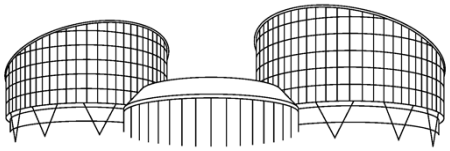

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MILJEVIĆ v. CROATIA

(Application no. 68317/13)

JUDGMENT

Art 10 • Freedom of expression • Conviction for defamation on account of statements made in the context of defence in another set of criminal proceedings and accusing a third party of witness tampering • Margin of appreciation afforded to State narrower when Art 10 is read in light of an accused's right to a fair trial • Right of an accused to speak freely without the fear of being sued for defamation whenever his or her speech concerned arguments made in connection with defence • An accused's statements protected in so far as not amounting to irrelevant or gratuitous attacks and malicious accusations against a participant in the proceedings or any third party • Solid factual basis required for statements with severe consequences for persons concerned • Applicant's statements having a sufficiently relevant bearing on his defence and thus deserving a heightened level of protection • Impugned statements targeting a well-known public figure required to display a wider level of tolerance to acceptable criticism • Impugned statements supported by some factual basis, having limited consequences and not amounting to malicious accusations • Domestic courts' failure to strike a fair balance between the competing interests at stake

STRASBOURG

25 June 2020

FINAL

25/09/2020

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

In the case of Miljević v. Croatia,

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

Krzysztof Wojtyczek, *President*,
Ksenija Turković,
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Pere Pastor Vilanova,
Jovan Ilievski,
Raffaele Sabato, *judges*,
and Abel Campos, *Section Registrar*,

Having deliberated in private on 27 May 2020,

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

PROCEDURE

1. The case originated in an application (no. 68317/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Rade Miljević ("the applicant"), on 24 October 2013.

2. The applicant was represented by Mr Z. Kostanjšek, a lawyer practising in Sisak. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that his criminal conviction for defamation for statements he had made concerning a third party in the context of his defence in another set of criminal proceedings had been contrary to Article 10 of the Convention. He also alleged that the appeal court in the defamation proceedings had lacked impartiality, contrary to Article 6 § 1 of the Convention.

4. On 8 September 2015 notice of the above complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1944 and lives in Glina.

A. Background to the case

6. On 4 September 2006 the applicant was indicted in the Sisak County Court (*Županijski sud u Sisku* – "the County Court") on charges of war crimes against the civilian population. It was alleged in the indictment that in 1991 he had participated in the killing of four detained civilians who had been taken from Glina Prison and executed.

7. Judge S.M. assumed control of the case as the president of the trial panel. During the proceedings, the applicant instructed several lawyers to represent him, including Z.K.

8. The events related to Glina Prison were of great public interest. A television show called *Istraga* ("Investigation") broadcast on a private television channel with national coverage, Nova TV, was dedicated to the incident in Glina Prison.

9. During the criminal proceedings against the applicant, a number of witnesses for the prosecution and the defence were heard. In his statement, a prosecution witness, I.T., stated that he had come forward with his allegations against the applicant because he had been detained in Glina Prison and he wanted to provide evidence to the prosecuting authorities about what he had experienced in detention. He explained that he had been advised by another witness in the proceedings, P.Š., to get in touch with a certain I.P. However, he had been unable to get in touch with I.P. Later, he had been contacted by a journalist from *Istraga* and he had taken part in the television show about the killing of the four civilians, the event in relation to which the applicant had been charged. Later on, he had made contact with the prosecuting authorities and volunteered to testify in the proceedings against the applicant.

10. I.P. is a colonel in the Croatian army and a disabled war veteran who was very active in collecting evidence and otherwise promoting the discovery of crimes committed against Croats during the war in Croatia. He also advised the editors of *Istraga* as they prepared several shows relating to different events of the war in Croatia.

11. In his closing arguments at a hearing held on 16 December 2008 the applicant alleged, among other things, that the criminal prosecution against him had been politically motivated and instigated by I.P., who had contacted prosecution witnesses directly and exerted pressure on them, instructing them on how to testify. The applicant also alleged that I.P. had instigated a virulent media campaign aimed at portraying him as a criminal and had led a criminal enterprise against him.

12. The applicant's closing arguments were reported by several media outlets.

13. On 17 December 2008 the applicant was convicted as charged and sentenced to twelve years' imprisonment. However, on 9 June 2009 that judgment was quashed by the Supreme Court (*Vrhovni sud Republike*

Hrvatske). The case was remitted to a different panel of the County Court, not including Judge S.M. (see paragraph 7 above), for further examination.

14. On 22 November 2012 a trial panel of the County Court acquitted the applicant of the charges. It found that it had been proved that the applicant had taken the four detained civilians from Glina Prison and surrendered them to an armed group of "military policemen" who had later executed them. However, it had not been proved that the applicant had been involved in the plan to execute the civilians, or that he had known that they would be executed.

15. On 21 January 2014 the Supreme Court confirmed the applicant's acquittal.

B. Defamation proceedings

16. On 5 January 2009 I.P. instituted a private criminal prosecution against the applicant in the Sisak Municipal Court (*Općinski sud u Sisku* – "the Municipal Court") on charges of defamation, an offence under Article 200 of the Criminal Code, in connection with the statements that the applicant had made in his closing arguments in the criminal proceedings on charges of war crimes on 16 December 2008 (see paragraph 11 above). In the defamation proceedings, the applicant was represented by Z.K., the same lawyer who had represented him in the criminal proceedings on charges of war crimes (see paragraph 7 above).

17. In his defence, the applicant argued that he had given the impugned statement while reading from a pre-prepared script of his closing statement, and that the president of the trial panel had then summarised his statement for the record. He also explained that he had submitted his written script to the file and that it had formed part of his closing statement. He denied using some colloquial expressions set out in the indictment – saying that I.P. had "instigated" the politically motivated prosecution (*rodonačelnik*) and that he had led a criminal enterprise against him (*ujdurmu*). Moreover, the applicant submitted that he had never referred to a "criminal enterprise" in his closing statement.

18. However, the applicant accepted that he had stated that I.P. had exerted influence as regards the witnesses and the lodging of a criminal complaint against him. He explained that the oral evidence given by I.T. during the criminal proceedings had made him believe this, as had I.T.'s appearance on the television show *Istraga* (see paragraph 9 above). Moreover, in his view, some of the witnesses had changed their minds during the proceedings. He had also seen I.P. making contact with witnesses in the court corridor before the hearings, and had seen him showing his (the applicant's) photographs to witnesses. According to the applicant, I.P. had communicated in particular with one of the victims' relatives, S.K., who had lodged a criminal complaint against him (the applicant). The media, and

particularly the television show *Istraga*, had not been objective in reporting on the case.

19. During the defamation proceedings, I.P. explained that he had not attended the hearing on 16 December 2008, but had read what the applicant had said about him in the media and on the Internet. This had disturbed him a great deal, as the comments had attracted widespread media attention, so he had even sought medical help. He also stated that he had had some problems in other countries because of what the applicant had said about him.

20. I.P. denied exerting any influence on the witnesses in the criminal proceedings against the applicant. He explained that he had been very active in promoting the truth about what had happened during the war, and that when some of the witnesses of war crimes contacted him he advised them to get in touch with the police or the relevant State Attorney's Office. He had attended several war crimes hearings, including those in the applicant's case. However, he had never exerted pressure on any witnesses or shown the applicant's photographs to witnesses. With regard to S.K. in particular, I.P. explained that he had not influenced her in relation to her lodging a criminal complaint, and that he had met her only when the proceedings against the applicant had already started.

21. I.P. confirmed that as part of his activities related to the war he had assisted in the preparation of several television shows. However, none of the shows on which he had worked had ever mentioned the applicant. He also denied any involvement in the television show *Istraga*, which had specifically dealt with the applicant's case. In this connection, I.P. also explained that the television show at issue had been prepared after the criminal proceedings against the applicant had already started, so the show had had no influence as regards the criminal case against the applicant being opened. With regard to his contact with I.T., a witness, I.P. stated that he had met him after the proceedings against the applicant had already started. I.P. explained that he had been contacted by some people from Nova TV who had said that I.T. had contacted their correspondent in Split. I.P. had asked them to advise I.T. to contact the police and the State Attorney's Office. Later on, when I.T. had come to give his evidence in the Sisak State Attorney's Office, I.P. had met him in order to show him where that office was located.

22. The Municipal Court further heard a number of witnesses and obtained copies of the relevant records from the County Court. At a hearing on 22 February 2011 the applicant requested that Judge S.M., who had presided over the trial panel in the first set of criminal proceedings against him, be questioned as a witness as regards the manner in which the record of the hearing had been prepared and whether she had been contacted by I.P. during the proceedings. However, the Municipal Court did not hear oral evidence from Judge S.M.

23. On 21 March 2012 the Municipal Court found the applicant guilty of defamation and fined him the equivalent of ten daily wages, an amount totalling 1,000 Croatian kunas (HRK – approximately 130 Euros (EUR)). It also specified that failure to pay the fine within four months of the judgment becoming final could result in the fine being replaced with community service. The applicant was also ordered to pay HRK 1,070 (approximately EUR 140) for court fees and HRK 16,337.50 (approximately EUR 2,150) for I.P.'s costs and expenses in respect of his legal representation.

24. The relevant parts of the judgment read as follows:

> "The conclusion [as to the applicant's responsibility for defamation] is based on the witness statements of I.P., J.F., M.P., Ž.G., V.R., I.T., S.K. and P.Š., as well as on the material evidence in the file, namely the County Court's records from the hearings in the criminal case against [the applicant], in particular the record of 16 December 2008, [the applicant's] written defence of 16 December 2008, the newspaper and Internet articles concerning the hearing of 16 December 2008, and the [medical records] for I.P.
>
> This court accepts the oral evidence given by I.P. as credible and objective because it is consistent with other evidence adduced during the proceedings. I.P.'s statement was corroborated by the statements of the witnesses Ž.G., J.F., S.K. and P.Š. and by other material evidence. His statement is, on the whole, confirmed by the witness I.T. ... This court [also] finds that [despite the fact that there are some discrepancies in the details as to how I.T. and I.P. actually met,] there are no grounds to cast doubt on the credibility of their evidence, since I.P. and I.T. confirmed that they had met on the day when I.T. had come to Sisak to give his statement to the State Attorney. Given that I.T.'s evidence is otherwise consistent with other evidence in the file, this court accepted it as credible and convincing. ...
>
> This court accepts the evidence given by the witnesses Ž.G., J.F. and M.P. [journalists who attended the hearing on 16 December 2008], as it finds their evidence convincing and credible. ... The court has no doubt that they reliably and objectively reported in the newspapers and on the Internet on what they had seen, heard and recorded at the hearing ...
>
> There is no reason for the court not to accept the evidence given by S.K., who clearly and convincingly explained how [she had met I.P. only after the proceedings against the applicant had already started, and after she had given evidence as a witness in the proceedings] ...
>
> In view of the above, the court has no doubt that at the hearing on 16 December 2008 before the Sisak County Court, in the criminal proceedings [on charges of war crimes], the accused made the impugned statement and thus defamed the claimant.
>
> ...
>
> It appears from an analysis of the witness statements obtained during the proceedings, and the Sisak County Court's trial record of 16 December 2008, that the hearing at issue lasted for a long time, that all other participants in the proceedings spoke before the accused did, and that the accused gave an oral statement, essentially reading from a prepared script. It also appears that on that occasion there were many verbal disputes between the accused and the president of the trial panel, and that after the accused had given his statement, the president of the panel summarised it for the record. The record of 16 December 2008 shows that the accused stated, amongst other

things, '[this] is a politically motivated process instigated [*rodonačelnik*] by I.P., who contacted prosecution witnesses directly and exerted pressure on them, instructing them on how to testify in these criminal proceedings, and also instigated a virulent media campaign aimed at portraying me as a criminal'. As regards this text, the accused only contests that he used the word '*rodonačelnik*' ... However, ... this court has no doubt that [the president of the trial panel] correctly summarised the accused's statement for the record, [something] which has been confirmed by [the journalist present at the hearing]. ...

... As to the use of the word '*ujdurma*', the court points out that the witnesses J.F. and M.P., journalists, categorically stated that the accused had used that word to refer to the claimant ... Moreover, the witness Ž.G., [another journalist], stated that on that occasion the accused had said that Croatian war veterans were a criminal organisation. [Ž.G.] explained how he had reported in his newspapers that the accused '[had] mentioned the name of I.P., ... stating that he had organised [the case against him]'. This court therefore does not accept that the accused did not utter the impugned words in reference to the claimant, particularly since on page eight of his written closing statement he wrote, amongst other things, 'honourable court, this is the real state of affairs, truth and aim of this politically motivated process directed by the organiser of this criminal enterprise, Mr I.P., together with his criminal group'.

However, the accused does not contest that in his closing statement he stated that I.P. had contacted prosecution witnesses directly and exerted pressure [on them], instructing them on how to testify, and had also instigated a virulent media campaign aimed at portraying [him] as a criminal, and had led a criminal enterprise against him. ...

It is true that the impugned defamatory statements were made in the context of the accused's closing arguments at the trial. However, it is obvious that these statements were not aimed at [supporting] the accused's defence, but rather at debasing the claimant, I.P., in the eyes of the public [by] presenting him as the leader and organiser of a criminal enterprise against [the applicant] and as somebody who had exerted influence on the witnesses in the proceedings to get them to change their minds. All of this aimed to damage [I.P.'s] honour and reputation. When making his closing arguments, the accused was supposed to analyse the evidence examined during the proceedings and the arguments of the prosecution and the witness statements, particularly those in his favour, with the aim of establishing his innocence in respect of the disputed crimes. [However], in doing this, he was not supposed to cause damage to others, namely I.P., by knowingly making incorrect, unverified and unsubstantiated claims. The overall context of [the accused's] closing arguments, including the impugned statements], shows that he made those statements only to cause damage to the claimant's honour and reputation, and not to defend himself in lawfully conducted [criminal] proceedings ...

On the basis of the evidence examined during the proceedings, this court finds that the accused's statements had no objective basis ... [The circumstances in which I.T. participated in the television show *Istraga*] can in no way justify the [applicant's] statement as to [I.P.'s] alleged conduct towards him. This court also finds it illogical that [I.P.], who, according to the accused, influenced the witnesses to [get them to] provide false statements, would make contact with those witnesses in the court corridor in front of the accused in order to instruct them on how to give false statements. If he really exerted such an influence on the witnesses, then it would be logical that he would do this somewhere out of the sight of the accused, and that he would avoid communicating with them in front of the courtroom. [I.P.'s] denial that he exerted any influence on the witnesses was confirmed by the witnesses themselves

when they were heard during these proceedings ... [T]he accused's defence also shows that he was aware that the criminal complaint against him had been lodged by S.K., so this court finds it illogical that he does not hold her responsible [for his prosecution], but I.P. This also supports the view that the accused's aim was to defame the claimant, and not to defend his rights and interests in the criminal proceedings. ...

As to the accused's statement that his misgivings [concerning I.P.'s conduct] became more severe when he saw [I.P.] in the court corridor showing photographs of him to witnesses, this court points out that this was denied by [I.P.] and the witness I.T. It is not logical that [I.P.], who attended only a few hearings [in the proceedings against the applicant], would show photographs [of him] to the witnesses, since those witnesses could easily have seen him in the court corridor ... and in the courtroom.

It appears from the records of the County Court's proceedings and the witness statements of D.R. and T.Š. that the accused had three defence lawyers in the proceedings. Thus, before making his closing statement, and despite the fact that he was in pre-trial detention, he had an opportunity to verify through [his lawyers] whether what he was stating against [I.P.] was correct. However, the accused did not do that. Instead, he knowingly made the incorrect defamatory allegations against [I.P.] with the aim of damaging his honour and reputation. If the accused had wanted to act in good faith when giving his closing statement, he could have made [the statement] by analysing the course of the proceedings without making the impugned defamatory claims against I.P.

The above makes it clear that part of the accused's closing statement, instead of aiming to demonstrate his innocence, represented a gratuitous and, for his defence, ineffective expression of unsubstantiated and defamatory statements concerning [I.P.], [a person] whom, for reasons known only to him, the accused sees as responsible for the criminal proceedings against him ... [H]e attributes to [I.P.] very negative and decisive importance for everything that has happened to him in the proceedings. It is clear that presenting someone in this light seriously damages that person's honour and reputation. Indeed, there is nothing positive or good in being [portrayed] as a leader of a criminal enterprise or someone who influences witnesses [to get them] to provide false evidence or submit false criminal complaints and the like. It therefore cannot be accepted that these statements were made in the heat of the moment during closing arguments. In the court's view, these statements were solely aimed at damaging [I.P.'s] honour and reputation by attributing to him unlimited and unlawful powers to influence criminal proceedings against the accused. This is unacceptable, as [the applicant] thus undermined the entire legal system of the Republic of Croatia, which has jurisdiction over the prosecution of criminal offences and the lawful conduct of criminal proceedings against the perpetrators of those offences.

In view of the above, this court has established beyond any doubt that the impugned statements concerning the claimant [I.P.] were false and capable of damaging his honour and reputation. He is a retired coronel in the Croatian army who, after the statements were reported in the media, felt so seriously affected that he even sought medical help. Moreover, those statements have attracted significant public attention."

25. The applicant challenged that judgment before the County Court, which acted as a court of appeal in the matter. He argued that the first-instance court had failed to appreciate all the circumstances of the case, especially those that had legitimately led him to conclude that I.P. had led a campaign against him, in particular by influencing the witnesses. The applicant further contended that the first-instance court had not taken into

account that his statements had been made in the context of his closing arguments in the criminal proceedings against him on charges of war crimes, and that some of the statements had been distorted in the course of the media reporting the events and Judge S.M. drafting the trial record.

26. On 31 January 2013 an appeal hearing was held before the County Court, sitting as a panel of three judges, including Judge S.M. The applicant's lawyer Z.K. was present at the hearing. When explicitly asked whether he had any objection to the composition of the appeal panel, the lawyer Z.K. answered that he had no objection.

27. Following the hearing, the County Court dismissed the applicant's appeal and upheld his criminal conviction, endorsing the reasoning of the Municipal Court. It also remitted the case to the Municipal Court for a reassessment of the costs and expenses of the proceedings, on the grounds that the first-instance judgment had lacked the relevant reasoning in this regard.

28. On 13 May 2013 the Municipal Court found that the applicant was not obliged to pay for the court fees, owing to his limited financial resources. However, it obliged him to pay HRK 16,337.50 (approximately EUR 2,150) for I.P.'s legal representation. That decision became final on 12 July 2013.

29. The applicant was allowed to pay his fine in ten instalments of HRK 100 (approximately EUR 13). On 14 September 2015 the applicant informed the Municipal Court that he had paid all ten instalments.

30. In the meantime, the applicant had challenged his conviction for defamation by lodging a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*). On 15 May 2013 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded, endorsing the reasoning of the lower courts.

II. RELEVANT DOMESTIC LAW

31. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, with further amendments) read as follows:

Article 16

"(1) Rights and freedoms may be restricted only by law in order to protect the rights and freedoms of others, the legal order, public morals or health.

(2) Every restriction of rights and freedoms should be proportional to the nature of the necessity for the restriction in each individual case."

Article 35

"Everyone has the right to respect for and legal protection of his or her private ... life ..."

Article 38

"(1) Freedom of thought and expression shall be guaranteed.

(2) Freedom of expression shall include in particular freedom of the press and other media, freedom of speech and public expression, and free establishment of all media institutions."

32. The relevant part of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, with further amendments) provides:

Defamation

Article 200

"(1) Whoever asserts or disseminates a falsehood about another person which can damage [that person's] honour or reputation shall be punished by a fine [of ten] to one hundred and fifty daily wages.

(2) Whoever, through the press, radio, television, in front of a number of persons, at a public assembly, or in another way in which the defamation becomes accessible to a large number of persons, asserts or disseminates a falsehood about another person which can damage [that person's] honour or reputation, shall be punished by a fine.

(3) If the defendant proves the truth of his or her allegation or the existence of reasonable grounds to believe in the veracity of what he or she has expressed or disseminated, he or she shall not be punished for defamation, but may be punished for insult or for reproaching someone for a criminal offence."

Reasons for finding that offences against honour and reputation are not unlawful

Article 203

"There shall be no criminal offence in the event of ... the defamatory content referred to in paragraphs 1 and 2 of Article 200 being expressed and made accessible to other persons in ... the defence of a right or in the protection of justifiable interests if, from the manner of expression and other circumstances, it clearly follows that such conduct was not aimed at damaging the honour or reputation of another."

33. Article 302 of the Criminal Code proscribed false reporting of a criminal offence, making it punishable by a fine or a maximum of three years' imprisonment. Article 304 of the Criminal Code proscribed witness tampering, making it an offence against the proper functioning of the judiciary punishable by a prison sentence of between six months and five years.

34. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette no. 110/1997, with further amendments) concerning the disqualification of judges from proceedings which were applicable at the time are set out in the case of *Zahirović*

v. Croatia, no. 58590/11, § 25, 25 April 2013. Under Article 4 of the Code of Criminal Procedure as applicable at the time, the accused was allowed to remain silent and not to answer any questions.

III. RELEVANT INTERNATIONAL MATERIAL

35. On 4 October 2007 the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 (2007) entitled "Towards decriminalisation of defamation". Its relevant passages read as follows:

> "6. Anti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others. The Assembly nonetheless urges member states to apply these laws with the utmost restraint since they can seriously infringe freedom of expression. For this reason, the Assembly insists that there be procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility.
>
> 7. In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant complained that his criminal conviction for defamation of I.P. had been unjustified and unfair. He relied on Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

38. The applicant argued that he had had reasonable grounds to believe that someone had been instructing witnesses on how to testify in the criminal proceedings against him on charges of war crimes. In his view, some of the witnesses had changed their minds, and after his lawyer had pointed out the inconsistencies in their evidence he had received a threatening letter. In this context, the applicant also pointed out that a police record from an identification parade had not faithfully represented what the witnesses had observed and stated. During the proceedings, the witness I.T., who had participated in the television show *Istraga* concerning the killings in Glina Prison, had clearly stated that he had been instructed to get in touch with I.P. At that time, the television show *Istraga* had been very popular, and I.P. had assisted in preparing the show by producing scripts for the reconstruction of various events which had taken place during the war. I.P. was a well-known person and activist as regards matters concerning crimes committed during the war. He had often attended the hearings in the applicant's case, and had also testified as a witness in some other war-crime cases.

39. According to the applicant, these were the circumstances that he had wanted to bring to the attention of the trial court in his closing statement. He pointed out that in the criminal proceedings on charges of war crimes he had been in pre-trial detention and had faced serious charges and possibly a heavy penalty. Thus, he had had a legitimate reason to defend himself. His intention had not been to defame I.P., but he had had justified concerns over I.P.'s involvement in his case. Moreover, although throughout the proceedings the media had been very biased against him, he had not known that his words would be reported by the media.

40. The applicant further submitted that all the circumstances of the alleged defamation had not been properly established in the defamation proceedings. In his view, the domestic courts had failed to strike a fair balance between his legitimate interest in defending himself and I.P.'s right to protect his reputation. They had also failed to appreciate the fact that his freedom of speech as an accused in criminal proceedings was important for the exercise of his right to a fair trial. In this connection, the applicant stressed that it was the right of every accused to defend himself as he saw fit. Thus, in his view, the court in the defamation proceedings had had no right to examine and decide whether the statements he had made in his

defence were true. The applicant considered that an excessive burden would be placed on the accused in criminal proceedings if they ran the risk of being prosecuted for defamation. In his view, the right of an accused to defend himself freely outweighed the right of any other individual to protect his reputation. Lastly, the applicant argued that when assessing the severity of the sanction imposed on him, the large amount of I.P.'s legal fees which he had been obliged to pay had to be taken into account.

(b) The Government

41. The Government did not contest that the applicant's criminal conviction for defamation had amounted to an interference with his freedom of expression. However, in the Government' view, that interference had been lawful and justified. In particular, the interference had been based on Article 200 of the Criminal Code, which was sufficiently accessible, foreseeable and certain. The interference had also pursued the legitimate aim of the protection of the rights of others, namely the protection of I.P.'s reputation.

42. As to the proportionality of the interference, the Government stressed that there was no doubt that the applicant had made the impugned defamatory statements. Those statements had been made in a courtroom in front of a number of persons, including journalists, so the applicant must have been aware that those statements would be made available to the public. His allegations had had a severe impact on I.P., who had even sought medical help for the distress he had suffered. In this connection, the Government submitted that it was important to bear I.P.'s personal circumstances in mind. He was a retired military officer and a disabled war veteran who had invested himself with regard to discovering crimes committed during the war. Thus, the applicant's allegations had had a significant impact on him. As those allegations were essentially statements of fact, there had been nothing wrong in asking the applicant to demonstrate their factual basis. However, in the Government's view, he had failed to show that he had had any objective grounds or justification for his statements. Moreover, the Government did not consider that such an unjustified attack on I.P. involved any legitimate public interest.

43. The Government further argued that the domestic courts had diligently conducted the proceedings and had properly balanced all the relevant interests at stake, including those related to the applicant's right to defend himself in the criminal proceedings and I.P.'s right to protection of his reputation. The domestic courts had also paid attention to the overall context in which the applicant's statements had been made and had concluded that they had aimed to defame I.P. rather than provide legitimate arguments for the applicant's defence. In the Government's view, the manner in which the applicant had made allegations against I.P. could in no way be considered part of his defence. In any event, the fact that he had

been defending himself in criminal proceedings could not be interpreted as giving him an absolute right to make defamatory statements against persons completely unrelated to the proceedings in question. Lastly, the Government considered that the sanction imposed on the applicant had been moderate and had not disturbed the balance between his defence rights in the criminal proceedings and I.P.'s right to protection of his reputation.

2. The Court's assessment

(a) Existence of an interference

44. The parties agree that the applicant's criminal conviction for defamation – in respect of the statements he had made concerning I.P. in the closing arguments of his trial for war crimes – constituted an interference with his freedom of expression under Article 10 § 1 of the Convention. According to the Court's case-law, an accused's statements in criminal proceedings may concern his freedom of expression under Article 10 (see, albeit in a different context, *Zdravko Stanev v. Bulgaria (no. 2)*, no. 18312/08, § 31, 12 July 2016, concerning defamatory statements made by an accused against a first-instance judge in the context of subsequent appeal proceedings). However, an issue in this context may also arise from the perspective of an accused's right to defend himself effectively in proceedings, under Article 6 of the Convention (see paragraphs 54-56 below). Thus, the Court's approach to the examination of a particular case will depend on the circumstances of the case and the nature of the complaint made by the applicant. In the present case, having regard to the fact that the applicant specifically complained about his criminal conviction for defamation of I.P., and that the domestic courts considered the case from the perspective of an attack on I.P.'s honour and reputation, the Court will address the applicant's conviction for defamation as an interference with his freedom of expression under Article 10 of the Convention, bearing in mind the implications of his right to defend himself effectively in criminal proceedings.

45. Such an interference, in order to be permissible under Article 10 § 2, must be "prescribed by law", pursue one or more legitimate aims, and be "necessary in a democratic society" for the pursuit of such an aim or aims.

(b) Whether the interference was prescribed by law

46. It is not disputed between the parties that the interference with the applicant's right to freedom of expression had a legal basis in the domestic law – Article 200 of the Criminal Code (see paragraph 32 above) – and that the relevant law satisfied the "quality of law" requirements under the Convention (see, for instance, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, §§ 123-25, 17 May 2016). The Court accepts that the interference was prescribed by law.

(c) Whether the interference pursued a legitimate aim

47. In agreement with the position of the domestic courts (see paragraph 24 above), the Government argued that the interference in question had pursued the legitimate aim of "the protection of the reputation or rights of others". The Court finds no reason to reach a different conclusion on this issue. It further notes that the domestic courts also made reference to the fact that the nature of the applicant's allegations against I.P. undermined the perception of the proper functioning of the criminal-justice system in Croatia (see paragraph 24 above). Thus, in so far as relevant for its assessment in the present case, the Court will also have regard to the principles related to "maintaining the authority and impartiality of the judiciary", one of the legitimate aims under Article 10 § 2 of the Convention.

(d) Necessary in a democratic society

(i) General principles

48. The Court refers to the general principles for assessing the necessity of an interference with the exercise of freedom of expression as set out in *Morice v. France* ([GC], no. 29369/10, § 124, ECHR 2015); *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 75, 27 June 2017).

49. Furthermore, it may be reiterated that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see, for instance, *Denisov v. Ukraine* [GC], no. 76639/11, § 97, 25 September 2018). The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers also the psychological well-being and dignity of a person. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 76; and *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 117, 14 January 2020). On the other hand, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence (see *Axel Springer*, § 83; *Medžlis Islamske Zajednice Brčko and Others*, § 76; and *Denisov*, § 98, all cited above).

50. In instances where, in accordance with the criteria set out above, the interests of the "protection of the reputation or rights of others" bring Article 8 into play, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting the two values

guaranteed by the Convention, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 77). The general principles applicable to the balancing of these rights were first set out in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, §§ 104-07, ECHR 2012) and *Axel Springer AG* (cited above, §§ 85-88); then restated in more detail in *Couderc and Hachette Filipacchi Associés v. France* ([GC], no. 40454/07, §§ 90-93, ECHR 2015); and more recently summarised in *Medžlis Islamske Zajednice Brčko and Others* (cited above, § 77).

51. When it is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the competing interests. The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question. Accordingly, the margin of appreciation should in theory be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Bédat*, cited above, § 52, with further references).

52. Furthermore, the Court has consistently held that in matters of public interest there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression (see, among many other authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending (see *Morice*, cited above, § 125). The potential seriousness of certain remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III) does not obviate the right to a high level of protection, given the existence of a matter of public interest (see *Bédat*, cited above, § 49).

53. However, in this context regard must also be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded. The phrase "authority of the judiciary" in Article 10 § 2 of the Convention includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function. What is at stake is the confidence which the courts in a democratic society must inspire

not only in the accused, as far as criminal proceedings are concerned, but also in the public at large (see *Morice*, cited above, §§ 128-30).

54. Where pending criminal proceedings are concerned, consideration must also be given to everyone's right to a fair hearing as secured under Article 6 of the Convention (see, *mutatis mutandis*, *Bédat*, cited above, § 51). In this connection, while the right to freedom of expression is not unlimited, equality of arms and fairness more generally militate in favour of a free and even forceful exchange of arguments between the parties (see *Nikula v. Finland*, no. 31611/96, § 49, ECHR 2002-II; *Saday v. Turkey*, no. 32458/96, § 34, 30 March 2006; and *Zdravko Stanev*, cited above, § 40). Thus in this context it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty – of the freedom of expression can be accepted as necessary in a democratic society (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 174, ECHR 2005-XIII; see also *Nikula*, cited above, §§ 49 and 55, and *Mariapori v. Finland*, no. 37751/07, § 62, 6 July 2010).

55. Nevertheless, the Court has already held that Article 6 of the Convention does not provide for an unlimited right to use any defence arguments, particularly those amounting to defamation. In this connection, the Court has opined as follows (see *Brandstetter v. Austria*, 28 August 1991, § 52, Series A no. 211):

> "[T]he Court observes in the first place that Article 6 § 3 (c) ... does not provide for an unlimited right to use any defence arguments.
>
> Mr Brandstetter claimed in his appeal in the defamation proceedings that, since he had made the impugned statements in the exercise of his rights of defence, they could not constitute punishable defamation. According to the Vienna Court of Appeal, however, the rights of defence could not extend to an accused's conduct where it amounted to a criminal offence such as, in the present case, that of consciously arousing false suspicions concerning the Inspector ...
>
> The Court agrees in principle with this ruling. It would be overstraining the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings.
>
> It is, however, not for the Court to determine whether Mr Brandstetter was rightly found guilty of having done so. According to its case-law, it is, as a rule, for the national courts to assess the evidence before them (see, *mutatis mutandis*, [*Delta v. France*, 19 December 1990, § 35, Series A no. 191-A])."

56. The Court would also stress that in the context of freedom of expression, it draws a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, where a statement amounts to a value judgment, the

proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment, it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see, for instance, *Morice*, cited above, § 126, with further references).

57. Moreover, the Court has consistently held that in the context of an interference with freedom of expression, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference (ibid., § 127). In principle, in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see, for instance, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-IV, and *Kącki v. Poland*, no. 10947/11, § 57, 4 July 2017). However, as already noted above, restraint in resorting to criminal proceedings is normally required in matters concerning the defence's freedom of expression in the courtroom in the context of a criminal trial (see paragraph 54 above; see also, in general, paragraph 35 above).

58. Lastly, the Court reiterates that because of their direct, continuous contact with the realities of the country, a State's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article. Where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts (see *Bédat*, cited above, § 54, with further references).

(ii) Approach to be adopted by the Court in the present case

59. In order to determine the approach to be applied in the present case, the Court has to look at the interference complained of in the light of the case as a whole, including the form in which the remarks held against the applicant were conveyed, their content and the context in which the impugned statements were made (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 78).

60. The Court firstly needs to examine whether I.P.'s Article 8 rights were engaged, in order to determine whether the applicant's Article 10 right

is to be balanced against I.P.'s Article 8 right to protection of his reputation (see paragraphs 49-50 above).

61. In this connection, the Court notes that the applicant in fact accused I.P. of conduct tantamount to criminal behaviour – witness tampering, which is punishable under the relevant domestic law (see paragraph 33 above, and compare *Pfeifer v. Austria*, no. 12556/03, §§ 47-48, 15 November 2007). Indeed, it was established during the domestic proceedings that he had accused I.P. of leading a criminal enterprise which aimed to have him convicted of war crimes (see paragraphs 11 and 24 above). In the Court's view, that accusation was clearly capable of tarnishing I.P.'s reputation and causing him prejudice in his social environment, particularly given his status as a military officer and disabled war veteran who was very active in the process of discovering crimes committed during the war in Croatia (see paragraphs 10 and 24 above). Moreover, there is no reason to call into question the domestic courts' findings that I.P. had felt seriously affected by the statements made, which had even made him seek medical help for the distress he had suffered (see paragraph 24 above).

62. Accordingly, the Court finds that the applicant's accusations attained the requisite level of seriousness which could harm I.P.'s rights under Article 8 of the Convention. The Court must therefore verify whether the domestic authorities struck a fair balance between the two values guaranteed by the Convention, namely, on the one hand, the applicant's freedom of expression protected by Article 10 and, on the other, I.P.'s right to respect for his reputation under Article 8 (see paragraph 51 above; see also *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 79).

63. In this connection it is worth reiterating that Articles 8 and 10 of the Convention normally enjoy equal protection. The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question (see paragraph 50 above; see also *Bédat*, cited above, § 53, concerning weighing up the rights secured under Articles 6 and 10).

64. However, in the present case the applicant's right to freedom of expression under Article 10 as an accused in criminal proceedings has also to be understood in the light of his right to a fair trial under Article 6 of the Convention. As borne out by the Court's case-law, when the right to freedom of expression under Article 10 is read in the light of an accused's right to a fair trial under Article 6, the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower (see paragraphs 54-55 above).

65. In particular, in the Court's view, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the

accused to speak freely without the fear of being sued in defamation whenever his or her speech concerns the statements and arguments made in connection with his or her defence. On the other hand, the more an accused's statements are extraneous to the case and his or her defence, and include irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it becomes legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8 of the Convention.

66. The Court emphasises that an accused's statements and arguments are protected in so far as they do not amount to malicious accusations against a participant in the proceedings or any third party. As follows from the Court's case-law, the defendant's freedom of expression exists to the extent that he or she does not make statements that intentionally give rise to false suspicions of punishable behaviour concerning a participant in the proceedings or any third party (see paragraphs 54-55 and 62 above). In practice, when making this assessment, the Court finds it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements (see, *mutatis mutandis*, *Zdravko Stanev*, cited above, § 42). The more severe the consequences are, the more solid the factual basis for the statements made must be (see paragraph 56 above; and see, *mutatis mutandis*, *Pfeifer*, cited above, §§ 47-48).

67. Lastly, in accordance with its case-law, the Court must have regard to the nature and severity of the sanctions imposed when assessing the proportionality of the interference in a particular case (see paragraph 57 above).

(iii) Application of the above principles to the present case

68. In assessing the impugned statements and the reasons given in the domestic courts' decisions to justify the interference with the applicant's freedom of expression, the Court finds the following issues of particular relevance, having regard to the criteria identified above (see paragraphs 65-67 above): the nature of the impugned statements and the context in which they were made, in particular whether they concerned arguments made in connection with the applicant's defence; the factual basis for the statements and the consequences for I.P.; and the nature and severity of the sanction imposed.

(α) Nature and context of the impugned statements

69. The applicant made the impugned statements in his capacity as an accused in the criminal proceedings on charges of war crimes. As the accused in criminal proceedings, as a matter of fair trial, the applicant had a right to give his own version of events and to cast doubt on the reliability of the evidence adduced, including the credibility of the witnesses heard

during the proceedings (see, for instance, *Erkapić v. Croatia*, no. 51198/08, § 78 *in fine*, 25 April 2013).

70. In this connection, it should be noted that the applicant's remarks concerning I.P., although given orally in public at the trial, had been prepared in writing. At the hearing, the applicant read out his written closing statement and submitted it to the file. The Municipal Court's findings indicate that the applicant's written statement also contained the impugned allegations against I.P. and generally corresponded to what the applicant stated at the hearing (see paragraph 24 above). For its part, the Court has no reason to call these findings into question. It will thus proceed on the understanding that the applicant in his defence made the impugned statements concerning I.P. in the manner established by the Municipal Court.

71. The Court notes that I.P. is a retired military officer and a disabled war veteran. Although he did not act in any official capacity in the criminal proceedings against the applicant or assume any formal role in those proceedings, he did attend the public hearings in the applicant's case. Moreover, the Court cannot lose sight of the fact that I.P. is a well-known public figure and activist as regards the discovery of crimes committed during the war. In that capacity, he advised the editors of the television show *Istraga* when they prepared several reports relating to different events in the war in Croatia (see paragraphs 10, 21 and 24 above), and it was in that capacity that some of the witnesses in the applicant's case contacted him (see paragraphs 9 and 20-21 above). Thus, there is no doubt that he entered the public scene in this field of social interest, and was therefore in principle required to display a wider level of tolerance to acceptable criticism than another private individual (see, for instance, *Kapsis and Danikas v. Greece*, no. 52137/12, § 35, 19 January 2017).

72. The applicant's impugned statements, which the domestic courts found to have amounted to defamation, concerned his allegations that "the criminal prosecution against him had been politically motivated and instigated by I.P."; that "[I.P.] had contacted prosecution witnesses directly and exerted pressure on them, instructing them on how to testify"; and that "[I.P. had] instigated a virulent media campaign aimed at portraying the applicant as a criminal" and had "led a criminal enterprise against [the applicant]" (see paragraphs 11 and 24 above).

73. These statements were made in the applicant's closing arguments when he addressed the trial court, just before the conclusion of the proceedings and the adoption of the first-instance judgment (see paragraphs 11 and 13 above). At this stage of the proceedings, as the Municipal Court explained, the applicant was supposed to analyse the evidence examined during the proceedings, the arguments of the prosecution and the witness statements. Nevertheless, the Municipal Court in particular found that the overall context of the applicant's closing

arguments, including the impugned statements, showed that he had made those statements to cause damage to I.P.'s reputation, and not to defend himself in the criminal proceedings (see paragraph 24 above).

74. The Court notes, however, that the impugned statements which the applicant made against I.P. concerned defence arguments which were sufficiently linked to the applicant's case and worked in favour of his defence. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case.

75. As a matter of principle, the defendant must have an opportunity to speak freely about his impression of possible witness tampering and the improper motivation of the prosecution case without fear of being subject to proceedings for defamation. In the present case the applicant's statements indeed concerned his impressions relating to I.P.'s behaviour. It is of little relevance that I.P. himself was not examined as a witness in the criminal proceedings against the applicant since there was no doubt that he had an interest in the applicant's case and that he was in contact with some of the witnesses examined during the proceedings (see paragraph 71 above).

76. In view of the above, the Court finds that the nature and context in which the impugned statements were made shows that they had a sufficiently relevant bearing on the applicant's defence and thus deserved a heightened level of protection under the Convention, in accordance with the relevant criteria identified in the Court's case-law (see paragraph 65 above).

(δ) Consequences for I.P. and factual basis for the statements

77. The Court has already found that the applicant's allegations against I.P. in essence amounted to allegations of witness tampering (see paragraphs 61-62 above). However, there is no indication that the domestic authorities instituted or ever considered instituting a criminal investigation or proceedings against I.P. in that regard, although the domestic system proscribes offences relating to false criminal accusations and witness tampering (see paragraph 33 above). Moreover, even accepting – as the Municipal Court found – that I.P. sought medical help in connection with the distress caused by the applicant's statements, there is no conclusive evidence that he suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

78. In the defamation proceedings, the domestic courts approached the applicant's allegations against I.P. as statements of fact and found that they lacked a sufficient basis and thus amounted to a gratuitous and unsubstantiated attack against I.P. (see paragraph 24 above).

79. The Court agrees with the domestic courts' finding that the applicant's statements concerning I.P. amounted to allegations of fact. However, it notes that the domestic courts failed to appreciate sufficiently

the fact that the applicant had seen I.P. attending the hearings in his case and that I.P. himself accepted that he had met some of the witnesses from the applicant's case, most notably I.T., who was examined as a prosecution witness in the applicant's case, and S.K., who had lodged a criminal complaint against the applicant on charges of war crimes (see paragraphs 9, 18 and 20 above). Moreover, the domestic courts failed to take into account the prominent activities of I.P. in this field and his engagement in the television show *Istraga*, albeit without direct involvement in the broadcast concerning the applicant.

80. Thus, having regard to the above findings, it cannot be said that the impugned statements lacked any factual basis for the applicant's arguments relating to I.P.'s involvement in his case. Taking into consideration also the context in which these statements were made – namely as defence arguments during a criminal trial – the Court finds that although the statements were excessive, they did not amount to malicious accusations against I.P. Lastly, the Court cannot but assess the applicant's statements in the light of the objectively limited consequences they have had for I.P., in particular having regard to the fact that the domestic authorities have never investigated I.P. for the criminal offence of witness tampering.

(ε) Severity of the sanction imposed

81. With regard to the nature and severity of the sanction imposed, the Court notes that although the applicant was ordered to pay the minimum fine possible under the relevant domestic law, this sanction nevertheless amounted to a criminal conviction. As already noted, restraint in resorting to criminal proceedings is normally required in matters concerning the defence's freedom of expression in the courtroom in the context of a criminal trial. Indeed, it is only in exceptional circumstances that a restriction – even by way of a lenient criminal penalty – of freedom of expression can be accepted as necessary in a democratic society (see paragraph 54 above).

(ζ) Conclusion

82. In the light of the above considerations, the Court does not consider that the domestic courts struck a fair balance between the applicant's freedom of expression as understood in the context of his right to defend himself, on the one hand, and I.P.'s interest in the protection of his reputation on the other. The domestic authorities failed to take into consideration the heightened level of protection that the statements given by the defendant deserve as part of his defence during a criminal trial. In this connection the Court would reiterate that defendants in criminal proceedings should be able to speak freely about issues connected to their trial without being inhibited by the threat of proceedings for defamation as long as they do not intentionally give rise to a false suspicion of punishable

behaviour against a participant in the proceedings or a third party (see paragraphs 66 and 77 above; and see *Brandstetter*, cited above, § 52).

83. There has therefore been a violation of Article 10 of the Convention.

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

84. Relying on Article 6 § 1 of the Convention, the applicant complained that the County Court had not been impartial in the defamation proceedings, on account of Judge S.M.'s participation in the appeal panel which had upheld his conviction for defamation. In his view, given her previous involvement in the war crimes case against him and the fact that he had asked for her to be heard in the defamation proceedings, Judge S.M. should have withdrawn from the defamation proceedings.

85. The relevant part of Article 6 § 1 provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

86. The Government contested that argument. They pointed out that the applicant's lawyer had been present at the hearing before the appeal panel on which Judge S.M. had sat. However, although explicitly asked whether he had any objection to the composition of the panel, the lawyer had raised no objection to Judge S.M.'s involvement in the case. At the same time, in the Government's view, there had been no reason under the domestic law for Judge S.M. to be disqualified *proprio motu* from taking part in the defamation proceedings. Moreover, the Government argued that the applicant had failed to properly raise his complaint of the County Court's lack of impartiality in his constitutional complaint. In any event, in the Government's view, there had been no violation of Article 6 § 1 of the Convention concerning the impartiality of the County Court.

87. The Court considers that it is not necessary to address all of the Government's objections, as this complaint is in any event inadmissible for the following reasons.

88. The Court notes that in *Zahirović v. Croatia* (no. 58590/11, §§ 35-36, 25 April 2013) and *Smailagić v. Croatia* ((dec.), no. 77707/13, § 32, 7 November 2015), it held that when the domestic law offered a possibility of eliminating concerns regarding the impartiality of a court or a judge, it would be expected (and in terms of the national law, required) that an applicant who truly believed that there were arguable concerns on that account would raise them at the first opportunity. This would above all allow the domestic authorities to examine the applicant's complaints at the relevant time, and ensure that his or her rights were respected. The Court thus emphasised that the failure of an applicant to do this would prevent it from concluding that the alleged procedural defect complained of had interfered with the applicant's right to a fair trial, which accordingly would

render his or her complaints inadmissible as manifestly ill-founded (see also *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, §§ 48-49, 4 June 2019).

89. In the case at hand, the Court notes that, similar to what was observed in the cases cited above, the applicant and his lawyer were well aware of the involvement of Judge S.M. in the criminal proceedings on charges of war crimes against him. However, the applicant's lawyer, who was present at the appeal hearing in the defamation proceedings, did not make a complaint or objection as to the composition of the panel, although he was explicitly asked whether he had any such objection (see paragraph 26 above).

90. At the same time, given that Judge S.M. was never summoned or examined as a witness in the defamation proceedings, under the relevant domestic law there was no reason for her to be automatically excluded (*isključenje*) from the case (Article 36 § 1 of the Code of Criminal Procedure – see the case-law reference in paragraph 34 above). Instead, it was for the applicant to raise arguable concerns concerning her alleged lack of impartiality by asking for her removal (*otklon*) from the case (Article 36 § 2 and Article 38 § 2 of the Code of Criminal Procedure – see the case-law reference in paragraph 34 above). This is particularly true given that, as already noted, his lawyer had every opportunity during the appeal hearing to seek her removal (see paragraphs 26 and 89 above).

91. Moreover, as the Court has already held, the previous involvement of a judge in separate criminal proceedings is not in itself sufficient to give rise to a conclusion as to the lack of impartiality of the judge or court concerned (see, for instance, *Alexandru Marian Iancu v. Romania*, no. 60858/15, §§ 66-74, 4 February 2020). In such circumstances, the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, should be taken into account as a relevant factor in determining whether a court's requirement of impartiality under Article 6 § 1 has been satisfied (see *Smailagić*, cited above, § 35).

92. Accordingly, given the failure of the applicant's lawyer to use the opportunity to eliminate the alleged concerns as to Judge S.M.'s lack of impartiality at the relevant time during the appeal hearing, without any relevant reason for such an omission being given, it cannot be considered that there were objective and legitimate reasons to doubt the impartiality of the appeal court. The Court cannot therefore conclude that the circumstances complained of disclose any breach of the applicant's right to a fair trial (see *Zahirović*, § 36; *Smailagić*, § 36; and *Sigurður Einarsson and Others*, §§ 48-49, all cited above).

93. In these circumstances, the Court finds that the applicant's complaint is manifestly ill-founded and should therefore be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides as follows:

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

A. Damage

95. The applicant claimed 2,281 euros (EUR) in respect of pecuniary damage, related to the fine and costs and expenses of the proceedings which he had been obliged to pay following his conviction for defamation; and EUR 20,000 in respect of non-pecuniary damage.

96. The Government considered this claim to be excessive, unfounded and unsubstantiated.

97. The Court takes the view that there is a sufficient causal link between the pecuniary damage claimed and the violation found under Article 10 of the Convention. It is thus appropriate to order, under the head of pecuniary damage, the reimbursement of the sums that the applicant was required to pay following his conviction for defamation, which in total amounts to the sum claimed by the applicant.

98. On the other hand, in view of the specific circumstances of the case and the nature of the statements made by the applicant, the Court finds it appropriate not to make an award in respect of non-pecuniary damage. The Court considers that the finding of a violation of Article 10 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

99. The applicant also claimed EUR 833 for the costs and expenses incurred for his legal representation before the Court.

100. The Government considered this claim unsubstantiated.

101. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In this case the applicant failed to submit itemised particulars of his claim or any relevant supporting documents. Moreover, he did not submit documents showing that he had paid or was under a legal obligation to pay the costs and expenses for his legal representation before the Court. It follows that the claim must be rejected (see *Merabishvili v. Georgia* [GC], no. 2508/13, § 372, 28 November 2017).

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 10 of the Convention concerning the applicant's conviction for defamation admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,281 (two thousand two hundred and eighty one euros), plus any tax that may be chargeable, in respect of pecuniary damage, to be converted into Croatian kunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Krzysztof Wojtyczek President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Pastor Vilanova is annexed to this judgment.

K.W.O.
A.C.

CONCURRING OPINION OF JUDGE PASTOR VILANOVA

(Translation)

1. In this case, the Court has found a violation of Article 10 of the Convention. I fully agree with that conclusion.

2. The case concerns the applicant's criminal conviction for defamation of I.P. The offending statements concerning the latter had been made during an earlier criminal trial in which the applicant was accused of war crimes. I.P. was not involved in those proceedings, not even as a witness or a victim, but had simply attended some of the hearings as a member of the public.

3. I have reservations as to the approach taken by the majority in order to justify the aim of the domestic courts' interference with the applicant's right to freedom of expression. In paragraph 47 of the judgment two separate aims are juxtaposed in order to legitimise the interference. On the one hand, the protection of the reputation or rights of others. On this point I have nothing to say, since a conviction for defamation is indeed designed precisely to protect the good reputation of another person. On the other hand the majority, on their own initiative, add a second aim, namely that of maintaining the authority and impartiality of the judiciary. My conceptual difficulties centre on this second aspect.

4. According to our Court's case-law, the phrase "authority of the judiciary" includes the notion that the courts are the proper forum for the resolution of legal disputes (see *Worm v. Austria*, 29 August 1997, § 40, *Reports of Judgments and Decisions* 1997-V). The clause relating to this safeguard is designed primarily to protect the judiciary against gravely damaging attacks that are essentially unfounded (see *Morice v. France* [GC], no. 29369/10, § 128, ECHR 2015), but also to protect the rights of litigants (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 56, Series A no. 216).

5. The majority take the view that the authority and impartiality of the judiciary are at stake here owing to the nature of the remarks made by the applicant during the first criminal trial, which allegedly undermined (public) confidence in the Croatian criminal justice system. The majority refer to the Municipal Court judgment of 21 March 2012 (see paragraph 24 of the judgment), but unfortunately do not cite any specific passage. As a result, the judgment loses something of its readability. But the real issue here is quite different. In fact, the applicant was not convicted in the present case for criticising the Croatian judicial system or influencing a judge. No: he was found guilty of the offence of defamation with regard to a war veteran (see paragraph 10 of the judgment), I.P., who had no connection to the machinery of justice. It is true that, according to the Municipal Court's assessment, the applicant attributed unlimited powers to I.P. to have him

convicted. Nevertheless, it should be borne in mind that the applicant's conviction was based solely on his defamatory statements concerning I.P. and not on any remarks attacking the justice system or an individual judge. What is more, there is nothing to suggest that I.P. ever faced any legal action for allegedly exerting pressure on prosecution witnesses in the context of the applicant's trial for war crimes (see paragraph 77 of the judgment). Had that been the case, I would agree that his prosecution or conviction could be justified on the basis, among other elements, of the protection of the authority of the judiciary, which concerns all "persons involved in the machinery of justice" (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 56, Series A no. 30).

6. I agree that this case is about the freedom of expression of an accused in the context of his criminal trial, and especially in the defence of his case. Consequently, the right to a fair trial may come into play (see paragraph 64 of the judgment). Nevertheless, the paragraph in question comes under the section dealing with the violation of Article 10. This does not warrant what, in my humble opinion, is the questionable introduction of extraneous elements aimed at further justifying the interference. Freedom of expression applies across the board and does not stop at the courtroom door.