**Summary and outcome**

The European Court of Human Rights (ECtHR) held that conviction for defamation for statements made in the context of defence in another set of criminal proceedings was contrary to the right to freedom of expression conferred by art. 10 of the European Convention of Human Rights (ECHR).

The application was brought to the ECtHR by Mr. Rade Miljević, following his criminal conviction for defamation. The applicant was charged of defamation in connection with statements made in the closing arguments of criminal proceedings on charges of war crimes on 16 December 2008. The national courts found that the applicant had made defamatory statements against I.P. by accusing I.P. of witness tampering in a criminal procedure.

The ECtHR highlighted the paramount importance of freedom of expression of accused while presenting their defence in criminal proceedings without being fearful of a subsequent threat of proceedings for defamation. The ECtHR found that by convicting the applicant for defamation the national courts failed to strike a fail balance between ECHR, art. 10 and 8.

**Facts**

From September 2006 to November 2012 the Sisak County Court held a criminal procedure against the applicant on charges of war crimes against the civilian population. According to the indictment, in 1991, the applicant had participated in the killing of four detained civilians who had been taken from Glina Prison and executed. A television show called Istraga broadcasted on Nova TV, was dedicated to the incident in Glina Prison.

Number of witnesses testified during the criminal proceedings. One of the prosecution witness, I.T., a former detainee of Glina Prison explained that he had been advised by another witness, P.Š., to get in contact with I.P.  I.P., a colonel in the Croatian army, was a disabled war veteran engaged in collecting evidence and promoting the discovery of crimes committed against Croats during the Croatian war. I.P. also advised the editors of Istraga as they prepared materials related to the war in Croatia. I.P. had attended several war crimes hearings, including the one of the applicant. I.T. had been unable to get in touch with I.P. and later on had made contact with the prosecuting authorities volunteered to testify in the proceedings.

On 16 December 2008 during his closing arguments 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" [para.11].

On 17 December 2008 the applicant was convicted and sentenced to 12 years imprisonment. However, on 9 June 2009 that judgment was quashed by the Supreme Court. On 22 November 2012, the County Court acquitted the applicant of the charges as 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.” [para. 14] On 21 January 2014 the Supreme Court confirmed the lower courts decisions.

On 5 January 2009, I.P. instituted a private criminal prosecution against the applicant in the Sisak 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 on 16 December 2008.

In his defence, the applicant argued that he had given the impugned statement while reading from a pre-prepared script of his closing statement, He denied the use of some colloquial expressions, e.g. that I.P. had “instigated” the politically motivated prosecution and that he had led a criminal enterprise against the applicant. However, the applicant accepted that he had stated that I.P. had exerted influence over the witnesses and had initiated a criminal charge against him. He argued that he had a reasonable base for his statement because of multiple reasons such as a change in the testimony of some of the witnesses; or I.P.’s contact with witnesses in the court corridor before the hearings while showing them photographs of the applicant. In the applicant’s view, I.P. had communicated with one of the victims’ relatives, S.K., who had lodged a criminal charge against the applicant.

During the defamation proceedings, I.P. explained that he had not attended the hearing on 16 December 2008, but had read applicant's statements in the media. As a result of the alleged defamation, he had sought medical help and had some problems in other countries. I.P. denied the allegations of the applicant that he had exerted influence on the witnesses in the criminal proceedings against the applicant. He also denied any involvement in the television show Istraga, which had dealt with the applicant’s case.

During the defamation procedure the Municipal Court heard the parties and several witnesses and obtained copies of the relevant records from the County Court.

On 21 March 2012 the Municipal Court found the applicant guilty of defamation and fined him the equivalent of ten daily wages, or approximately EUR 130 and ordered the applicant to pay approximately EUR 140 for court fees and approximately EUR 2,150 for I.P.’s costs and expenses in respect of his legal representation.

The applicant, unsuccessfully, appealed with the County Court, who remitted the case to the Municipal Court for a reassessment of the costs and expenses of the proceedings. On 13 May 2013 the Municipal Court found that the applicant was n ot obliged to pay for the court fees, due to his financial situation, but ordered him to pay approximately EUR 2,150 for I.P.’s legal representation.

The applicant also lodging a constitutional complaint with the Constitutional Court challenged his conviction for defamation. On 21 January 2014 the Court rejected the complaint as manifestly ill-founded.

**Decision overview**

The ECtHR delivered a unanimous judgement finding a violation of ECHR, art.10.

It was not disputed by the parties that the applicant’s criminal conviction for defamation constituted an interference with his freedom of expression under ECHR, art. 10 § 1  nor that this interference had a legal basis in the domestic law i.e., article 200 of the Criminal Code. The ECtHR was also satisfied that the interference in question had pursued the legitimate aim of “the protection of the reputation or rights of others”. In addition, the ECtHR add another aim which is that of maintaining the authority and impartiality of the judiciary.

The central issue for the Court was whether the interference was necessary in a democratic society.

The applicant argued that he had had reasonable grounds to believe that someone had been instructing the testimony of the witnesses. He stated that after his lawyer raised concerns that some of the witnesses had changed testimonies, he had received a threatening letter. He mentioned that I.P., a “well-known person and activist as regards matters concerning crimes committed during the war” [para. 38] produced scrips for various events that took place during the war for the television show Istraga. The applicant stressed that I.P. attended the hearings in the applicant’s case several times and had testified as a witness in other war-crime cases. As he was charged with heavy crimes and being held in pre-trial detention, he had had a legitimate reason to defend himself. His intention had not been to defame I.P., but to express his justified concerns over I.P.’s involvement in his case. The applicant argued that the courts neglected that his freedom of speech as an accused in criminal proceedings was essential for the exercise of his right to a fair trial. Thus, the court in the defamation proceedings were not in a position to examine and decide on the veracity of his closing statements. The applicant pointed out that accused would be placed in an unfavorable situation if they may be subsequently 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” [para. 40].

As to the proportionality of the interference, the Government argued that the domestic courts had properly balanced the relevant rights at stake. Тhe Government stated that because the allegations were essentially statements of fact, the applicant had failed to demonstrate any objective grounds or justification for his statements. Also, the Government submitted that the sanction imposed on the applicant had been moderate and had not disturbed the balance between his applicant right under ECHR, art 10 and I.P.’s right under ECHR, art.8.

The ECtHR first laid out the general principles on the necessity requirement in the freedom of expression context as defined in [Morice v. France](https://globalfreedomofexpression.columbia.edu/cases/morice-v-france/) [GC] [2015] 29369/10; [Bédat v. Switzerland](https://globalfreedomofexpression.columbia.edu/cases/bedat-v-switzerland/) [GC] [2016] 56925/08, 2016; and [Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina](https://globalfreedomofexpression.columbia.edu/cases/medzlis-islamske-zajednice-brcko-v-bosnia-herzegovina/) [GC] [2017], 17224/11.

Then the ECtHR reiterated that the right to protection of reputation is a right protected under ECHR, art. 8 (as stated in Denisov v. Ukraine [GC] [2018] 76639/11, § 97). By referring to the rich jurisprudence (Axel Springer AG v. Germany [GC] [2012] 39954/08, § 83; [Medžlis Islamske Zajednice Brčko and Others](https://globalfreedomofexpression.columbia.edu/cases/medzlis-islamske-zajednice-brcko-v-bosnia-herzegovina/), § 76; and [Beizaras and Levickas v. Lithuania](https://globalfreedomofexpression.columbia.edu/cases/beizaras-and-levickas-v-lithuania/) [2020] 41288/15, § 117), the ECtHR stressed that 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” [para 49].

The ECtHR stated that general principles applicable to the balancing of the rights under ECtHR, art 8 and 10 were first set out in [Von Hannover v. Germany](https://globalfreedomofexpression.columbia.edu/cases/von-hannover-v-germany-no-2/) (no. 2) ([GC] [2012] 40660/08 and 60641/08, §§ 104-07, ECHR, [Axel Springer AG](https://globalfreedomofexpression.columbia.edu/cases/axel-springer-ag-v-germany/) [2012]39945/08 §§ 85-88); Couderc and Hachette Filipacchi Associés v. France ([GC] [2015] 40454/07, §§ 90-93 and [*Medžlis Islamske Zajednice Brčko and Others*](https://globalfreedomofexpression.columbia.edu/cases/medzlis-islamske-zajednice-brcko-v-bosnia-herzegovina/), § 77).

The ECtHR reminded that in matters of public interest the authorities have a particularly narrow margin of appreciation, regardless of the potential seriousness of certain remarks (as in Thoma v. Luxembourg [2001] 38432/97, § 57).

The Court highlighted that regard must given to the special role of the judiciary in society. The ECtHR stated that the phrase “authority of the judiciary” in Article 10 § 2 of the Convention includes“… that the courts 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” [para 53].

The ECtHR moved on to elaborate on the right to a fair hearing as secured under ECHR, art. 6. The ECtHR stated that “equality of arms and fairness more generally militate in favour of a free and even forceful exchange of arguments between the parties" (as in Nikula v. Finland [2002] 31611/96, § 49 and Saday v. Turkey, [2006] 32458/96, § 34). Therefore, only in exceptional circumstances the restriction of the freedom of expression can be accepted as necessary in a democratic society (as in [Kyprianou v. Cyprus](https://globalfreedomofexpression.columbia.edu/cases/kyprianou-v-cyprus/) [GC] [2005] 73797/01, § 174 and Mariapori v. Finland [2010] 37751/07, § 62).

The ECtHR has also reiterated that ECHR, art.6 does not provide for a use of defence arguments if they amount to malicious accusations against a participant in the proceedings or any third party.

The Court then referred to the distinction between statements of fact and value judgments stressing that assertions about matters of public interest may constitute value judgments rather than statements of fact (as in [*Morice*](https://globalfreedomofexpression.columbia.edu/cases/morice-v-france/), § 126).

Concerning the severity of the sanctions imposed the ECtHR held that 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.

Lastly, the ECtHR reiterated that where the national courts have weighed up the relevant interests according to the criteria laid down in the Court’s case-law, strong reasons are required for the ECtHR to substitute its view for that of the domestic courts ([Bédat](https://globalfreedomofexpression.columbia.edu/cases/bedat-v-switzerland/), § 54).

After outlining these general principles, the Court noted that the applicant’s accusations attained the requisite level of seriousness which could harm I.P.’s rights under ECHR, art.8 and therefore it was necessary to examine whether the domestic authorities struck a fair balance between the two values guaranteed by the Convention.

In assessing the impugned statements and the reasons given in the domestic courts’ decisions, the Court identified three criteria.

Firstly, the court analysed the nature and context of the impugned statements. The ECtHR noted that applicant made the impugned statements orally in public at the trial as an accused in the criminal proceedings on charges of war crimes.  At the hearing, the applicant read out his written closing statement and submitted it to the file.

Concerning I.P.’s involvement and interest in the applicant’s case, the Court found 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" (as in Kapsis and Danikas v. Greece [2017] 52137/12) [para.72]. It is of little importance for the Court that I.P. was not examined as a witness in the case.

The Court held the impugned statements were sufficiently linked to the applicant’s case and worked in favor of his defense. "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." [para.74]

In view of the above, the Court found that the nature and context in which the impugned statements were made showed that they had a sufficiently relevant bearing on the applicant’s defence and thus deserved a heightened level of protection under the Convention.

Secondly, the ECtHR analysed the consequences for I.P. and factual basis for the statements. According the Court's view the domestic authorities did not institute a criminal investigation or proceedings against I.P.  although the domestic system proscribes offences relating to false criminal accusations and witness tampering. In addition, the ECtHR was not convinced that there is conclusive evidence that I.P. suffered, any profound or long-lasting health or other consequences.

Although the Court agreed that the applicant’s statements concerning I.P. amounted to allegations of fact, the Court held that the domestic courts failed to appreciate sufficiently the fact that the applicant had seen I.P. attending the hearings in his case, that I.P. acknowledged that he had met some of the witnesses, most notably I.T., and S.K., and I.P.’s engagement in the television show Istraga. Therefore the ECtHR concluded that the impugned statements did not lack actual basis for the applicant’s arguments relating to I.P.’s involvement in his case and although the statements were excessive, they did not led to malicious accusations against I.P. [para 80].

Finally the Court analysed the severity of the sanction imposed, and concluded that even though the applicant paid the minimum fine possible under the relevant domestic law, this sanction amounted to a criminal conviction that is not necessary in a democratic society.

The ECtHR concluded that the domestic courts failed to strike a fair balance between the applicant’s freedom of expression in the context of his right to defend himself, and I.P.’s interest in the protection of his reputation on the other  which led to a violation of ECHR, art.10.

 **Decision direction**

The ECtHR highlighted the importance of freedom of expression of accused in the context of exercising their fair trial rights. Although the court reiterated the competing balance between art. 8 and art. 10, it notably held that defendants in criminal trials deserve a higher level of protection against the statements they make in court to ensure that the fear of defamation proceedings does not inhibit them from speaking openly about the issues concerned with the trial.