LCP stipulates that any evidence collected in an unlawful manner or by violation of the rights and freedoms established in the Constitution of the country, the laws and international agreements, as well as any evidence resulting thereof, may not be used and may not provide the ground for a judicial verdict. This paragraph regulates the manner of obtaining evidence, and not the manner of making evidence or the contents of the evidence, which sets a legal standard in defence of the public interest.

Therefore, regardless of the fact of how the contested audio recordings of telephone conversations in this specific case have been made, the recordings themselves have been obtained legally and may be used in the procedure, also in pursuance with the Law Establishing the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications (Official Gazette No. 159/15) and Article 287 of the LCP which regulates the duty to deliver information to the public prosecutor, in this case the prosecutor that has the mandate to investigate and prosecute criminal offences related to and arising from the contents of illegally intercepted communications, and to whom the political party .... delivered these and other recordings, documents in electronic format and written evidence.

After all, the Skopje Appellate Court presented the same position on page 33 of its Ruling No. KOKZ.35/15, dated 26 September 2016.131

"According to this Court, with the adoption of the said Law Establishing the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications (Official Gazette No. 159/15), the audio recordings of the telephone conversations have been incorporated in the legal order in the country and it is on these grounds that the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications investigates crimes and prosecutes perpetrators and it is on these grounds that they become part of the evidence material.132"

This Ruling of the Skopje Appellate Court reaffirms the case law of this Court, under which a difference is made between the making and the obtaining of evidence, confirming once again the interpretation that Article 12 of the LCP exclusively prohibits a prohibition of illegally obtaining evidence and does not apply to how the evidence was made. Compared to the second instance Ruling adopted by the same Court in the case of Shpuiu/Spy, this is a very similar Ruling, since it refers only on the formal-grammatical and teleological interpretation of Article 12 of the LCP, without going into the substantive interpretation of the reason why it would be reasonable to allow the use of unlawfully recorded materials as evidence. This is done in another Ruling again adopted by the Appellate Court and again when deciding upon an appeal lodged by the Special Public Prosecutor’s Office regarding the case of Tortura/Torture.

At first glance, the Ruling No. KSZ-590/17 of the Skopje Appellate Court, adopted on 28 November 2017 is similar to the previously quoted Rulings of the same Court, especially in terms of the reasoning, which reaffirms the position that there is a difference between the illegality of making evidence and of obtaining evidence. This Ruling too confirms the interpretation that when the illegally made evidence is obtained legally by the parties to the procedure, there is no reason why such evidence would not be admitted in assessing the indictment. The essential difference, which is made in this Ruling, can be found on page 8 where the Appellate Court, while presenting the reasoning for the Ruling, finds that the illegally recorded materials may be used as evidence in the procedure, emphasizing that

"The first instance court and the parties offering arguments in support of their respective positions refer to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Human Rights Court, as regards the issue whether the evidence at hand may be used in the instituted criminal procedure.

The Chamber of this Court is of the opinion that when the public interest is protected, rights of the individual may not prevail over the public interest. Therefore, in a case of a serious crime, for which the defendants in this case were indicted, the evidence in question may be used in the instituted criminal procedure. Therefore, the Court cannot accept the claim of the defence that by admitting such evidence the freedoms and rights of the defendants guaranteed by the Constitution and Article 8 of the said Convention are violated. On the contrary, by affirming the public interest, by consolidating the democracy in the state, which is a guarantor of the functioning rule of

131 It is the matter of the Shpuiu/Spy case, which has been explained above.

132 See: Skopje Appellate Court, Ruling KZ-729/17, issued on 4 August 2017.
law, this principle is part of the fundamental values of the constitutional order of the country.133

As different from previous Rulings, this Ruling clearly emphasizes the principle of protecting the public interest and the case law of the Skopje Appellate Court recognizes the position that when it is a matter of protecting the public interest, the fact that an item of evidence limits or violates rights of the individual, does not make such an item of evidence inadmissible in a court procedure. This is a position of the Court of great significance and relevance since in the context of such a position what is of key relevance is not the manner of obtaining or making the evidence, but the purpose or goal such evidence is to serve, this being protecting the public versus the interest of the individual. The Ruling links the goal of protecting the public interest with consolidating the democracy in the country and the rule of law principle, which after all are fundamental values of the constitutional order. This corresponds fully with the interpretation of provisions of the ECHR and with the case law of the ECtHR with regard to the admissibility of evidence made by violation of certain human rights, especially when the matter at hand is the right to privacy protected under Article 8 of the ECHR.

In view of the case law produced in these cases, the Venice Commission had specific proposals relating to the Law on the Protection of Privacy,134 proposals which clearly demanded introducing the principle of public interest when deciding upon the protection of privacy of public figures, and especially of politicians. Hence, the Venice Commission clearly stated that the Criminal Code needs to be amended in order to enable decriminalization of the crime of illegal audio recording135 in cases involving the principle of protecting the public interest.136 Furthermore, the Venice Commission established that the Law on the Protection of Privacy by stipulating strict punishments for the publication of communications intercepted without authorization, runs contrary to the principle of protecting the public interest of citizens, who have the right to know about criminal conduct of people they have elected.137

The issue of admissibility of use of illegal evidence in court procedures may be viewed from the perspective of consolidating, but also of undermining the rule of law. This is a complex issue for the court, and its consideration and assuming a position on this issue demands elaborate skills, knowledge and professionalism.138 When it comes to the public interest and when it is a matter of events involving public figures and holders of office, the greatest public interest is to establish the truth (about what happened). The public is always concerned if suspects are free, and the public has a vested interest in the advancement of the rule of law.

However, regardless of the fact whether the Court will issue a decision setting aside illegal evidence or will base the judgment on such evidence, it is important that the decision also contains a reasoning on this issue within the framework of the free assessment of evidence in pursuance with Article 10 of the LCP and the duty under Article 16 of the Criminal Code. With a view to offering a better insight into the court practice, this Analysis offers brief summaries of judgments and decisions of courts from the four appellate court jurisdictions regarding evidence made by the application of technical devices and obtained without a court warrant that has (not) been used in the procedure:

1. Judgment of the Gevgelija First Instance Court,139 pronouncing three defendants guilty of the crime of endangering the security, under Article 144, para. 1 of the Criminal Code and punishing them with a fine. The defendants at the given month and year endangered the security of the private plaintiff - the damaged party, by seriously threatening his life; at one occasion, one of the defendants used his phone to send the victim an SMS with a threatening content, while on another occasion one of the defendants also using his mobile phone called the victim and threatened him verbally, while all three defendants verbally threatened the victim in their direct meetings.

The main evidence upon which the judgment was based is the SMS messages sent from the mobile phone and the contents of the telephone conversations. Such evidence obtained with the use of technical devices were not obtained on the basis of a court warrant, but were admitted as legal by the Court (Article 250 of the LCP), while it should be underlined that the defendants did not challenge the contents of the evidence and the manner in which the evidence had been obtained.

2. Judgment of the Skopje I First Instance Court of 2016140 for the crime of inflicting bodily injury, under Article 130, para. 1 of the Criminal Code. In the criminal procedure, it was not proven that the defendant had committed the crime in question. One of the evidence proposed to be produced in the course of the hearing by the victim was evidence acquired with the use of technical means - a CD containing a recording of the event. However, the Court did not admit such evidence, without offering any reasoning for such a decision. The second instance court vacated the first instance judgment141 and instructed the first instance court that the evidence be admitted and assessed as part of the overall evidence in order to fully establish the decisive facts, although the first instance judgment was based on many other primarily verbal items of evidence.

3. Ruling of the Skopje Appellate Court of 2016142 altering the judgment of the Skopje I First Instance Court No. KOK 107/13, dated 6 October 2014, as regards

137 Ibid.
139 See: Judgment No. K216/16, dated 2 February 2016 (final and confirmed).
141 See: Ruling of the Skopje Appellate Court, No. KZ 898/16, 2016.
the sentence and the award of the property claim (ex officio). With respect to the appeal claims of the defence that the judgment of the first instance court is based on evidence, which according to the provisions of the LCP a court judgment may not be based, i.e. audio recordings and transcripts of conversations among the defendants (the recordings were made by the first defendant who did not tell the other co-defendants that he was recording their conversations) the court offered the argument that in the specific case, the contested evidence (the audio recordings) were not obtained illegally, because the provisions governing the obtaining of such evidence apply only to authorities involved in the procedure, while in this specific case the audio recordings have been obtained with special investigative measures - inspection and search of a computer system, seizure of computer system or parts thereof and seizure of computer database, measures which were ordered in accordance with the LCP, which makes the evidence legally obtained evidence. Ultimately, the arguments lead to the conclusion that there must be a difference made between the manner in which evidence was made and the manner the evidence has been obtained. In this respect, the legality of the manner in which one of the defendants made the evidence by recording without authorization the conversations with his interlocutors - co-defendants, according to the court does not raise any doubts about the legality of the said evidence, since the evidence has been obtained legally, as described above. 143

The arguments of the court regarding the legality of the evidence in question – the audio recordings and transcripts – is sufficient and relevant, especially when a difference is made between how the evidence was made and how the evidence was obtained.

4. Ruling of the Supreme Court of 2010144 vacating the judgment of the Skopje I First Instance Court No. KOK 29/08, dated 19 December 2008 and the Ruling of the Skopje Appellate Court No. KZ 748/09, dated 23 June 2009, returning the case to the first instance court for a retrial, because the judgments of the lower instance courts were adopted on basis upon which, according to the provisions of the LCP, judgments must not be based. Namely, the DVD recordings, minutes and reports about applied special investigative measures, photo albums and other material evidence, which were obtained through application of special investigative measures were illegal and as such should have been set aside from the rest of the case file (the order for application of special investigative measure was issued with respect to one account of a crime, while in the court procedure the evidence gathered through the application of the special investigative measures was used for the conviction of defendants indicted for a different crime, for which in the period of criminal activity in question such an order could not have been issued in accordance with the law). This Ruling is closely related to the Ruling of the Supreme Court of 2014145, which also vacates judgments of lower instance courts – No. KOK 41/10, dated 24 February 2012 of the Skopje I First Instance Court, and No. KOKZ 39/12, dated 24 October 2012 of the Skopje Appellate Court, returning the case for a retrial, before a Chamber of the first instance court with a completely different composition, since in the retrial the first instance court adopted a judgment No. KOK 29/08 (see the above referred to
decision, entered in the records with a new number KOK 41/10), which was based on evidence deriving from illegal sources (fruit of the poisonous tree). 146

The briefly described case law of domestic courts leads to the conclusion that legality of evidence in a criminal procedure is considered by courts (judges) primarily from the viewpoint of violations of procedural rules for obtaining and producing evidence. In this context, it is evident that the assessment of the illegality of evidence does not require the application of other standards, except for standards set forth under the LCP. The challenge in assessing the evidence as admissible or inadmissible arises in cases in which it is necessary to determine whether the evidence (i.e. the manner in which it has been obtained or used) violates (limits) or does not violate some constitutional rights of an individual (most often it is a matter of Article 3 “automatic” inadmissibility; Articles 6 and 8 of the ECHR), then whether the violation of the right is in accordance with the law, whether the violation is necessary and proportionate (Article 8 of the ECHR). In case such evidence is admitted then it is necessary to assess the effect of the admission of such evidence both on the fairness of the court procedure (Article 6 of the ECHR- illegality of evidence does not automatically amount to violation of the right to a fair trial). Such examples of the case law are evidently complex and require a specific approach that would also include full compliance with the positions taken by the ECtHR. 147 In fact, the transposition of the case law of the ECtHR would mean to apply the meaning and practical effect of the positions assumed by the ECtHR and not repeating the wording of ECtHR judgments. This becomes even more important since the ECtHR case law is created through a dynamic and evolutive interpretation of the guarantees and standards set forth under the ECHR.

The normative strictness of the rules on non-admission of illegal evidence in a court procedure (Article 12, para. 2 of the LCP) does not correspond with the ECtHR standards, nor does it correspond with the standards stipulated under the Constitution. Such formalistic approach condoning a priori non-admission of illegal evidence as evidence that may not be used and upon which a court judgment may not be based, deprives the provisions of the LCP from their substantive interpretation, i.e. meaning and application. Such an approach is an eclectic approach and is legally inefficient, threatening the protection of the general public interest, which often is of greater importance than the interest of protecting individual rights and freedoms. 148 Hence, when applying criminal

procedural law, the provisions of the national LCP are understood and applied superficially and in a formalistic fashion, which significantly differs from the thus far established case law of domestic courts and that of the ECHR.

7. CONCLUSIONS AND RECOMMENDATIONS

As it has been elaborated above, the LCP, i.e. its Article 12 relating to legality of evidence, places the emphasis on the manner of obtaining evidence, and not the manner the evidence was made. However, this Article is not fully and precisely developed. Therefore, when future amendments to the LCP will be drafted, they should take into account Article 12, amending it primarily taking due account of the Croatian solution. Hence, under Article 12 there must be a clear difference made between the terms making evidence and obtaining evidence, and between indirect evidence and source evidence the legal admissibility of which is challenged.

Furthermore, this Article needs to incorporate a clear position that the public interest shall always prevail over violations of certain rights and freedoms, when it comes to issues such as what is the nature of the right or freedom violated by illegally obtaining the evidence, whether such evidence is the only evidence in the criminal procedure, and whether the defendant had an opportunity to challenge such evidence. This Article should also make a better categorization of illegally obtained evidence in the context of the nature of constitutional and legal rights violated by such evidence. This Article is to clearly stipulate that the right to protection against torture, inhuman and degrading treatment and punishment is at the same rank of importance as the right to a fair trial, while the right to privacy, or the right to protection of the reputation and honour, especially when public figures are involved, are of secondary importance, vis-à-vis the right to a fair trial and the principle of protecting the public interest.

The analysis of the case law of the ECHR on this issue clearly shows that in adopting its judgments the Court assesses whether the overall criminal procedure was fair, and in this context evidence gathered by violating the rights of citizens does not automatically lead to an assessment that the procedure against them has been unfair. In this respect, the Court applies the proportionality test, which is to result with the ultimate decision whether any infringement of a certain right guaranteed under the domestic law, Constitution or Convention may be justified. With regard to Article 8, the margin of appreciation varies according to the circumstances, the case and its background and is guided by two sets of circumstances 1. Whether certain infringement of a right is justified, necessary and proportionate against the background of the public interest and 2. Whether the state has undertaken sufficient activities to honour its positive obligations. In the context of the examination of the nature of the established violation of the Convention, the Court considers the question as to whether the use of information as evidence obtained by violating Article 8 make the trial overall unfair, contrary to Article 6, taking into consideration all circumstances of the case, especially whether the rights to defence of the applicant have been respected, while also attaching importance to the quality and significance of the evidence in question, i.e. to the interests of criminal justice.

In the context of the right to privacy, the Court has on several occasions established that this right has a secondary importance compared to the right to a fair trial and the principle of protecting the public interest, which always have the advantage. Thus, the LCP, as well as other laws need to be amended and supplemented in order to incorporate the public interest as a criterion for assessment of evidence in a criminal procedure.

As regards the illegally intercepted communications, which were publicly shown in the country, and for the processing of which a SPO has been established, based on the case law of the ECHR, the relevance of the infringement upon the right to privacy of public figures can easily be established, especially when it is matter of their possible involvement in the perpetration of crimes. Hence, the illegally wiretapped conversations which disclose that crimes have been committed by public figures and representatives of state institutions may be used as evidence in criminal procedures instituted by the SPO.
BIBLIOGRAPHY:

- Trpenoski, L., Can the Special Public Prosecutor’s Office win the battle against the court decisions excluding evidence as illegally obtained, Journal of Criminal Law and Criminology No. 2/2017 www.journal.maclc.mk.
- Martinović, I., Kos D., Nezakoniti dokazi: teorijske i praktične dvojbe u svjetlu prakse Europskog suda za ljudska prava, Hrvatski ljetopis za kaznene znanosti i pravsku, br. 2, 2016.
- Osborn, D., Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia, Murdoch University School of Law, Volume 7, Number 4 (December 2000).
- Damaška, M., Procesne posljedice upotrebe dokaza dobivenih na nedozvoljeni način, Naša zakonitost, 3-6/1960, pp. 228.


- Damaška, M., Dokazno pravo u kaznenom postupku: oris novih tendencija, Pravni fakultet u Zagrebu; 2012.

- Karas, Ž., Neke primjedbe o izdvajanju nezakonitih materijalnih dokaza, Policija i sigurnost, Vol. 21, No. 4, pp. 753-774.


- Norden v. United States, 308 U. S. 338 (1939). The doctrine underlying the name was first described American case law in Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920).


- UN Convention against Torture. The full text of the Convention can be found at the following link: http://legal.un.org/avl/ha/catcdip/ctcdip.html


- Law Establishing the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications (2015, 9 15) Official Gazette No 159/2015.
- Heglas v. the Czech Republic, no. 5935/02, § 84, 1 March 2007.
- Khan v. the United Kingdom, no. 35394/97, § 34, ECHR-V.
- P.G. and J. H. v. the United Kingdom, no. 44787/98, § 76, ECHR 2001-IX.
- Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX.
- Levinta v. Moldova, judgment.
- Levinta v. Moldova, paragraph 104.
- Jalloh v. Germany (GC), no. 54810/00, ECHR 2006-IX.
- Gladyshev v. Russia, no. 2807/04, 30 July 2009.
- Hajrulahu v. FYROM, Judgement of 29 October 2015.
- Khan v. the United Kingdom, no. 35394/97, ECHR 2000.
- P.G. and J. H. v. the United Kingdom, no. 44787/98, ECHR 2001-IX.
- Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX.
- Bykov v. Russia (GC), no. 4378/02, 10 March 2009.
- Heglas v. the Czech Republic, no. 5935/02, § 84, 1 March 2007.

- Zakharov v. Russia (GC), no. 47143/06, § 260, ECHR 2015.
- Supreme Court of Croatia, Ruling of 7 March 2007, Case No. I.KZ-559/06.
- Supreme Court of Republika Srpska, Ruling of 27 March 2007, Case No. 118-0-KZ-07-000 006.
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2002).
- Judgment No. K 3574/15, of 26 January of the Skopje First Instance Court, Skopje, confirmed with a Ruling of the Skopje Appellate Court No. KZ 397/2016, the case of the baby sitter beating up a baby in Skopje.
- Report about the activities of the Public Prosecutor’s Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications covering six months (period from 15 March to 15 September 2017), published on 15 September 2017 in Skopje.
- Skopje Appellate Court, Ruling KZ-729/17, issued on 4 August 2017.
- Criminal Code, Article 151.
- Judgment No. K216/16, dated 2 February 2016 (final and confirmed).
- Ruling of the Skopje Appellate Court No. KZ 898/16 of 2016.
- Judgment No. KOK 23/08 of 2016 (final and confirmed).