USTAVNI SUD REPUBLIKE HRVATSKE
Number: U-III-6559/2010
Zagreb, 13 November 2014

The Constitutional Court of the Republic of Croatia, composed of Jasna Omejec, President of the Court, and Judges Mato Arlović, Marko Babić, Snježana Bagić, Slavica Banić, Mario Jelušić, Davor Krapac, Ivan Matija, Antun Palarić, Aldo Radolović, Duška Šarin and Miroslav Šeparović, in proceedings instituted by a constitutional complaint by Miroslav Hršum from Sarajevo, Ulica Vuka Karadžića 89, Bosnia and Herzegovina, who is now serving a prison sentence in the State Prison in Gospić, represented by Željko Lubina, attorney from Split, at a session held on 13 November 2014, unanimously rendered the following

D E C I S I O N

I. The constitutional complaint is hereby partially accepted.

II. It is established that, since no investigation was conducted following his allegations of abuse from 9 May 2008 at 8.00 pm until 10 May 2008 at 8.45 pm, the right of the applicant, Mr. Miroslav Hršum's, guaranteed in Article 23.1, taken separately and read in conjunction with Article 25.1 of the Constitution of the Republic of Croatia (Official Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10, 138/11, 5/14. and 111/3) and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette – International Agreements nos.18/97, 6/99, 8/99, 14/02 and 1/06) was violated in the procedural aspect.

a) Due to the established violation, the applicant was granted, for the period up to the adoption of this decision, compensation amounting to HRK 20,000.00, which will be paid from the State Budget within three months from the date when the applicant submits a request for the payment thereof to the Ministry of Justice of the Republic of Croatia.

b) Pursuant to Article 31.4 and 31.5 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02 and 49/02 – consolidated text), the Constitutional Court establishes that the Office of the State Attorney of the Republic of Croatia shall be obliged to initiate and conduct an efficient investigation of the alleged abuse of the applicant, Miroslav Hršum, from 9 May 2008 at 8.00 pm to 10 May 2008 at 8.45 pm.

III. In relation to other objections of the applicant which were not dismissed by the ruling in this case, the constitutional complaint is hereby rejected.

IV. This decision shall be published in the Official Gazette

and

R U L I N G

I. The following parts of the constitutional complaint are dismissed:

– the part of the objection referring to the period before 10 May 2008 at around 2.00 pm;

– the parts in relation to objections in which the applicant refers to Articles 18 and 116.1 of the Constitution.

II. This ruling shall be published in the Official Gazette.

S t a t e m e n t o f r e a s o n s

I. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

1. The constitutional complaint was filed by Miroslav Hršum, a citizen of Bosnia and Herzegovina, with permanent residence in Sarajevo, Ulica Vuka Karadžića 89, Bosnia and Herzegovina, who is currently serving a prison sentence in the State Prison in Gospić (hereinafter: the applicant). The constitutional complaint was filed personally by the applicant and then by Željko Lubina, the applicant's attorney from Split. Both constitutional complaints are jointly regarded as a single constitutional complaint submitted by the applicant. The constitutional complaint is timely and admissible.

2. The constitutional complaint was filed against a judgment adopted by the Supreme Court of the Republic of Croatia (hereinafter: the Supreme Court) No. Kž-Us-79/10-6 of 15 September 2010, which was corrected by the Supreme Court ruling No. Kž-Us-79/10-8 of 18 November 2010 (hereinafter: Supreme Court judgment or second-instance judgment).

This judgment rejected the appeals submitted by the applicant, co-defendants, and the Office for the Suppression of Corruption and Organised Crime (hereinafter: USKOK) against the judgment adopted by Split County Court in Split No. K-Us-25/08 of 3 February 2010 (hereinafter: County Court judgment or first-instance judgment).

2.1. In the County Court judgment, the applicant was found guilty of two criminal offences against property – robbery, laid down in Article 218.2 in conjunction with Article 218.1 of the Criminal Code (Official Gazette no. 110/97, 27/98 - correction 50/00 – decision of the Constitutional Court of the Republic of Croatia no. U-I-241/2000 of 10 May 2000, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07 and 152/08; and on the basis of the same law he was sentenced to six years in prison (for the first criminal offence) and six years in prison (for the second criminal offence). Subsequently, a single sentence of ten years in prison was imposed. The sentence of imprisonment included the period of deprivation of liberty starting from 10 May 2008.

2.2. Pursuant to Article 79.1 and 79.2 of the Criminal Code, the applicant was subject to the security measure of expulsion of an alien from the country for ten

years, starting from the moment when the judgment became final. The time served in prison was not included in the duration of the security measure.

2.3. Pursuant to Article 82.1 and 82.2 in conjunction with Articles 464.1, 466 and 468.1 and 2 of the Criminal Procedure Act (Official Gazette nos. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03 - consolidated text, 178/04, and 115/06, hereinafter: CrPA), the applicant and other defendants were deprived of unlawfully acquired assets amounting to HRK 38,594.00. Pursuant to Article 132.2 CrPA, the applicant was ordered to pay the injured party, Hrvaska pošta d.d., on the basis of a property claim, a total of HRK 256,026.00 together with interest from 15 March 2008 and to pay the injured party Croatia osiguranje d.d. Zagreb a total of HRK 143,974.00 increased by the legal interest rate starting from 25 March 2009. The applicant was also obliged to cover court expenses amounting to HRK 5,500.00.

3. The applicant believes that the disputed judgments violated his constitutional rights guaranteed in Articles 14, 18.1, 24.1 and 2, 25.1, 26 and 29.1-4 of the Constitution of the Republic of Croatia (Official Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10, 138/11, 5/14 and 111/1) and Articles 3, 5.2 and 116.1 of the Constitution.

He also believes that they violated Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette – International Agreements nos.18/97, 6/99, 8/99, 14/02 and 1/06; hereinafter: the Convention).

4. For the purposes of the Constitutional Court proceedings, pursuant to Article 69, indent 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02 and 49/02 - consolidated text, hereinafter: the Constitutional Act), delivery of the criminal file from the Split County Court no. K-Us-25/08 was requested.

5. In addition to the case file, the following opinions and documents were procured during the Constitutional Court proceedings:

– the opinion of the investigating judge of Split County Court, Stanko Grbavac, no. K-Us-25/08 of 18 April 2011 which was received by the Constitutional Court on 26 April 2011 (hereinafter: opinion of the investigating judge);
– the opinion of the Deputy Ombudsman, Željko Thür, no. P.P.-21-03-799/09-6 of 2 May 2011 together with medical records of the applicant (hereinafter: the Ombudsman's opinion of 2 May 2011);
– the opinion of the Supreme Court Secretary, Zdravko Stojanović, of 3 May 2011, together with annexes related to the deliberation and adoption of the disputed judgment of the Supreme Court;
– the opinion of the Prison System Directorate of the Ministry of Justice of the Republic of Croatia, class: 730-11/11-12/10, reg. no: 514-07-01-01-05/1-11-2 of 16 June 2011, together with annexes concerning injuries suffered by the applicant when admitted to the prison in Split;
– the opinion of the Split-Dalmatia Police Administration concerning the arrest of Miroslav Hršum, no.: 511-12-23-KU-236/08 of 3 October 2011. (hereinafter: the opinion of the police concerning the arrest of the applicant of 3 October 2011).

6. The case in question is a very complex criminal one in which the applicant was, together with several other persons, accused first of one criminal offence of robbery committed on 15 March 2008, and after that of another criminal offence of robbery committed on 23 November 2007. This Constitutional Court case brought to the surface several important constitutional issues, some of which were raised for the first time in its Constitutional Court practice and were deemed important for the future work of the Constitutional Court. This particularly refers to the issue of the alignment of Constitutional Court proceedings with the case law of the European Court of Human Rights in Strasbourg (hereinafter: ECtHR) in relation to the failure to conduct an investigation, or in relation to an inefficient investigation in the light of Article 23.1 taken separately and read together with Article 25.1 of the Constitution and Article 3 of the Convention (where the scope of the question also included Article 2 of the Convention).

6.1. In addition to preliminary actions (see point 5 of the statement of reasons of this decision and ruling), the circumstances demanded, according to the conclusion adopted by the competent court panel discussing the case on 16 February 2012, that the case be decided at a Constitutional Court session due to its wider importance. For that reason, the case appeared successively on the agenda of several expert meetings (6 March 2012, 20 March 2012, 11 April 2012, 17 April 2012, 25 September 2012, 15 July 2014, 30 September 2014, 6 October 2014, 21 October 2014, 28 October 2014 and 4 November 2014) and several thematic meetings of judges were also held with this case as the only or principal item on the agenda (22 October 2012, 11 April 2013, 25 November 2013, 17 February 2014 and 27 October 2014). For the purposes of these proceedings, a special study was prepared concerning the judgment in which the applicant was found guilty on the basis of direct evidence, that is, on the basis of a "closed circle of circumstances".

6.2. This being an exceptionally extensive criminal case, the Constitutional Court employed, upon the reporting judge's request, two external counsellors to work on the processing and preparation of the case together with senior Constitutional Court legal advisers from the Centre for Evidence and Documents of the Constitutional Court.

7. The applicant submitted to the Constitutional Court a signed rush note written on 21 March 2011 which was received on 28 March 2011 asking for the speeding up of Constitutional Court proceedings initiated by his constitutional complaint. The second rush note, which was also personally signed, was received by the Constitutional Court on 29 February 2012.

In this respect, the Constitutional Court found that rush notes submitted to the Constitutional Court are not legal means for the speeding up Constitutional Court proceedings within the meaning of Article 63 of the Constitutional Act and Article 35.1 of the Convention.

II. FACTS AND CIRCUMSTANCES OF THE CASE

1) Description of events

8. In the Split Postal Headquarters of the company Hrvatska pošta, at Hercegovačka 1, in the Department for Cash Transactions, several masked and armed persons committed armed robbery on 15 March 2008 between 10.25 pm and 10.43 pm during which, at gunpoint, they overcame, and then handcuffed and tied with tape, several security guards and post office employees and stole from the vault a total of HRK 15,021,500.00 and then left the crime scene in an unknown direction.

8.1. In branch office 21110 of Hrvatska pošta in Split, at the address of Gradišćanskih Hrvata 22, several masked and armed persons committed armed robbery on 23 November 2007 and stole a minimum of HRK 96,688.41 from the Split Postal Headquarters of the company Hrvatske pošte. The competent police administration filed criminal charges against the unknown perpetrator on 23 November 1997 (vol. 3, p. 172 of case file K-Us-25/08).

8.2. Those two armed robberies were subsequently connected. The Split-Dalmatia Police Administration, Criminal Police Sector, General Crime Department, submitted on 12 May 2008 to USKOK's Office in Split a special report – an amendment to the criminal charges submitted by the Split headquarters of the company Hrvatske pošte, Hercegovačka 1, no.: 511-12-09-23-KU-236/08A.Ž. of 12 May 2008 (hereinafter: Special Report of 12 May 2008) against the applicant and several other persons suspected of having committed the two criminal offences of robbery (vol. 1, pp. 1 – 9 of the case file K-Us-25/08), that is, the armed robbery of 23 November 2007 and the armed robbery of 15 March 2008.

2) Arrest and questioning of the applicant by the police and the investigating judge

9. The applicant claims that he was kidnapped from his rented flat in Split on 9 May 2008 at around 8 pm by masked civilians and that these persons tied his arms and legs, put a tape over his mouth and eyes and took him out of his flat by force, put him in the trunk of a car and drove away in an unknown direction. The drive lasted for “1-2 hours”, and he was hit on his thighs for the entire duration of the drive. Later on he realised he had been taken into the woods where those persons stripped him, brutally beat him up, hit him with a rubber baton on the soles of his bare feet, on his legs and back and in his crotch and intimidated him until the following morning. One of the persons said that they should give him a shovel to dig his own grave. Those persons abused him verbally, mentioning the names of his two children and saying that they had killed them. They also insulted him because of his ethnic origin. One of the persons fired a gun next to his head. He claims that, as a result of this beating, his legs and thighs were hurt that night, that his front teeth were broken and that his left testicle was injured. According to the applicant, the purpose of the torture was to make him promise that later on he would admit and sign everything the police asked him to. When he agreed to do that, the kidnappers put him back in the trunk of the car the next morning, 10 May 2008, and left him at the premises of the police administration in Split, where he was handed over to the police.

9.1. According to the arrest report of the Split-Dalmatia Police Administration, Criminal Police Sector, General Crime Department no.: 511-12-09-23-KU-236/08 of 10 May 2008 (vol. 3, pp. 159 – 160, case file K-Us-25/08; hereinafter: Arrest Report of 10 May 2008), the applicant was arrested on 10 May 2008 at 3 pm at the premises of the Split-Dalmatia Police Administration, General Crime Department on suspicion of a criminal offence of robbery under Article 218 of the Criminal Code. In the opinion of the police concerning the arrest of the applicant of 3 October 2011, (see point 5 of the statement of reasons of this decision and ruling) it is repeated that the perpetrator was arrested on 10 May 2008 at 3 pm, but it was also added that he was "brought into the premises of the General Crime Department of the SD Police Administration .... at around 2 pm of the same day".

10. According to the claims made by the applicant, when he was handed over to the police in the early morning hours of 10 May 2008, violence against him continued at the premises of the Split Police Department where different official persons read him some previously prepared documents and threatened that "he would be even worse off" if he didn't confirm what they said. They rejected his request for medical assistance. The applicant claims that he was hit many times by Inspector Rubelj. He claims that, when his attorney and the deputy state attorney arrived, the official persons dictated his statement from a note book according to previously prepared notes, and that his lawyer left the room but in the end signed the records noting that “this will not hold up in court”. He claims that he asked everybody for medical assistance and that he asked them to call his family or the embassy but "they ignored my demands and did not let me call anyone". They did not let him "eat or drink" all day. He claims that Inspector Rubelj wrote the "arrest warrant" only after the attorney had left and stated in the warrant that the applicant was arrested on 10 May 2008 at 2:00 pm. The applicant claims that he refused to sign this report but was forced to do so in the end because Inspector Rubelj started hitting him again. Finally, he claims that two police officers dragged him down the stairs into the basement of the police station where the holding cells were situated because his feet were bloody and swollen, and he was brought before the investigating judge on Monday, 12 May 2008.

10.1. On the other hand, the Arrest Report of 10 May 2008, which was written on a standardised form, reads:

> "B. INSTRUCTION ON THE RIGHTS OF THE ARRESTED PERSON
>
> 1. The arrested person was informed on 10 May 2008 at 3 pm, pursuant to the provisions of Article 6.1 of the Criminal Procedure Act and Article 96 of the same Act, of:
>
> – the reasons for his arrest;
> – his right to remain silent;
> – the right to professional assistance of a defence counsel of his choice.
>
> (…)
>
> 2. After having been read his rights, the arrested person:
>
> a. called attorney Željko Lubin who came to the premises of the organisational unit on 10 May 2008 at 3.30 pm.
>
> (…)
>
> e. refused to have the following persons informed of his arrest:
> – family;
> – consulate/embassy.”

The following was also stated in the Arrest Report of 10 May 2008:

> "Pursuant to Article 177.5 of the Criminal Procedure Act, the following persons were present at the interview with the arrested person:
>
> a) a state attorney from USKOK – Natalija Petković
>
> b) defence attorney Željko Lubina."

The applicant signed the above-mentioned report without any comments or objections.

10.2. Furthermore, according to information from the Records of the Questioning of the Suspect, No. 511-12-09-23-KU-236/08 of 10 May 2008 (vol. 2, pp. 121 – 129 of case file K-Us-25/08; hereinafter: the Records of the Questioning of the Suspect of 10 May 2008), the applicant's defence attorney, Željko Lubina, was informed that his client had to come to the premises of the police administration on 10 May 2008 at 3.00 pm, and the questioning of the applicant started on 10 May 2008 at 3.30 pm.

The records consist of a total of nine pages and each page was signed by the applicant, his defence attorney, police officer Željko Rubelj and deputy competent state attorney, Natalija Petković. The applicant stated the following in the records: "I am aware of the criminal offences I am being charged with, I am familiar with my rights and I present the following defence in the presence of my defence attorney Željko Lubina....". After that, the Records of the Questioning of the Suspect of 10 May 2008 contain the applicant's detailed description of events concerning the robbery of a post office in November 2007 in Split and the events related to the renting of apartments in Split up to the second robbery of a post office in Split in March 2008.

The statement ends with the following words: "I have nothing else to state, I am aware that I can read the records, I state that I listened to the records being dictated and will therefore sign the records without reading their contents." According to the records, the questioning of the applicant was completed at 8.45 pm.

11. Pursuant to a decision of the Investigative Centre of Split County Court no. KIR-475/08 of 11 May 2008 (vol. 3, pp. 156 – 158 of case file K-Us-25/08), the applicant was detained for 24 hours under the condition that "detention may last at the latest until 12 May 2008 at 3.00 pm".

The applicant was brought before the investigating judge of Split County Court on 12 May 2008. According to the Records of the Questioning of the Defendant, no. KIR US 36/08 of 12 May 2008 (vol. 3, p. 176, case file K-Us-25/08; hereinafter: Records of the Questioning of the Defendant of 12 May 2008), the applicant was interrogated by the investigating judge Stanko Grbavac from 12.40 pm to 12.50 pm in the presence of a defence attorney of his own choice (attorney Željko Lubina) and the state attorney (deputy director of USKOK, Natalija Petković). The records read:

> "When the suspect was read the criminal charges under no. KU-236/08 and after being given the information and instructions as mentioned above, he stated that he understood what he had been charged with and what the grounds for the suspicion against him were and that he would use his legal right to remain silent and that his attorney would be Žejko Lubina, attorney from Split, who was present at the interrogation.

SUSPECT'S DEFENCE

‘I fully maintain my defence given at the police station in front of my defence attorney Željko Lubin who is present, but since I don't have money to pay for his services, I will for the time being remain silent and refuse to answer any questions.’

Completed at 12.50 pm.

The defendant was informed of the provision of Article 77 CrPA and he stated that he did not wish to read the records and that he would sign them.”

11.1. The investigating judge adopted on the same day a ruling on conducting investigation no. KIO-Us-13/08 of 12 May 2008 (vol. 4, pp 191 – 194 of case file K-Us-25/08) against the applicant and six other persons on account of reasonable suspicion that they had acted as a group to commit the criminal offence of armed robbery, thus committing the criminal offence of robbery referred to in Article 218.2 and 218.1 of the Criminal Code. On that same day, 12 May 2008, the applicant was detained on the basis of grounds for detention referred to in Article 102.1.1, 2, 3 and 4 CrPA.

12. In a handwritten document of 13 May 2008, which was submitted by the applicant's attorney directly to Split County Court in the investigation case file KIO-Us-13/08 on 4 June 2008 (vol. 9, pp. 347 - 349 of case file K-Us-25/08), the applicant stated that he was “kidnapped by police officers who were masked in balaclavas and heavily armed” on 9 May 2008. Then he went on to describe how he had been kidnapped and tortured and forced to admit to committing a criminal offence. It seems that the applicant did not enclose medical documentation with his letter although he mentioned in the letter the existence of medical records supporting his injures.

12.1. The constitutional complaint was accompanied by a copy of handwritten petition no. 1 of 21 September 2008 addressed to the investigating judge, Stanko Grbavac, to which, according to the applicant, he never received any reply. The applicant stated in this petition that, at the interrogation in front of the investigating judge conducted on 12 May 2008, he defended himself by remaining silent because he was not familiar with the legal procedures, because he did not know the language and was afraid and he asked to be able to give his statement which he did not give before in his mother tongue, but was deprived of this possibility, although this is laid down in Article 7.2 CrPA (p. 27 of the Constitutional Court file). This petition of the applicant, however, was not contained in case file K-Us-25/08. For petition “no 2” of 21 September 2008, see point 60.1 of the statement of reasons of this decision and ruling.

12.2. The applicant enclosed with the constitutional complaint a copy of a handwritten petition of 20 April 2010 addressed to a judge of the Split County Court, Bruno Klein, and in which he gave his detailed account of the events concerning the criminal offence of 15 March 2008 and presented various objections to the manner in which competent police and judicial authorities treated him (pp. 30 - 34 of the Constitutional Court file). This applicant's petition, however, was also missing from case file K-Us-25/08.

3) Search conducted in the applicant's flat

13. In the meantime, on 11 May 2008, a search was conducted in a flat rented by the applicant in Split.

13.1. According to applicant's claims, the search was conducted unlawfully in violation of the rules on witnesses and without the presence of his attorney. The applicant was forced to sign the records because he was threatened by police officers and insulted because of his ethnic origin. He was not permitted to read the records beforehand. A more detailed overview of the applicant's opinion on the search of his flat is contained in points 77 and 78 of the statement of reasons of this decision and ruling.

13.2. The search conducted in the applicant's flat was recorded in the Records of the Search of the Flat and Other Premises prepared by the Split-Dalmatia Police Administration, General Crime Department no. 511-12-09-23-KU-236/08 of 11 May 2008 (vol. 1, pp. 21 – 24, case file K-Us-25/08; hereinafter: Records of the Search of the Flat of 11 May 2008). A more detailed overview of the contents of the records is provided in point 81 of the statement of reasons of this decision and ruling.

4) Criminal proceedings against the applicant

14. The applicant and nine co-defendants were indicted in indictment no. UK-137/08 of 21 October 2008 for two criminal offences of robbery referred to in Article 218.2 in conjunction with Article 218.1. of the Criminal Code (vol. 26, pp. 979 -1026 of the case file K-Us-25/08).

15. At the first hearing which took place on 25 May 2009, the applicant, represented by attorney Željko Lubina, stated that he pleaded not guilty in relation to all items of the indictment, and that he would present his defence at the end of the presentation of evidence (vol. 33, p. 1223 of case file K-Us-25/08). He repeated the same at the trial which took place on 12 October 2009 where he stated that he would present his defence (vol. 45, pp 1577 and 1578 of case file K-Us-25/08).

16. At the trial which took place on 13 January 2010, the applicant presented his defence (vol. 52, p. 1800 of case file K-Us-25/08). He pleaded not guilty to both items of the indictment. He renounced the truth and validity of his statements before the police and the investigating judge, which was described in the first-instance judgment in the following manner:

> "When he was presented with the records before the investigating judge and with the contents of the records, and reminded that he had signed the records personally after having been duly informed as referred to in Article 77 CrPA, the first defendant, Miroslav Hršum, stated that that was not correct and that what he had stated at the trial was the truth.
>
> When he was presented with his statement of seven pages given to the police in the presence of the defence attorney, Željok Lubina, and signed by his defence attorney, the first defendant, Miroslav Hršum, stated that he was not able to think clearly and that what he stated at the trial was the truth. When the statement given to the police was read to him in its entirety and when the president of the panel of judges asked him if he wanted to comment on what he had stated at the trial that the

police had forced him into making the statement which was prepared in advance and that his defence in front of the police contained many details, including from his personal life, the first defendant, Miroslav Hršum, stated that he did not wish to comment on it.

(…) He stated that, before arriving before the investigating judge, he was not familiar with the meaning of Article 4 CrPA and that the police had not informed him about that provision but only beat him. When the defence attorney presented him with the expert report of 12 May 2008, he said that the report referred to the situation when they would not take him to his room during detention but they took him to the Split Hospital for examination. (…) When further questioned by the president of the panel about the fact that the entire records had been read to him in front of the police in the presence of the defence attorney, which was signed by him and his attorney, the defendant stated that he would have signed anything at that moment....

(…)

(…) He was in bad shape when he was brought before the investigating judge, which may be evidenced by photographs of the arrest and he never said to the investigating judge he did not have money to pay for the attorney. He spent three minutes with the investigating judge."

16.1. The rest of the applicant's statement of 13 January 2010 was summarised in the first-instance judgment as follows:

"(…) When he was arrested on 9 May 2008 at 9.00 pm, he was actually kidnapped by some persons with hoods over their heads who beat him and broke three of his ribs and that he was also kicked several times in his testicles. They also cursed him and beat him with batons on his feet. Only afterwards did they remove the tape that was closing his mouth and asked him about the robbery of the postal headquarters in Split, and he said he did not know anything about it. After all of that he was taken to the third floor where the tape was removed from his face and he was questioned and abused, which is why he said he would admit to anything. They also showed him pictures of a robbery and a person who looked nothing like him but, since they were beating him, he said he would admit to anything. (…) They already started writing records which they had prepared in advance and only then did his attorney join them. The attorney left the room half way through the records as a sign of protest and when his attorney and the director of USKOK left, he was asked to sign the arrest report dated 10 May at 3.00 pm. When he tried to object, they beat him, so he signed everything. On Sunday he was taken to his flat for the search but he could not even walk and the landlord was in the apartment with two men, who were sitting at the table, and who were later joined by a lady who brought coffee. When he did not want to sign these records, he was slapped two or three times, and then taken to the investigating judge, although he was unable to walk. He said in front of the investigating judge that he would like to remain silent, as he had said to the police, and he did not know how it was entered into the records that he defended himself like this in front of the police. He underwent a medical check up after detention and his injuries were recorded."

17. The defence attorney's proposal to conduct a medical expert examination of the applicant's state of mind at the moment of giving his statement before the police and before the investigating judge on 10 and 12 May 2008 was rejected at the trial which took place on 15 January 2010. The first-instance court explained its decision as follows:

"(…) Miroslav Hršum gave his statement to the police on 10 May and to the investigating judge on 12 May in the presence of his attorney, who has been his

attorney for the duration of proceedings, and neither of the records contains comments of the first defendant, or his attorney, that the defendant, Miroslav Hršum, was unfit to stand trial. Furthermore, the investigating judge did not note any such problem and the statement given to the police is seven pages long and is very detailed. For that reason, the defence attorney's proposal referred to under 1, at the end of the presentation of evidence and following the questioning of all other defendants, was found irrelevant for the above-mentioned circumstances and all the other presented evidence."

18. Following the trial, the first-instance court found the defendant guilty on 3 February 2010 (see point 2.1 of the statement of reasons of this decision and ruling) together with eight other co-defendants (Miro Cokarić, Emil Cokarić, Vesna Vuco, Mladen Stupalo, Boris Marušić, Zoran Stevanović, Jozo Certa and Milan Mitić).

19. The applicant personally appealed against the first-instance decision on 20 April 2010, and the second appeal was filed by his attorney on 3 May 2010. Both appeals contain objections repeated in the constitutional complaint, as well as claims that the conviction of the applicant was based on unlawful evidence that should have been excluded from the case file.

20. The Supreme Court rejected the applicant's appeal on 15 September 2010 and confirmed the first-instance judgment.

21. At the moment of the adoption of this decision, the applicant is serving his prison sentence for the committed criminal offences. The applicant was in Split Prison from 12 May 2008 to 28 February 2010 when he was relocated to Dubrovnik Prison due to overcrowding. He was there until 19 August 2010 when he was again relocated to Spit Prison, and on 21 March 2011 he was sent to the Diagnostics Department of Zagreb Prison.

According to a letter to the head of Šibenik Prison, class 740-02/11-01/01, reg. no: 573-04-11-36 of 19 April 2011, addressed to Split County Court, "prisoner Mirsolav Hršum, son of Rado, born on 20 September 1962 in Rogatica, Bosna and Herzegovina, was brought to Šibenik Prison to serve his 10 (ten)-year prison sentence."

According to a letter addressed to Šibenik Prison, class 730-08/12-01/03 reg. no.: 573-04-12-4 of 24 January 2012, on the basis of a decision adopted by the Ministry of Justice, Prison System Directorate, Central Office, class: 730-08/12-01/71 reg. no.: 514-07-01-02-02/3-12-2 of 18 January 2012, the applicant was relocated to further serve his sentence in Gospić Prison, starting on 24 January 2012. He is still at that location.

III. ALLEGED ABUSE OF THE APPLICANT

22. The general prohibition of abuse is laid down in Article 23.1 of the Constitution, and the special positive obligation to treat arrested persons and convicted persons humanely is regulated by Article 25.1 of the Constitution. The provisions read as follows:

”Article 23

(1) No one may be subjected to any form of abuse.

(…)"

”Article 25

Any arrested and convicted person shall be accorded humane treatment, and the dignity of such individual shall be respected.

(…)"

22.1. "Arrested person", for the purposes of Article 25.1 of the Constitution, refers to all persons deprived of liberty by public authorities before or during a trial, regardless of the positive legal terminology used to designate such persons in individual stages of pre-investigative, investigative and criminal proceedings (arrested person, detained person, prisoner, etc.).

23. General prohibition of abuse is laid down in Article 3 of the Convention that reads:

”Article 3

PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. ALLEGED KIDNAPPING AND ABUSE OF THE APPLICANT DURING ARREST AND QUESTIONING AT THE POLICE STATION

1) Applicant's objections

24. The applicant claims in his constitutional complaint that he was kidnapped from his flat in Split on 9 May 2008 at around 8.00 pm by unknown (masked) persons who took him to an unknown location where he was abused. The applicant states the following in his constitutional complaint that he prepared himself:

"(…) I was arrested (...) on 9 May 2008 in the evening hours at around 8.00 pm in my flat in Split by masked persons for whom it was never established if they were official persons because the panel did not allow their interrogation stating they may not be interrogated or give statements and that it was not necessary due to the further explanation of the kidnapping/arrest which will come below.

The above-mentioned persons put me in the trunk of a vehicle (tied up, wrapped in tape). I was taken to an unknown location in the woods where I was beaten and tortured until the early morning hours of the next day, not knowing why I was kidnapped and the next day I was taken to the first police station and left tied up until the arrival of Inspector Rubelj. The inspector wrote my arrest report at 2.00 pm on 10 May 2008 and they beat me into signing it.

The statement of Mr. Rubelj at the trial in response to a question by the defence (...) Mr. Rubelj answers: 'I found Hršum in the office in the early morning hours barefoot and naked following my arrival at the office for work.' To the defence attorney's question about whether Hršum had any identification documents, Rubelj answered 'He did not have any personal documents, he was barefoot and naked, that is, only in his sweatpants because that was the only thing he still had on ... I found a membership card of something called the white eagles'. Which is a terrible lie of an official person who permits himself or was permitted to state such lies and falsehoods before the panel. (…)

Therefore I state that if Inspector Rubelj, as he stated before the panel, found me in the morning hours in his office when he arrived for work, how is it possible that he wrote my arrest warrant in the afternoon hours, that is, at around 2.00 pm when my detainment period started (arrest) according to all the rulings. I was there from 8.00 pm on 9 May 2008 to 2.00 pm on 10 May 2008.

The defence attorney made a request to interrogate persons who had deprived the suspect Hršum of his liberty and to question them before the court about the way in which they deprived him of his liberty and where he was deprived of his liberty as well as where they kept the suspect during the disputed time period.

The panel adopted its decision at a closed session after this request. The request was denied and could not be appealed, with the explanation that those persons may not be arrested. Therefore, the question is who arrested (kidnapped) the suspect.

Everything I described may be verified, the manner in which I was arrested (first kidnapped) and then arrested the next day at 2.00 pm.

I have attached to the complaint a copy of the petition submitted to the investigating judge requesting to be ensured the right to give my statement before the judge without coercion, but I never received any reply. Request of 21 September 2008 was sent from detention to the investigating judge, Stanko Grbavac."

24.1. The applicant further states the following:

"I state, and may prove with facts that I was treated in a degrading and inhumane manner from the arrest and forced testimony and for the entire duration of the investigation and detention and that I was deprived of all possible rights guaranteed in the CrPA of the Republic of Croatia.

I was arrested (kidnapped) in my apartment on 9 May 2008 by unknown persons who were masked civilians and who acted as criminals and who introduced themselves as criminals. Then they wrapped me in aluminium tape (tied my legs, arms, wrapped the tape around my head and over my mouth and blindfolded me) and thus carried me out of the apartment and put me in the trunk of a vehicle and then drove in an unknown direction. The entire time they cursed my Serbian mother and children whom they mentioned by name. They told me that they had killed my children, Dejan and Alesksandar, and that they were taking me to Sarajevo and that I would be tortured like never before until we got to Sarajevo. After an hour and a half's drive, they took me to an unknown location and I didn't see anything because my eyes were covered with tape. Then those people took me out of the trunk (...) One of them placed a gun to my temple and charged it and said 'Shall I finish him off right now' and the other one answered (who I assumed was the leader of the group). When I was lying in the grass the guy with the gun fired next to my head and I remember his comment 'Look at that Serbian trash, even the bullet won't have him.' Then they started kicking me in the back and crutch and in my testicles which lasted until after midnight. I lost consciousness from time to time because of the pain and they would wait for me to regain consciousness and then continued beating me. (…)

Since I was naked and barefoot, some of them stepped on my feet and one of them started hitting me with a rubber object (baton) on my bare feet. They did not ask me anything, they just beat me and I am not sure for how long because I was more unconscious than conscious. Only sometime in the morning hours did they take off the tape but only from my mouth because I started choking as I was unable to breathe through my nose in that condition and only my nose wasn't taped.

Then one of them told me to talk or they were going to start the final stage. Then I managed to say that I knew that they were cops and I figured that out because of the rubber baton they hit me with. Then the leader only said 'Look at the bastard how he figured it out'. To stop any further torture, I said that I would say whatever they wanted and admit to anything, including everything that had happened in Croatia

in the past 20 years, although I didn't even know what they wanted from me. Then the person who I assume was the leader of the group told me that if I wanted to live, I should confirm and sign anything the police ask me to after they arrest me and that they would be close by and if I refused to sign anything, they would take me away again on a trip of no return because nobody knew that I had been arrested or where to look for me. I state even now that I would like to face those persons in court or at least that they give their testimony.

When I finally accepted, they put a tape over my mouth again and put me head first in the vehicle between the back and front seat.

The ride again lasted for an hour and then they carried me out of the vehicle and I felt they were carrying me up some stairs. I concluded they carried me to the 3rd or 4th floor of a building. They carried me into a room and sat me on a chair and then I heard the door close. After 5-10 minutes a man came and asked me who I was and what I was doing there. He started taking off the tape from my eyes, mouth and legs. He asked me while laughing why I was naked and barefooted. I did not answer at first and then he laughed and hit me on the back of my head with his fist and knocked me down. Later he asked me why I had committed the criminal offence I was accused of. I hereby claim again that I have never committed a criminal offence, let alone the one I was charged with. The way in which my statement was forced in a police station is confirmed by the enclosed petition of 21 September 2008 which I sent to the investigating judge and which was not granted and to which I never received a reply for unknown reasons. To give a statement before an investigating judge when I am physically and mentally capable.

The fact stated in the statement of reasons of the judgment that I signed the above-mentioned statement is not correct. The above-mentioned attorney, Mr. Lubina, stood up in protest half way through the dictation of the records written by Inspector Rubelj in his notebook. When he completed the dictation, he hit me for who knows how long. He literally said: 'You'd better sign this or you will end up in the woods again tonight. I won't let you fuck with me all day long'.

The state attorney Natalija Perković was also there and said to Rubelj 'I will get attorney Lubina because he is still in the building and he needs to sign that too.' She came back in about 10 minutes accompanied by attorney Lubina who said from the doorstep, 'See what you did right now. That will not hold up in court.' When the attorney left, Mr. Rubelj wrote me an arrest warrant in which he put that the arrest time was 2.00 pm on 10 May 2008.

It is clearly stated at the beginning of this text that I was arrested at 8 pm on 9 May 2008. When I refused to sign, he started hitting me again and I was forced to sign it.

Since I couldn't walk because my feet were bloody and swollen, two more officers came and dragged me down the stairs into the basement of the police station where the holding cells were located."

25. The applicant objected that he received no medical assistance during questioning at the police station.

> "I hereby state that I asked for medical assistance at the police station and in front of the state attorney and my attorney. It was denied me from 10 May 2008 when I was brought in after being tortured and beaten up until the evening hours of 12 May 2008 when I was detained in Bilice Prison in Split. My condition can also be seen in the picture of the daily newspaper of Slobodna Dalmacija of 13 May 2008. This is the moment when I was being carried by the police to the court building before the investigating judge where I wasn't tied up but they were only holding me not to fall. (…)

My condition upon arrival may be confirmed by the judicial police officers on duty and the doctor who was on duty in the afternoon hours of 12 May 2008. My condition was such that they would not accept me before I was given medical assistance and it was then that I was taken to Firule Hospital in Split. In the hospital they diagnosed me with injuries to my feet, back, testicles, all as a result of the beating.

This is also confirmed by medical records from that day enclosed with this complaint. ...”

2) Assessment of the Constitutional Court

a) Substantive aspect of Article 23.1 separately and in conjunction with Article 25.1 and Article 3 of the Convention

26. Article 23.1 of the Constitution and Article 3 of the Convention contain one of the most important fundamental values of a democratic society. These articles absolutely prohibit any kind of abuse, even in the most serious circumstance such as terrorism or organised crime, regardless of the circumstances and behaviour of the victim. Neither the requirements of the investigation or difficulties in the fight against crime may justify limiting the protection that must be ensured in relation to the physical integrity of individuals.

Article 25.1 of the Constitution specifies the prohibition of abuse and it refers to special groups of persons: arrested persons (see point 22.1 of the statement of reasons of this decision and ruling) and convicted persons. It is therefore recognised in the Croatian Constitution that persons deprived of liberty are particularly vulnerable. For this reason, the competent authorities not only have a negative constitutional obligation to abstain from abuse of persons deprived of liberty. It is their positive constitutional obligation to treat those persons in a humane manner and to respect their dignity.

26.1. In risky situations such as the establishment of public order, the prevention of criminal offences, the catching of alleged criminals and one's own protection, or the protection of other persons, police officers are allowed to use certain measures, including the use of force. However, such force may be used only if necessary and may not be excessive. The use of unnecessary physical force which is not strictly necessary due to the behaviour of the person on whom it is used deprives that person of his or her dignity and, as a rule, represents a violation of the right guaranteed in Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention (see ECtHR, *V. D. v. Croatia*, judgment of 8 November 2011, application no. 15526/10, § 69).

27. In order to be subject to the scope of Article 23.1 of the Constitution and Article 3 of the Convention, the behaviour must reach a minimum level of seriousness. The assessment of this minimum level of seriousness always depends on the circumstances of the specific case, such as the duration of the behaviour, its physical and mental consequences for the victim, and in some cases the sex, age and health condition of the victim.

28. Claims of abuse must be supported by appropriate evidence. The Constitutional Court recalls that the ECtHR applies the standard of “beyond

reasonable doubt” to the assessment of such evidence, but also adds that such evidence may result from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (ECtHR, *Đurđević v. Croatia*, judgment, 19 July 2011, application no. 52442/09, § 79). The Constitutional Court does not view that the Constitution prevents the application of the “beyond reasonable doubt” standard in its autonomous meaning provided by the ECtHR in its case law in proceedings for the protection of constitutional rights before the Constitutional Court in the case of abuse in the substantive aspect. There is no doubt as to the suitability of this standard since a fact will be regarded as established only if the presented evidence does not cause reasonable doubt about the actual existence of the fact.

29. In that sense, the Constitutional Court notes that it is stated in the record of the specialist examination in the emergency room of Split Hospital of 12 May 2008, no. protocol 12193/09, which was enclosed by the applicant with the constitutional complaint:

> "Dg. Contusio dorsi thoracis
> Infravtio costae IV et V susp
> Contusionec podis lat utq
> The patient came because of injuries allegedly suffered during police arrest.
> About the state:
> Conscious, eupnoic, afebrile, anicteric, chest properly arched and shows breathing movements, mobile, pressure on the back of the chest painful, auscultatic regular breathing. Visible contusion marks, bruising of both feet.”

29.1. On that same day, 12 May 2008, the Clinical Department for Diagnostic and Intervention Radiology of the Faculty of Medicine of the University of Split conducted a radiological exam of the applicant (no. of receipt 61900) and a specialist radiologist, Mari Perić, prepared a radiological examination record which reads as follows:

> "... On the shown bone parts, the suspicious lesion of the bone structure in the area of the back quarter of the 4th and 5th rib is slightly more lateral than the costovertebral articulation.
> RTG of lungs and heart:
> There are no post-traumatic intratoracal complications.
> RTG image of thoracic and lumbar spine:
> There are no changes to the bone parts resulting from trauma. ... “

30. Therefore, it is obvious from the medical documentation that the applicant had contusion marks and bruises of both feet on 12 May 2008 and it was also suspected that the bone structure was broken in the described part. It is indisputable that the medical records were preceded by the arrest and questioning by the police. In the light of the applicant's claims that the recorded injuries resulted from police brutality, the Constitutional Court finds them serious enough to be regarded as the “minimum level of gravity” within the meaning of Article 23.1 of the Constitution and Article 3 of the Convention.

31. The applicant's complaints concerning his abuse in the substantive aspect comprise several periods that must be examined separately by the Constitutional

Court since they are connected to his claim that he was arrested on 9 May 2008 at around 8.00 pm after having been abducted (kidnapped) from his flat in Split.

32. Arrest is regulated by Article 24 of the Constitution that reads:

> ”Article 24
>
> No one may be arrested or detained without a written court order grounded in law. Such an order has to be read and presented to the person placed under arrest at the moment of said arrest.
>
> The police authorities may arrest a person without a warrant when there is reasonable suspicion that such person has perpetrated a grave criminal offence as defined by law. Such person shall be promptly informed, in understandable terms, of the reasons for arrest and of his/her rights as stipulated by law.
>
> Any person arrested or detained shall have the right to appeal before a court, which must forthwith decide on the legality of the arrest."

32.1. Although the applicant did not refer to Article 5 of the Convention, the Constitutional Court quotes its relevant part as well:

> ”Article 5
>
> RIGHT TO LIBERTY AND SECURITY
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (…)
>
> c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence...”

33. The main purpose of Article 24 of the Constitution and Article 5 of the Convention is the guarantee of the protection of a person against unlawful arrest and detention. This is physical freedom or personal security that people may not be deprived of arbitrarily. The concepts of lawfulness and legal safety, or legal security, arising from the rule of law as the highest value of the constitutional order of the Republic of Croatia, are present in the whole of Article 24 of the Constitution.

33.1. The concept of "arrest" within the meaning of Article 5 of the Convention is the moment when a person is no longer free. According to the established position of the ECtHR, this concept has an autonomous meaning and it expands beyond the area of criminal law measures (ECtHR, *Van Der Leer v. Germany,* judgment, 21 February 1990, application no. 11509/85, § 27).

In order to establish whether a person has been arrested within the meaning of Article 5.1.c of the Convention, the starting point must be the concrete situation of a person (ECtHR, *Engel et al v. the Netherlands*, judgment, 8 July 1976, application no. 5100/71 et al § 59).

33.2. From the point of view of the protection of human rights in proceedings before the Constitutional Court, the above-mentioned legal positions of the ECtHR apply to the concept of “arrest” by state administration bodies within the meaning of Article 24 of the Constitution. For this reason, the concept of “arrested person”, that is, “a person that has been arrested”, within the meaning of Article 24 of the Constitution is

much narrower than the concept of “arrested person” within the meaning of Article 25.1 of the Constitution that must be interpreted in a broader manner (see point 22.1 of the statement of reasons of this decision and ruling).

34. The Constitutional Court continues to stress that the undocumented arrest or detention of a person by a state administration body represents a complete negation of important guarantees contained in Article 24 of the Constitution and Article 5 of the Convention and a most serious violation of the Constitution and the Convention. Lack of data – such as the date, time and place of arrest, the name of the arrested person, reasons for the arrest and the name of the person that conducted the arrest – is not in compliance with the requirements of the rule of law or the basic purpose of Article 24.1 and Article 24.2 of the Constitution and Article 5.1.c of the Convention (ECtHR, *Fedotov v. Russia*, judgment, 25 October 2005, application no. 5140/02, § 78, judgments).

aa) The alleged arrest of the applicant (kidnapping) of 9 May 2008 at around 8.00 pm and the abuse of 9 May 2008 at around 8.00 pm until he was brought into the premises of the police station

35. Concerning the period from 9 May 2009 at around 8.00 pm (that is, the time when the applicant was allegedly arrested by “being kidnapped”) until the moment when the applicant was taken to the premises of the police station, the applicant alleges that he was in that period abused by “unknown masked civilians who claimed they were criminals and introduced themselves as such” and "in relation to whom it was never established if they were official persons.” The applicant further stressed that he concluded only later that the persons that allegedly abused him were “some kind of police officers” and he concluded that because of the “rubber baton they used to beat me up”. He had a tape over his eyes the entire time (see points 24 and 24.1 of the statement of reasons of this decision and ruling).

35.1. The Constitutional Court notes that all information in the case file certifies that the applicant was arrested at another time (10 May 2008 at 3.00 pm), except for one piece.

It is stated in the Special Report of 12 May 2008 (see point 8.2 of the statement of reasons of this decision and ruling) that the applicant was formally arrested on 9 May 2008 at 3.30 pm. Considering the entire case file, it must be concluded that the mentioned date of the formal arrest of the applicant in the Special Report is an obvious error. If this information was to be taken as credible, it would mean that the formal arrest of the applicant took place a few hours before the (alleged) “kidnapping” which is regarded by the applicant as the moment of his arrest and which, according to the applicant, took place at around 8.00 pm on 9 May 2008. This is not credible. Such a conclusion would be “stretched”.

Given that the date of the applicant's formal arrest in the Special Report of 12 May 2008 is an obvious error, the Constitutional Court stresses that errors in such criminal files must be immediately corrected because they could, in principle, have legal consequences in certain circumstances. It is not clear why this was not done in this case. The Constitutional Court strongly condemns such oversights.

36. Considering the above-mentioned circumstances, the Constitutional Court finds that the applicant's claims that he was arrested at around 8.00 pm on 9 May 2008 and held by police officers from 8.00 pm on 9 May 2008 until he was brought to the police station during which time he was subjected to physical and psychological abuse, and the documents supporting these claims, are not sufficient proof to substantiate such a conclusion.

For that reason, the period between 9 May 2008 at 8.00 pm and the bringing in of the applicant to the police station is not covered by Article 24.1 and Article 24.2 of the Constitution, which means that Article 25.1 of the Constitution does not apply to that period *ratione materiae* because for it to apply it is necessary for the person to be in the custody of a state administration body (see point 22.1 of the statement of reasons of this decision and ruling).

Bearing this in mind, the Constitutional Court concludes that during this period police officers did not violate the applicant's right guaranteed in Article 23.1 of the Constitution and Article 3 of the Convention in the substantive aspect.

36.1. In conclusion, the constitutional complaint is rejected in the part referring to the period between 9 May at 8.00 pm and the bringing in of the applicant to the police station pursuant to Articles 73 and 75 of the Constitutional Act in relation to the alleged violation of Article 23.1 of the Constitution and Article 3 of the Convention in the substantive aspect (point III of the operative part of the decision). The constitutional complaint is rejected in that part pursuant to Article 32 of the Constitutional Act in relation to the alleged violation of Article 25.1 of the Constitution in the substantive aspect (point I, indent 1 of the operative part of the ruling).

ab) Alleged abuse from the moment of being brought into the official premises of the police administration to the moment of formal arrest

37. The applicant claims that he was arrested (by being kidnapped) on 9 May 2009 at around 8.00 pm by unknown masked individuals whom he later concluded were the police, and that he was brought into the police administration in the morning of 10 May 2008, where he was further abused by police officers who asked him to confirm a statement they had already prepared.

37.1. On the other hand, according to the Arrest Report of 10 May 2008, the applicant was formally arrested on 10 May 2008 at 3.00 pm. According to a special police report submitted to the Constitutional Court, the applicant was brought to the premises of the police administration on 10 May 2008 at around 2.00 pm (see point 9.1 of the statement of reasons of this decision and ruling).

38. It is indisputable that the competent court considered and established the moment of the formal arrest of the applicant. At the hearing of 14 October 2009, the applicant's defence attorney proposed that persons who had deprived the applicant of his liberty be called as witnesses. At the trial of 14 December 2009 (vol. 50, p. 1757 of case file K-Us-25/08), the panel found that “by omission, the defence attorney's proposal under 1, to call as witnesses persons that deprived Miroslav Hršum of his liberty, was not noted in writing in the last records”. After that the panel adopted a ruling rejecting the defence attorney's proposal. The ruling reads:

> "The panel adopted the following
>
> r u l i n g
>
> The applicant's defence attorney's proposal under 1 concerning the interrogation of persons that deprived the first defendant, Miroslav Hršum, of his liberty is hereby rejected because it is deemed irrelevant considering the established facts and all other evidence existing in the file."

The repeated proposal of the applicant concerning the interrogation of persons who had arrested him was rejected at the hearing of 12 January 2010.

The statement of reasons of the first-instance judgment, in relation to the rejection of this proposal for evidence, reads as follows:

> "(...) this proposal is deemed irrelevant considering the established facts and evidence existing in the file. Furthermore, it may be concluded from the Arrest Report concerning Miroslav Hršum (pp. 159 and 160) that he was arrested on 10 May 2008 at 3.00 pm. There, it was not necessary to call the above-mentioned witnesses and it is clear which moment is regarded as the start of the deprivation of liberty of Miroslav Hršum."

39. The Constitutional Court notes, however, that the competent courts did not deal with the objections of the applicant referring to the time before 3.00 pm on 10 May 2008, that is, before the moment when the applicant became "formally" arrested. Since these objections do exist, it means that the courts omitted to consider them. It seems, however, that this omission of the courts is not crucial because it does not have an impact on the facts pointing to the conclusion that the applicant's claim that he had been brought to the premises of the police administration in the early morning hours of 10 May 2008 is not credible.

39.1. The applicant's claim that he was brought to the premises of the police administration in the morning hours of 10 May 2008 is a continuation of his version of events according to which he was arrested by police officers (by being kidnapped from his flat) the previous day at around 8.00 pm and physically and psychologically abused all night and it had already been established that this version of events was not substantiated by evidence.

39.2. It must be added that this description of events, as presented by the applicant in several written statements, is contradictory and is obviously not credible, such as, for example, the claim that on 10 May 2008 the police officers "kept me somewhere all day until 9.00 pm and then told me that they would call my attorney and the prosecutor to be present while I am giving my statement (see point 48 of the statement of reasons of this decision and ruling). However, it is indisputable that the applicant's attorney came to the premises of the police administration at 3.30 pm (see point 10.1 of the statement of reasons of this decision and ruling). The Constitutional Court therefore finds that the applicant's claims concerning the description of events may be trusted only if there are other indications that may serve to confirm their truthfulness.

The applicant claims that police officer Rubelj stated "at the trial", "when he was asked by the defence", that he found the applicant "in the office barefoot and naked only in his sweatpants in the morning hours when he came to work and stated that he

did not know how I ended up in his office. To the defence attorney's question whether Hršum had any identification documents, Rubelj answered 'He did not have any personal documents, he was barefoot and naked, that is, only in his sweatpants because that was the only thing he still had on ... I found a membership card of something called the white eagles'" (see point 24 of the statement of reasons of this decision and ruling).

In order to check the claims made by the applicant, the Constitutional Court reviewed all the records of the trial which took place at the County Court in Split in case K-Us-25/08. It may be concluded that the witness Željko Rubelj had been questioned at the trial which took place on 13 July 2009 (vol. 40, pp. 1494 - 1497 of case file K-Us-25/08) about the circumstances of the search of the applicant's flat when he stated "him" (the applicant of the constitutional complaint - remark by the Constitutional Court) "I met before because I was taking a statement from him at the police administration. Hršum had something on him, I don't know what, but I remember it wasn't an ID but only the White Eagles Card. He got out of the car without any difficulty and was able to walk and he did not complain about the soles of his feet."

For that reason, the Constitutional Court may not accept the applicant's claim as true.

39.3. Furthermore, it is clear from the arrest reports of other suspects that Miro Cokarić, Emil Cokarić, Vesna Vuco and Boris Marušić were arrested on 10 May 2008 at 3.00 pm at the premises of Split-Dalmatia Police Administration, General Crime Administration, while Mladen Stupalo was arrested on 10 May 2008 at 11.25 at the Second Police Station in Split, Pojišanska 2 (vol. 3, pp. 161 – 170 of case file K-Us-25/08). The Constitutional Court does not see any indications or reasons to point to the conclusion that the arrest time of the applicant would be different from the arrest time of other above-mentioned persons.

39.4. Finally, the applicant's following claim that "Mr. Rubelj wrote an arrest warrant in which he put that I was brought in at 2.00 pm on 10 May 2008" (see points 10 and 24.1 of the statement of reasons of this decision and ruling) may not be regarded as correct. The Arrest Report of 10 May 2008 does not contain any information about the time when the applicant was brought into the police administration (see point 10.1 of the statement of reasons of this decision and ruling).

40. Considering all this and the undisputed facts that the applicant was formally arrested on 10 May 2008 at 3.00 pm and that the police questioned him that same day from 3.30 pm to 8.45 pm (see points 9.1 and 10.2 of the statement of reasons of this decision and ruling), the Constitutional Court concludes that the credibility of the applicant's claim that he was brought to the premises of the police administration in the morning hours of 10 May 2008 cannot be established beyond reasonable doubt. Therefore, his further claims that he was abused in those premises may also not be accepted as true.

41. The Constitutional Court notes that in this part this case is different from *Mađer v. Croatia* (judgment, 21 July 2011, application no. 56185/07, §§ 101 and 123). In contrast to the present case, where the applicant's claims that he was brought to the premises of the police administration in the morning hours of 10 May 2008 may not be accepted as true beyond reasonable doubt, in *Mađer v. Croatia* it was undisputed

that the applicant arrived at the Zagreb Police Administration at around 6 am on 1 June 2004 (for that reason, in the applicant's opinion, his detention should have been counted from that moment on) but he was formally arrested 24 hours later, on 2 June 2004 at 7 am (which is why the Croatian government claimed that to be the moment of the applicant's arrest).

42. Regardless of this important difference in the two cases, both point to the conclusion that there is a problem in police practice in relation to the deprivation of liberty resulting from the fact that the time, place and manner of the first deprivation of liberty of the person for the purpose of police questioning are not recorded and neither are the time and manner in which the person was brought in for the purpose of questioning, or the place where the person was brought in, and resulting from the fact that all police actions towards this person are not recorded, and neither are all other relevant events related to the bringing in and questioning of a the person. Some of these omissions were mentioned by the ECtHR in § 103, judgment *Mađer v. Croatia* (omission to keep full records of the time when police officers were interrogating a person, omission to keep records of when the person was allowed to sleep and when he or she was given food or drink). An example of such an omission in this case could be the non-recording of the fact that the applicant's defence attorney at one point left the room where the applicant was being questioned, which happened according to the applicant's claims.

The described police practice must be immediately aligned with the requirements arising from the binding judgments of the ECtHR.

43. Finally, the Constitutional Court does not consider it necessary to review in the circumstances of the concrete case whether the applicant was formally arrested at the moment when he was brought to the premises of the police administration (10 May 2008 at 2.00 pm) or whether he acquired that status an hour later, when he was formally arrested (10 May 2008 at 3.00 pm). Due to the short period of time between these two events (one hour), which also makes this case different *Mađer v. Croatia*, it suffices to conclude that the period between the time when the applicant was brought to the premises of the police station on 10 May 2008 at 2.00 pm and the formal arrest on that same day at 3.00 pm is not covered by Article 24.1 and Article 24.2 of the Constitution. For that reason, Article 25.1 of the Constitution cannot be applied *ratione materiae* to that previous period (which, according to the applicant, started at the premises of the police administration in the morning hours of 10 May 2008) because, for that Article to apply, it is necessary for the person to be arrested by a state authority (see point 22.1 of the statement of reasons of this decision and ruling).

Consequently, the Constitutional Court concludes that police officers did not violate the applicant's right guaranteed under Article 23.1 of the Constitution and Article 3 of the Convention in the substantive aspect in the period between the time when he was brought to the premises of the police administration on 10 May 2008 at 2.00 pm and his formal arrest which took place that same day at 3.00 pm.

43.1. In conclusion, the constitutional complaint is rejected in the part referring to the period between the time when he was brought to the premises of the police administration on 10 May 2008 at 2.00 pm and his formal arrest which took place that same day at 3.00 pm on the basis of Articles 73 and 75 of the Constitutional Act in

relation to the alleged violation of Article 23.1 of the Constitution and Article 3 of the Convention in the substantive aspect (point III of the operative part of the decision). The constitutional complaint is rejected in that part pursuant to Article 32 of the Constitutional Act in relation to the alleged violation of Article 25.1 of the Constitution in the substantive aspect (point I, indent 1 of the operative part of the ruling).

ac) Alleged abuse from the formal arrest to the completion of police questioning

44. Concerning the time from 2.00 or 3.00 pm to 8.45 pm on 10 May 2008 (or the period when the applicant was indisputably at the premises of the police administration where he was questioned, first as a detainee and then as an arrested person), the Constitutional Court stresses that it is impossible to reasonably conclude only on the basis of the applicant's claims whether the police used any force against him during that period of time and, if they did, whether the force was necessary or excessive.

The only certain conclusion that may be made is that during that time he did not suffer any injuries by the police that were recorded in his medical records. Since all injuries that were medically recorded on 12 May 2008 could have been incurred before 10 May 2008 at 2.00 pm (when the applicant was brought to the police administration), and some of them might have been incurred after that time, any conclusion other than the above-mentioned one would be pure guesswork.

44.1. Therefore, and since the competent authorities did not assess the circumstances of alleged abuse at the premises of the police administration as claimed by the applicant, the Constitutional Court may not establish beyond reasonable doubt whether the police officers used force against the applicant and whether the injuries suffered by the applicant were caused by police violence during the questioning (cf., *mutatis mutandis*, ECtHR, judgment, *Đurđević v. Croatia*, §§ 80-82).

44.2. Consequently, the Constitutional Court concludes that on 10 May 2008, between 3.00 pm and 8.45 pm, concerning the alleged police abuse of the applicant during his questioning at the premises of the police administration which allegedly resulted in physical injuries of the applicant, there was no violation of the substantive aspect of Article 23.1 in conjunction with Article 25.1. of the Constitution and Article 3 of the Convention.

44.3. Considering the above-established facts, the constitutional complaint was rejected in this part pursuant to Articles 73 and 75 of the Constitution (point III of the operative part of this decision).

ad) Alleged abuse by deprivation of food and water at the police administration

45. In addition to the above-mentioned objections, the applicant stated in the statement of 13 May 2008, which is contained in the file of the investigation, that police officers did not give him food or water for 24 hours while he was at the premises of the police administration on 10 May 2008.

In light of these claims and since they refer to alleged omissions by police officers while carrying out official actions (detention, arrest, questioning of the applicant), the Constitutional Court finds that these alleged omissions of the police are sufficiently serious to be considered separately and qualified as inhumane treatment of the applicant. In that case, only the time from 2.00 pm on 10 May 2008 may be taken into account when the applicant was indisputably under police authority.

45.1. There are no indications in the case file that could serve as direct or indirect evidence of the applicant's above-mentioned claim (a medical report or doctor's notes that the applicant was dehydrated), and no direct or indirect evidence to the contrary. Therefore, the Constitutional Court finds that, taking into account the events concerning the alleged abuse of the applicant by the police in general, the credibility of the applicant's claim about the inhumane treatment of the police in this respect may not be confirmed beyond reasonable doubt in this case either.

Consequently, the Constitutional Court concludes that there was no violation of the substantive aspect of Article 23.1 in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention concerning the alleged inhumane treatment of the police consisting of depriving the applicant of food and water during the police questioning on 10 May 2008.

45.2. Considering the above-established facts, the constitutional complaint was rejected in this part pursuant to Articles 73 and 75 of the Constitution (point III of the operative part of the decision).

b) Procedural aspect of Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention

46. Although the Constitutional Court previously found that it was unable to determine, on the basis of the submitted documentation, the manner in which the injuries were inflicted on the applicant and, therefore, it was not proven that the applicant was in fact abused by the police, this does not mean that the applicant's complaint based on Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention may not be considered from the point of view of the positive obligation to conduct an official investigation (cf*., mutatis mutandis,* ECtHR, judgment, *Dolenec v. Croatia*, § 150).

46.1. If an individual claims that official persons have abused him, and may not substantiate that claim with certain evidence (for example, with medical records), Article 23.1 of the Constitution and Article 3 of the Convention lay down that an efficient official investigation of the alleged abuse must be carried out. The investigation must be such to allow the discovery and punishment of responsible persons. Otherwise, the general prohibition of abuse, in spite of its basic meaning, would be inefficient in practice, and it might also result in official persons abusing the rights of persons under their custody without any punishment. The investigation must be independent and impartial. Persons responsible for conducting the investigation and persons conducting the investigation must be independent of the persons that have participated in the disputed event. This does not mean that it is sufficient for there to be no hierarchical or institutional link. The precondition is the real

independence of investigators. Investigation must be subject to public review, and the applicant must have efficient access to the investigation.

Competent authorities must act diligently and promptly. The obligation to conduct an investigation is not “an obligation of results, but of ways”: every investigation does not necessarily have to be successful and lead to a conclusion coinciding with the description of events of the applicant but, in principle, it must allow for the establishment of the facts of the case and, if it is proven that the claims of abuse are true, for the identification and punishment of the responsible persons.

Serious allegations of abuse must be thoroughly investigated. Competent authorities must invest significant efforts into establishing what happened. They should not rely on hasty or unfounded conclusions in order to close the investigation as soon as possible, nor base their decisions on such conclusions. They must take all reasonable and available steps to procure evidence concerning the disputed event. Thus, for example, they need to procure a detailed statement of the alleged victim and statements of eye witnesses, procure forensic evidence and, where appropriate, additional medical records with a detailed and accurate description of injuries and an objective analysis of medical diagnoses, in particular concerning the causes of the injuries. Any oversight in an investigation resulting in the inability to determine the cause of injuries may, depending on the circumstances of an individual case, lead to the conclusion that the investigation was inefficient. The investigation must also be efficient in the sense that it may help establish whether the force used by the police was justified considering the circumstances.

46.2. The Constitutional Court recalls that the ECtHR has, until this day, adopted a series of judgments against the Republic of Croatia in which it presented the above-mentioned legal positions and in which it found a violation of Article 3 of the Convention in the substantive and/or procedural aspect. These are, for example, *Dolenec v. Croatia* (judgment, 26 November 2009, application no. 25282/06, §§ 129 – 130 and 143 – 145), *Gladović v. Croatia* (judgment, 10 May 2011, application no. 28847/08, §§ 39 – 40 and 46 – 49); *Mađer v. Croatia* (§§ 105 – 107 and 111 – 112); *Đurđević v. Croatia* (§§ 72 – 74, 77 and 83 – 85), and *V D. v. Croatia* (§§ 60 – 65). Further relevant case law was mentioned in all the above-mentioned ECtHR judgments.

47. By applying the above-mentioned general positions to the concrete case, the Constitutional Court starts from the position that the applicant fulfilled his duty to notify the competent authorities that he was abused by the police (cf., *mutatis mutandis,* ECtHR, *Mađer v. Croatia*, § 114). This is clear from the documents contained in the case file, which are mentioned further in the text.

48. Attorney Željko Lubina submitted to the file on 15 May 2008 and 4 June 2008 handwritten pleadings of the applicant of 13 and 14 May 2008. In the statement of 13 May 2008, the applicant stated, among other things, the following:

> “I state that I was kidnapped on 9 May 2008 at about 8.00 pm from my flat in Split at 25 Lubićeva Street by police officers masked in balaclavas and heavily armed. (...) five to six masked persons with weapons entered and attacked me (...) They threw me on the floor of the hallway yelling that they had come to kill me. Then they blindfolded me, tied me by the arms and legs with tape and handcuffed me and

between them they carried me out in front of the building and put me in the trunk (...) Then they drove away in an unknown direction and the drive lasted for about 1-2 hours. The entire time they hit me in my loins (...). One of them said that they would give me a shovel to dig my own grave. Then they stripped me to my underwear, ripped my sweatshirt off me and started hitting me and telling me to talk. I asked them what they wanted me to say and they told me that I would talk if I didn't want them to skin me. Then one of them said I had handsome sons (...). After that, another one (...) phoned someone and told them to kill my entire family. All beaten up, I told them not to touch my family but to kill me, and then one of them took his gun, placed it against my head, but another one told him to wait (...) Then all hell broke loose. They started hitting me with a baton on my bare feet. At that point I realised that they were the police. I remember losing consciousness 2-3 times and when I regained it, they would continue beating me (...). They kicked me all over my body. One of them kicked me in the crotch. After 5-6 hours of torture they told me that I had organised some robbery of a post office and that I had to admit it. I told them to tell me what I needed to say and that I would repeat everything and asked them just to stop torturing me because I was already losing consciousness. Then one of them called somebody, I assumed it was a superior officer, and told him that I would confirm everything they wanted and that I was done. After that they left me for 2-3 hours in front of some car's headlights. I state that I was blindfolded the whole time and that my mouth and legs were tied with a tape and my hands were handcuffed (...). Then they put me all beaten up and tied up into an SUV between the front and back seat and told me they were taking me to a police station where I would admit to everything they asked me. (…)

After a drive of 1h and 30 minutes they brought me into the Split Police Administration. Since I could not get out of the car they carried me while hitting me a few more times in my ribs. (…)

Approximately 10-20 minutes later one inspector came in who took off my blindfold and released my legs. I immediately asked for a doctor and he laughed and told me a doctor would not be necessary. After that they kept coming in and bringing already prepared papers, reading them and telling me that I would be even worse off if I didn't confirm. They kept me all day until 9.00 pm and then told me that they would call my attorney and the state attorney to be present while I was giving my statement. When my attorney and the state attorney came, they dictated the statement from a notebook according to a pre-existing concept which they had told me before the attorney arrived, so I would not ask to stay with the attorney, which I am entitled to, because later I was staying with them and I knew exactly what would happen to me. (…)

When the statement was finished, they asked the attorney to sign it and he said no and went out. Then I heard somebody talking in the hallway and telling him he had to sign it, after which he returned and did so but was obviously unhappy about it. I state that I asked everybody for medical assistance and to call my family or the embassy but they ignored my demands and did not let me call anyone.

I state that I was barefoot and that my clothes were ripped and they did not give me anything to eat or water to drink for 24 hours. Then I was detained until Monday when I was to be taken to the investigating judge (...) I asked the judge for a doctor because I could not talk and this was videotaped by journalists (...).

I was detained in Bilice where I asked for medical assistance and the doctor on call established that my genitals, feet, thighs, knees and spine were injured and immediately sent me to Firule State Hospital in Split. (…)"

48.1. The investigating judge's comment of 18 April 2011 (see point 5 of the statement of reasons of this decision and ruling) concerning whether he undertook some measures in relation to the applicant's pleadings of 15 May 2008 and 4 June 2008 or ordered an investigation, states the following:

> "It may be concluded from the examination of the records from the questioning of the suspect, Miroslav Hršum, by officers of the Split-Dalmatia Police Administration in the presence of his attorney that he never mentioned any police actions in relation to his arrest or coercion to give a statement to the police".
>
> It must also be mentioned that the suspect did not have any injuries when giving his statement to the investigating judge.
>
> All objections concerning the arrest of the suspect, Miroslav Hršum, have been submitted to the office of the state attorney which usually reviews whether pleadings submitted by parties represent criminal reports, and the investigating judge did not have any knowledge of whether the suspect, who is now the defendant and the convicted person, Miroslav Hršum, alone or through his attorney, filed any criminal charges against police officers, while the investigating judge acted in accordance with his legal and constitutional authority in these proceedings.
>
> It is usual in long-standing practice that when a suspect is brought in before an investigating judge and states that he was abused, physically injured, the investigating judge must call an expert medical witness to confirm the injuries. All this is submitted to the state attorney's office which is in charge of initiating criminal proceedings.
>
> This was not the case with Miroslav Hršum because he had not complained of any injuries and his handwritten pleadings that were written in Split Prison were addressed to the wrong person and they have all been enclosed in the file and are available to all interested parties."

49. The applicant asked on several occasions during the criminal proceedings for an investigation of his arrest and whether he was beaten up by the police. He repeated his claims that he had been kidnapped and beaten by the police in his appeal against the County Court's ruling of 18 December 2008 and at the trial on 14 December 2009, in his appeal against the first-instance decision and in the constitutional complaint.

50. The Constitutional Court finds that medical evidence and the objections of the applicant submitted to competent authorities together lead at least to grounds for suspicion and that his injuries could have been caused by the use of force by the police. Considering all this, his objections represented a request that could have been defended and competent authorities were, therefore, obliged to conduct an efficient investigation. However, they did not do that.

51. Consequently, the Constitutional Court finds that, in this concrete case, the procedural aspect referred to in Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention was violated because the applicant's claims of abuse from 9 May 2008 at 8.00 pm to 10 May 2008 at 8.45 pm were not investigated.

Due to the established violation, the applicant is entitled to monetary compensation for the period preceding the adoption of this decision pursuant to point IIa) of the operative part of the decision.

52. Pursuant to Articles 73 and 76 of the Constitutional Act, it was decided as in point II, including points IIa) and IIb) of the operative part of the decision.

Point IIb) of the operative part of the decision is based on Article 31.4 and 31.5 of the Constitutional Act. The established violation of the applicant's right to an efficient

investigation on the basis of his objections due to the alleged abuse that took place from 9 May 2008 at 8.00 pm to 10 May 2008 at 8.45 pm must be remedied in such a manner that the Office of the State Attorney of the Republic of Croatia must, immediately upon receipt of this decision, initiate and carry out an efficient investigation of the applicant's claims of abuse in the above-mentioned period and, depending on the result, conduct the appropriate actions under its competence.

B. ADMISSION OF GUILT DUE TO ABUSE OF THE APPLICANT DURING ARREST AND QUESTIONING AT THE POLICE STATION

53. The Constitutional Court separately examined the applicant's objections concerning the alleged abuse of his right to a fair trial consisting of the claim that the applicant's admission of guilt was coerced by means of the (previously described) abuse. Article 29.3 of the Constitution:

> ”Article 29
>
> (…)
>
> An admission of guilt may not be coerced from a suspected, accused or indicted individual.
>
> (…)"

1) Applicant's objections

54. In addition to the relevant parts of the constitutional complaint that have already been described in points 24 and 24.1 of the statement of reasons of this decision and ruling, the applicant stated the following in the constitutional complaint:

> "…. the police and the state attorney's office used all possible means and ways to obtain constructed statements under coercion just to accuse anyone as the perpetrator, and to solve (cover) the case, regardless of whether this person was guilty or innocent. (…)
>
> It is stated in the final judgment of the Supreme Court that I was questioned pursuant to the law by the police. The above text and enclosed evidence show how I was questioned and how the above-mentioned statement was already written in Inspector Rubelj's notebook.
>
> Why would attorney Lubina who was assigned *ex officio* during the arrest dispute all facts concerning the statement and the manner of coercing the statement although it is claimed that he had been present during the questioning and signed the statement and the question is why would he later dispute it, was he forced to sign the records because he was assigned by the police and the state attorney's office, why did the attorney ask for a medical expert examination of the defendant Hršum and of the medical diagnosis? The panel rejects the request made at a closed hearing and revokes (does not allow) the right to appeal.
>
> Requests (...) to establish who arrested me, the exact time of arrest and detention, that the persons who arrested me testify before the panel, why the testimony before the investigating judge requested by the applicant was not allowed.
>
> The panel adopted a decision on each of the above-mentioned requests, not necessary and no right of appeal.
>
> The duty of the panel was to establish in at least some segments the manner or to try to investigate, establish the important details that confirm, prove or deny the above-mentioned evidence. If the exact establishment and manner of procuring evidence was reviewed pursuant to the law, the outcome of the presentation of evidence would have been completely different, including the judgment.

This way of acting and the presentation of evidence and not permitting the establishment of exact and proper evidence is implemented in the CrPA in Article 367 paragraph 2.

... Why is the attorney during the investigation and presentation of evidence before the panel trying to prove that the statement was coerced and as such may not be accepted as evidence. Because he knows that he is also a witness and he is bound by legal ethics and does not want to compromise himself.

Because attorney Lubina was employed *ex officio* when the statement was being signed before the police and the state attorney's office and I authorised him (at my expense) to defend me for the entire proceedings. Why did he ask for a review of all the illegal actions committed during the testimony. Because Mr. Lubina was at the same time a witness for the records."

2) Assessment of the Constitutional Court

55. The use of evidence in criminal proceedings obtained through violation of Article 23.1 of the Constitution and Article 3 of the Convention raises serious doubt about the lawfulness of such proceedings from the point of view of Article 29 of the Constitution and Article 6.1 of the Convention (cited in point 92 of the statement of reasons of this decision and ruling). In that sense, the Constitutional Court recalls the ECtHR's legal position expressed in *Jalloh v. Germany* (judgment, Grand Chamber, 11 July 2006, application no. 54810/00):

"99. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see *Içöz v. Turkey* (dec.), no. 54919/00, 9 January 2003 and *Koç v. Turkey* (dec.), no. 32580/96, 23 September 2003)."

56. In this specific case, what should be used as the starting point is the previous finding that there had been no substantive violation of Article 23.1, either separately or in conjunction with Article 3 of the Convention, hence the applicant's objection that his admission of guilt had been coerced cannot be founded either.

In spite of that, the Constitutional Court noted that the first-instance court had clearly stated in the disputed judgment that the criminal responsibility of the applicant for the two criminal offences of robbery lay in a number of other items of material evidence, and not only in his admission of guilt. The relevant part of the first-instance judgment reads as follows:

"(…) Concerning the defendants' testimonies at the trial, in particular those of Miroslav Hršum ... the main issue in these proceedings ... would focus on abuse, coercion, blackmail, that is, planting objects and unlawful actions of the police.

However, in this process, material evidence established in these criminal proceedings are disregarded, that is, the fact that the seventh defendant, Zoran Stevanović, was found with the amount of HRK 327,000 in Brško and detained .... the discovery and seizure of the money from the third defendant Emil Cokarić, found in a plastic bucket in the basement of the heating room of the Split Hospital amounting to HRK 1,052,000.00 ... fingerprints on the money found by dactyloscopic examination which were established to be the fingerprints of the second defendant, Miro Cokarić, the third defendant, Amil Cokarić and the fifth defendant Mladen Stupala ... trails established in the records of the crime scene examination and then on the basis of

> warrants issued by investigating judges and the conducted investigation measures referred to in Article 180 CrPA, recorded telephone conversations between the first defendant Miroslav Hršum ... and the ninth defendant Milan Mitić... Further, the recorded telephone conversations between the first defendant Miroslav Hršum ... and second defendant Miro Cokarić ..."

It is clear from the above-mentioned part of the judgment that the admission of guilt of the applicant, which he claims was coerced by the police by the alleged abuse, did not represent the only or decisive evidence on which the competent courts based their disputed judgments. The conviction was based on other material and personal evidence separately and jointly, and the courts described the actions of the applicant in a manner which confirms the existence of his criminal liability for the commission of two criminal offences beyond reasonable doubt.

57. Therefore, the constitutional complaint is rejected in this part pursuant to Articles 73 and 75 of the Constitution (point III of the operative part of the decision).

C. ALLEGED ABUSE DUE TO THE NON-PROVISION OF MEDICAL ASSISTANCE DURING DETENTION

58. The applicant objected that he received no medical assistance while he was detained. The Constitutional Court examined this objection by the applicant from the point of view of prohibition of abuse laid down in Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention (cited in points 22 and 23 of the statement of reasons of this decision and ruling).

1) Applicant's objections

59. The applicant stated the following in the constitutional complaint:

> "I hereby state that I was deprived of the right to medical assistance and treatment in the following period of time. I will describe (elaborate on) that in the text below. As a result of injuries suffered during the arrest, the doctor concluded at the exam conducted a month later that I needed treatment in the area of my crutch (testicles) from that time until 9 July 2008 and on 14 August 2008 I was sent for surgery until 27 October 2010, which I was not permitted to do.
>
> On 21 September 2008 I sent a petition (enclosed as evidence) to the investigating judge in which I asked to be permitted to see a doctor at my own cost in any institution or prison hospital and to be allowed to undergo surgery because of my poor health condition. The investigating judge did not want to give his opinion (reply) to the above-mentioned petition.
>
> Since I was frequently complaining to the prison doctor that I could not take it anymore, she in the end told me 'I'm not allowed to do anything there. I have my orders.' Then she told me that the Ombudsman was coming the next day and that she would inform him of my problem and ask him to visit my room. When the Ombudsman, Mr. Thur, came, I complained to him and explained the situation and then gave him all the medical records.
>
> The Ombudsman asked the prison management in his letter of 8 June 2009 to send him a report about why I was not allowed to have the surgery advised by the doctor from Firule Hospital.
>
> Since this request was not fulfilled, the Ombudsman sent another letter on 14 July 2009 to me, personally asking me to inform him if I was not allowed to go to

surgery. He probably asked me to do that because he had not received any report from the prison management about the reasons for the postponement."

59.1. The applicant further talked about the medical treatment received during detention and stated the following in his constitutional complaint:

"This agony lasted until 27 October 2010. Before that I asked (pleaded) through my attorney and at the hearings to be sent to the doctor.

On 27 October 2010 in the morning hours, or, more precisely, at 6 am I was taken by the judicial police to Firule Hospital in Split for surgery.

Now I will describe how I was treated which is also confirmed in the hospital discharge form dated 27 October 2010.

The surgery started at 8.00 am and I woke up from anaesthesia at 11.30 am. Already at around 2.00 pm on that same day, judicial police officers, Češljar, Batovanja and Milić told me that they were ordered to take me immediately after surgery to the detention centre in Bilice. When I said that I could not get up, the doctor who had operated on me, Mr. Cinidro, came and only shrugged his shoulders and said that I had just come out of surgery and they should be careful not to open my wound.

I do not know who gave them the order but they put me in a wheelchair and took me in an elevator down to the entrance of the hospital and out into the back seat of a personal (official) vehicle, an "Opel", and then into detention. In this condition I had to climb to the 2nd floor to the 2nd department where I had stayed before. Everything I have said can be verified and there are witnesses. How I was treated (like an animal) (that would surely be treated better) from the moment of arrest.

I was deprived of all possible and even the minimum rights of a human being guaranteed in the constitutional and criminal law of the Republic of Croatia. This is substantiated by a copy of the discharge paper from the hospital dated the same day as my surgery, 27 October 2010, which is enclosed as evidence with this complaint.

After the surgery, since the conditions in my cell were not favourable for recovery, I got an infection and went through agony.

I was arrested on 9 May 2010 and my surgery took place on 27 October 2010. At the check-up exam after surgery, the doctor examined the wound and stated that the surgery had been successful although it was obvious that something was wrong. This was later confirmed by another doctor after a detailed examination and ultrasound conducted in Dubrovnik, not in Split.

After that and when my sentence was imposed, I was transferred, on 28 February 2010, to Dubrovnik Prison without any reason and in spite of my and my attorney's objections, which may be proven by my attorney's appeal to the Prison System Directorate in Zagreb."

2) Assessment of the Constitutional Court

60. The Constitutional Court notes that the applicant informed the competent authorities of his medical condition and asked for medical assistance on several occasions during his detention, starting from 10 May 2008.

60.1. Thus in the handwritten petition of 28 October 2008 addressed to the president of the County Court in Split submitted "through the Split County Court", the applicant asked to be "allowed to be checked by a doctor at my own cost in the private clinic 'Kalajdžić' in Split or any other specialised healthcare institution." He wrote in that pleading that he had addressed the same petition to the investigating

judge of the County Court in Split, Stanko Grbavac, on 21 September 2008 and did not receive “any reply”.

A copy of petition “no.2” dated 21 September 2008 and addressed to the investigating judge Stanko Grbavac was enclosed with the constitutional complaint. This petition, however, was not contained in case file K-Us-25/08. (For petition "no. 1" of the same date which is also not contained in the case file K-Us-25/08, see point 12.1 of the statement of reasons of this decision and ruling).

60.2. Furthermore, during the visit of the Ombudsman to Split Prison on 27 and 28 May 2009, the applicant complained to him in person about inadequate healthcare.

60.3. Finally, in the records from the trial which took place on 16 July 2009 at Split County Court (vol. 41, p. 1508 of case file K-Us-25/08), it was recorded that the applicant had stated in front of the panel that he had requested some medical examinations, that is, surgery but was only taken to the doctor and nothing else was done.

61. After examining case file K-Us-25/08, the Constitutional Court first established that the applicant's medical problems with his testicles had not started after his arrest and detention in May 2008. It may be concluded from the documents enclosed with the case file that the applicant's right testicle was removed in 1985 and that his left testicle had been examined on 2 February 2008 (p. 146 of the Constitutional Court file).

62. Concerning the behaviour of the competent authorities, the Constitutional Court notes that Split Prison already on 13 May 2008 asked the investigating judge to give his consent for the applicant to be examined by the specialist and the consent was given on 14 May 2008.

The applicant was examined on 9 July 2008 at the Urology Department of Split Hospital and then was sent for testicular ultrasound (vol. 28, p. 1068 of case file K-Us-25/08).

The radiology test results (patient no. 102793), prepared by Vesna Vidas-Fridl, radiology specialist, on 14 August 2008, state the following:

> “Left testicle of approximately identical and appropriate size, regular and homogeneous structure. Around the left testicle there is a wider anechogenic zone of liquid collection with spotted echoing, with a diameter of approximately 4 cm.
> Conclusion: (…) – left hydrocele of a subchronical type.”

Testicular ultrasound was conducted on 9 September 2008.

The radiology test of the testicles was repeated on 19 March 2009 at Split Hospital and the results, written by Dr Jadranka Roić Božić, radiology specialist, stated the following:

> “Testicular ultrasound:
> Left testicle is of a normal tissue structure. Pressed down in the scrotum by a larger quantity of liquid such as hydrocele. Right condition after orchidectomy.”

Subsequently, the director of Split Prison requested from the prison clinic, in a letter of 9 June 2009, a report on the health condition of the applicant and recommended medical treatment.

The diagnosis of the prison clinic of Split Prison of 26 June 2009, signed by Dr. Milena Pernat, stated the following:

> "Right testicle removed in 1985.
> It was noticed at the moment of arrival on 12 May 2008 that testicles were swollen.
> Urologist exam on 9 July 2008 – sent for testicular ultrasound.
> Testicular ultrasound conducted on 14 August 2008 – diagnosis/left hydrocele of a subchronical type.
> Urologist exam on 9 September 2008 – prescribed ultrasound and follow-up in 6 months with ultrasound results.
> Urologist exam on 2 February 2009 – requested another ultrasound.
> Ultrasound results of 19 March 2009 – no change.
> Urologist exam of 7 April 2009 – possible surgery (Dr. ŠITUM)
> Telephone conversation on 27 May 2009 with Dr. Marčinko in relation to the surgery (Prison Hospital).
> The surgeon is currently on vacation and no surgery is planned for the summer, which is why the surgery is scheduled for the autumn."

63. The applicant submitted to Split County Court on 13 October 2009 a handwritten petition asking from the competent court to approve "surgery at Firule Hospital scheduled for the second half of this month. Surgery had already been recommended in March of this year." The County Court judge Bruno Klein gave his consent on 16 October 2009 (vol. 46, pp. 1612 and 1613 of case file K-Us-25/08).

Surgery was carried out on 27 October 2009 in Split Hospital – Urology Department. The following is stated in the relevant part of the hospital discharge form, which is not dated, no. 47007 of 27 October 2009:

> "Miroslav Hršum ... was admitted into our department on 27 October 2009 for a surgical procedure for a left-hand hydrocele.
> Surgery on the date of admission. Early post-operative state normal and consequently discharged for further hospital treatment in the afternoon hours. ...
> DG: Hydrocoelae testis lat. sin.-N 43.0"

64. Judge Mladen Prvan of Split County Court in ruling no. KI-462/10 of 26 January 2011 accepted the applicant's (now the convicted person) petition and postponed the serving of the prison sentence for three months, ordering employees of Split Prison to accompany the applicant on 17 March 2011 to serve his prison sentence in Zagreb Prison, Department for Diagnostics and Programming. The applicant's objections that his health condition had seriously deteriorated, that he was being treated by a urologist and that he had lost one testicle and needed to be examined by a specialist surgeon Vedran Cindro from Firule Hospital who had operated on him were accepted in this ruling. The executing judge explained the postponement of serving the sentence by the fact that a period of three months was sufficient to "provide medical treatment for the convicted person and to carry out a new surgical procedure as recommended by the surgeon Vedran Cindro".

65. On the basis of the previously mentioned facts, it may not be concluded that the applicant further suffered abuse of any intensity in the period from 10 May 2008 because he was not provided with medical assistance or because the competent authorities failed to provide him with treatment, including surgery.

Consequently, the Constitutional Court finds that there was no violation of Article 23.1 in conjunction with Article 25.1 of the Constitution and Article 3 of the Convention in the procedural or substantive aspects in relation to the applicant's complaints of abuse because he was not provided with medical assistance during detention.

65.1. In relation to those objections, the constitutional complaint was rejected pursuant to Articles 73 and 75 of the Constitution (point III of the operative part of the decision).

IV. JUDGMENT ON THE BASIS OF ALLEGEDLY UNLAWFULLY OBTAINED EVIDENCE

66. The applicant claims that he was convicted on the basis of unlawfully obtained evidence contrary to Article 29.4 of the Constitution that reads:

> ”Article 29
> (…)
> Evidence obtained illegally may not be admitted in court proceedings.
> (…)"

66.1. According to the applicant's claims, the conviction was based on unlawfully obtained evidence for the following reasons:

– admission of guilt in front of the police was given without being previously informed of the relevant provisions of the CrPA, which he was entitled to;
– because evidence against him was gathered by the unlawful search of his apartment.

For the above-mentioned reasons, the applicant claims that the records of the questioning of the suspect of 10 May 2008 and the records of the search of the premises of 11 May 2008 should have been excluded from the case file.

A. RECORDS OF THE QUESTIONING OF THE APPLICANT BY THE POLICE AS ALLEGEDLY UNLAWFULLY OBTAINED EVIDENCE

1) Applicant's objections

67. The applicant explains in the constitutional complaint his claims concerning the violation of Article 29.4 of the Constitution in the following manner:

> “The Supreme Court of the Republic of Croatia admitted that it was not stated in the records of the questioning of Hršum by the police (first questioning of Hršum) that the applicant was informed in accordance with the provision of Article 225.2 CrPA (p. 6 of the judgment of the Supreme Court of the Republic of Croatia).
> (…)
> It is obvious that Hršum was interrogated as a suspect during the questioning.

It is not stated in the records of the questioning of suspect Hršum (pp. 121 – 129 of the file) that Hršum was informed of the charges against him and of the grounds of suspicion against him pursuant to Article 225.2 CrPA.

It is not stated in the records of the questioning of suspect Hršum (pp. 121 – 129 of the file) that Hršum was informed of his right not to present his defence or to remain silent pursuant to Article 225.2 CrPA.

Since the communication referred to in Article 225.2 CrPA must be entered into the records at the moment of the first questioning of the defendant, and this communication was not entered into the records, such records must be excluded from the case file. Since the information referred to in Article 225.2 CrPA must be entered into the records at the moment of the first questioning of the defendant, and this communication was not entered into the records, such records must be excluded from the case file. ...

Therefore, if the information referred to in Article 225.2 CrPA is not entered in the records of the first questioning of the suspect, this is proof that the suspect was not informed and is not obliged to present his defence or answer any questions.

Therefore, the records of the first questioning of the suspect Hršum (pp. 121 – 129 of the case file) may not be used as evidence in criminal proceedings (Article 225.10 CrPA). For that reason, the court ought to have excluded the records of the first questioning of the suspect Hršum (pp. 121 – 129 of the file).

The provision of Article 4 CrPA lays down certain procedures of the body conducting the proceedings and it does not regulate or prescribe the rights of the suspect, defendant or the convicted person."

2) Relevant law

68. The merits of the claims of the applicant concerning the violation of the rights referred to in Article 29.4 of the Constitution are assessed on the basis of Articles 9 and 367.2 CrPA which at that time read as follows:

"Article 9

(1) The court's decisions may not be founded on evidence obtained in an illegal way (illegal evidence).

(2) Illegal evidence is evidence obtained in a way representing a violation of the right to defence, dignity, reputation, honour and inviolability of private and family life, guaranteed by the Constitution, domestic law and international law, as well as evidence obtained in violation of criminal procedure provisions expressly provided in this Act, and evidence obtained through such illegal evidence."

"Article 367

(…)

(2) A substantive violation of criminal procedure provisions exists if the judgment is founded on evidence referred to in Article 9 paragraph 2 of this Act.

(…)"

3) Assessment of the Constitutional Court

69. It seems that the applicant asked for the first time on 29 October 2008 that the records of the questioning of the suspect of 10 May 2008 and the records of the questioning of the defendant of 12 May 2008 be excluded from the case file. Split County Court rejected on 18 December 2008 in ruling no. Kv-785/08 that proposal of the applicant with the following explanation:

> "The examination of the file revealed that the defendant Miroslav Hršum presented his defence on 10 May 2008 during questioning at the police station in the presence of his defence attorney Željko Lubina, attorney from Split. The defendant presented his detailed defence (pp. 121 – 129 of the file) in which he confessed he was guilty of committing the criminal offences in question. During questioning the defendant was informed of his rights. (…) When the questioning was completed, the defendant and his defence attorney signed the records. (...) Although the defendant Hršum's defence attorney Željko Lubina asked in a pleading of 29 August 2008 that the records in question be excluded from the case file, the investigating judge did not decide on the request and for that reason this Court finds the records on the questioning of the defendant Hršum lawful..."

69.1. The applicant appealed against that ruling to the Supreme Court which rejected the appeal in ruling no. Kž.Us-11/09-3 of 11 February 2009. It stated the following:

> "... contrary to the claims of the complainant, the concrete case does not involve illegal evidence referred to in Article 9.2 CrPA which is why the first-instance court had grounds to reject the defendant's proposal to exclude the above-mentioned records of the questioning. (…) In this procedure, although the defendant was not informed on both occasions of his right to testify in his mother tongue and his statement of waiver of his right was not entered into the records, this does not constitute illegal evidence referred to in Article 9.2 CrPA. (…) Furthermore, this is not evidence procured through violation of domestic or international legislation protecting the right to defence, dignity, reputation and honour and inviolability of private or family life because it is unquestionable that the defendant understood what he was being charged with since he described the disputed event in his personal statement. (…) Therefore, it is clear that the first-instance court has not committed the procedural violation mentioned above and referred to in Article 367.3 CrPA or a violation of the defendant's right to freedom guaranteed in the provision of Article 22 of the Constitution of the Republic of Croatia. (…)"

70. Finally, in the records from the trial at Split County Court of 12 January 2010 (vol. 52, p. 1796 of case file K-Us-25/08), the applicant's defence attorney proposed that the "court exclude from the file the records of the questioning of suspect no. 511-12-09-23-KU-236/08 prepared in front of the police. These records need to be excluded because they do not contain everything laid down in Article 225.2 CrPA in conjunction with Article 225.10. CrPA. These records do not contain information to the suspect that he is not obliged to present his defence or answer questions. Although it is prescribed in the CrPA that, in the case of the absence of the notification referred to in Article 225 CrPA, the records must be excluded from the file, I suggest that the court exclude those records from the file. I propose that the court exclude from the file parts of the indictment containing claims from these records in accordance with Article 225.10 CrPA."

The Deputy Director of USKOK objected to this proposal because it had already been decided upon by the panel and those objections had been mentioned in the appeal of the defence attorney which had already been decided upon by the Supreme Court. For that reason, she deemed that the purpose of the repeated proposals was to "stall the criminal proceeding" (vol. 52, p. 1796 of the case file K-Us-25/08).

The panel adopted a ruling at the same trial pursuant to Article 331.2 CrPA rejecting as unfounded the applicant's defence attorney's proposal to "exclude from the case file the records of the questioning of the suspect by the police in the presence of the defence attorney pp. 121 – 129 of the case file and parts of the indictment containing the claims from those records" (vol. 52, p. 1796 of case file K-Us-25/08). The statement of reasons of that ruling reads as follows (vol. 52, p. 1797 of case file K-Us-25/08):

> "The proposal of the first defendant's defence attorney to exclude the records of the questioning of the suspect, Miroslav Hršum, by the police pp. 121 – 129 of the case file because the defendant was not informed pursuant to Article 225.2 in conjunction with Article 10 CrPA is unfounded and should have been rejected because the records in question contain the notifications referred to in Articles 4 and 5 of the Criminal Procedure Act, and Article 4 contains the complete provisions of Articles 225.2 CrPA stating that the defendant must be informed during the first questioning of the criminal offences he is being charged with and of the grounds for the charges. It is also stated that he must be allowed to comment on all the facts and evidence and to state all the evidence to his benefit. Furthermore, Article 4.3 CrPA states that the defendant is not obliged to present his defence or answer questions and that it is prohibited and punishable to try to extort a confession or some other statement from the defendant or some other person participating in the proceedings. Therefore, the provision of Article 4 CrPA is even wider in its notifications for the defendant than the provision of Article 225.2 CrPA. Therefore, it was not necessary to exclude the records and parts of the indictment containing parts or claims from the records."

71. The applicant's defence attorney submitted on 15 January 2010 a document to Split County Court (vol. 53, p. 1811 of case file K-Us-25/08) adding to the case file four Supreme Court rulings (I Kž.817/06-3 of 24 October 2006, I Kž.244/08-3 of 12 March 2008, I Kž.572/03-3 of 18 September 2003 and I Kž.150/04-3 of 24 February 2004) where, according to the defence attorney, it is stated that this is valid evidence which is not excluded from the case file provided that the accused was questioned before the police authorities in conformity with Article 117.5 CrPA and after being informed in accordance with Article 225.2 CrPA. On this basis, the applicant's defence attorney concluded that "if the police authorities do not comply with Article 117.5 of the Criminal Procedure Act and do not inform the defendant in accordance with the provisions of Article 225.2 of the Criminal Procedure Act, these records may not be used as a basis for a court decision and the records have to be excluded from the case file."

72. The statement of reasons of the first-instance judgment, in relation to the rejection of this proposal for evidence, reads as follows:

> "The proposal of the first defendant's defence attorney under 1 to exclude the records of the questioning of the suspect, Miroslav Hršum, by the police ... because the defendant was not informed pursuant to Article 225.2 in conjunction with Article 10 CrPA is unfounded and should have been rejected because the records in question contain the notifications referred to in Articles 4 and 5 CrPA ... that the defendant must be informed during the first questioning of the criminal offences he is being charged with and of the grounds for the charges. It is also stated that he must be allowed to comment on all the facts and evidence and to state all the evidence to

his benefit. (…) Therefore, it was not necessary to exclude the records and parts of the indictment containing parts or claims from the records."

73. Having examined the records of the session of the second-instance panel of 15 September 2010 of the Supreme Court of the Republic of Croatia in Zagreb no. I Kž-Us 79/10-5 (vol. 66, pp. 2312 – 2313 of case file K-Us-25/08), the Constitutional Court found that the applicant's defence attorney, Željko Lubina, objected to the report of the reporting judge "because it was wrongly stated that the proposal for the exclusion of the records of the questioning of the defendant Miroslav Hršum by the police and the records of the search of the flat had not been submitted. This proposal was made during the proceedings and the reasons for rejection were mentioned in the judgment. The proposal was rejected by a ruling adopted during the trial which immediately became final and the trial was continued. The disputed records were signed by his client with his permission which was given by him because the records had not contained the notification referred to in Article 125.2 of the Criminal Procedure Act and he had not been informed pursuant to that Article but the records contained the notification referred to in Articles 4 and 5 of the Criminal Procedure Act, which means that these records were neither correct nor legal and should be excluded."

73.1. The Supreme Court provided a detailed answer to the claims in the applicant's appeal in the disputed judgment, stating the following:

"The appellant Hršum stated another important violation of the provisions of Article 367.2 CrPA, claiming that the disputed judgment was based on unlawful evidence, the records of the questioning of the defendant Hršum by the police authorities. The appellant claims that the records are unlawful evidence because the defendant was, before the first questioning, informed only pursuant to the provisions of Articles 4 and 5 CrPA, while the notification referred to in Article 225.2 CrPA was missing and he claims that, due to the above-mentioned omission, the records should be excluded from the case file as well as all other evidence arising therefrom. The applicant persists that the notification referred to in Article 225.2 CrPA should have been entered in the records of the questioning of the defendant and, since that was not the case, he deems the records of the questioning of the defendant to be unlawful evidence violating the provisions of criminal procedure referred to in Article 367.2 CrPA because they served as a basis for the adoption of the last judgment. Contrary to such claims of the appellant, this is not unlawful evidence pursuant to the provision of Article 9.2 CrPA. The defendant was interrogated by the police authority in compliance with the provision of Article 177.5 CrPA and was informed pursuant to Articles 4 and 5 CrPA, the defendant gave his statement in the presence of the defence attorney who was present during the questioning, and the credibility of such actions was confirmed by the defendant and the defence attorney by signing the records of the questioning of the defendant (p. 121 of the case file). The presence of the defence attorney is a condition for a statement to be accepted as evidence and the notification given to the defendant at the first questioning serves to inform the defendant about the charges and reasons for questioning and to inform him that he is not obliged to present his defence or answer questions. Although it is not clearly stated that the defendant was informed pursuant to Article 225.2 CrPA during his first questioning, it may be concluded from the contents of the provided notifications that he had been informed of all the pertaining rights. This is clear from the previously mentioned records of the questioning of this defendant and the beginning of his statement which reads: 'I am aware of the criminal offences I am being charged with, I have been informed of my rights and I present the following defence in the presence

of my defence attorney, Željko Lubina.' Consequently, the defendant's objection that the judgment was based on unlawful evidence and which is mentioned in the appeal is unfounded."

73.2. Therefore, the Supreme Court decided on two occasions on the applicant's appeals to exclude from the case file records of the questioning of the defendant by the police of 10 May 2008 due to its unlawfulness (ruling of 11 February 2009 and judgment of 15 September 2010). The Constitutional Court finds that the Supreme Court's explanations are relevant and sufficient to decide that the applicant's objections are unfounded.

74. Finally, it must be noted that the first-instance court assessed the proposals by other co-defendants to exclude the records and notes from the case file. Thus, the competent panel adopted the following ruling at the trial at Split County Court on 12 January 2010 to, as opposed to the records that referred to the applicant, "pursuant to Article 331.2 CrPA exclude from the case file the records of the questioning of the defendants by the police without the presence of the defence attorney (pp. 111 – 117), official note of the interview with Zdenko Cokarić (pp. 118 and 119), records of the questioning of the defendant by the police without the presence of the defence attorney (pp. 148 - 150 and 151 - 155 of the case file) and the official note on interviews with Vesna Vuco and Nataša Despotušić (pp. 828 and 829 of the case file) and the official note on the interview with Jozo Certo (p. 228 of the case file), which will be separated under a special cover and submitted to the investigating judge to be kept separately from the file." The panel referred to the above-mentioned exclusion of the records and notes from the case file (which referred to other defendants in the same criminal proceedings) as "documents a judgment may not be founded on and that had to be excluded from the case file pursuant to Article 331.2 CrPA in conjunction with Article 78 CrPA" (vol. 52, p. 1798 of the case file K-Us-25/08).

If the competent court did the same thing with the records relating to the other defendants, the Constitutional Court sees no reason why the Court could not do the same concerning the records relating to the applicant, provided that there were justified reasons for doing so. Therefore, it is clear that the court did not find justified reasons for their exclusion from the file.

75. Consequently, the Constitutional Court finds that Article 29.4 of the Constitution was not violated in the case of the applicant's claims that the records of his questioning by the police of 10 May 2008 should have been excluded from the case file as unlawful evidence because he admitted his guilt to the police without having been previously informed of the relevant provisions of the CrPA.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

B. EVIDENCE COLLECTED DURING THE ALLEGEDLY UNLAWFUL SEARCH OF THE APPLICANT'S FLAT

76. The Constitutional Court examined the applicant's objections concerning the allegedly unlawful search of his rented flat in Split in light of Article 29.4 of the Constitution (cited in point 66 of the statement of reasons of this decision and ruling).

Although the applicant did not invoke the violation of Article 34 of the Constitution and in spite of the fact that it remains questionable whether the searched flat in Split may be regarded as the applicant's “home” within the meaning of Article 34.1 of the Constitution and Article 8 of the Convention, when deciding on the applicant's objection, the Constitutional Court took into account Article 34 of the Constitution that reads:

> ”Article 34
>
> The home is inviolable.
>
> Only a court may order the search of a home or other premises pursuant to a written warrant drafted and explained in compliance with law.
>
> A tenant or his/her authorized representative shall be entitled to be present during the search of his/her home or other premises together with two mandatory witnesses.
>
> Subject to the conditions specified by law, the police authorities may enter a home or other premises even without a warrant or consent from the tenant and conduct a search in the absence of witnesses insofar as this is essential to enforce an arrest warrant or apprehend an offender, or to prevent any grave threat to life or substantial property.
>
> A search to locate or secure evidence, which is reasonably suspected to be in the home of a perpetrator of a criminal offence, may only be conducted in the presence of witnesses."

1) Applicant's objections

77. The applicant claims in his constitutional complaint that the criminal conviction is based on an unlawful search of his flat in Split which took place on 11 May 2008. Although the objection about the unlawful search of the flat was unclearly described in the constitutional complaint, it may be understood that the applicant's objection is based on two reasons:

– first, there were not two witnesses present during the search of the flat, which is required by the law, that is, the witnesses present could not observe all the actions made by the police during the search;

– second, the defence attorney was not present during the search because he was not informed of the search.

78. Consequently, the applicant stated the following in the constitutional complaint:

> "On 12 May 2008, at around 9.00 am, inspector Rubelj came with another two inspectors, they carried me out, put me into their official vehicle “Octavia” and took me to my flat. When we arrived at the building they carried me in because I could not walk. I would like to point out that I was not handcuffed the entire time which proves that I was so beaten up that they did not need to tie me since I could not even stand on my feet. When we entered the flat, it was already unlocked because the owner of the flat was inside with another two people who got up and left the flat. At that moment, when requested by the inspector, the owner of the flat asked Mrs. A."

(comment - surname abbreviated by the Constitutional Court) “to be present as the second witness. The owner of the flat said to Mrs. A." (comment - surname abbreviated by the Constitutional Court) “to make coffee for the inspectors who have already started the search. The owner of the flat remained seated at the table in the living room. I claim, and this was confirmed by Mrs. A." (comment - surname abbreviated by the Constitutional Court) “during the first testimony before the Court that neither she nor the owner of the flat could observe the police officers in the bedroom and in the other room. She stated the following during her first testimony: ‘When I came into the flat I saw the police officers unscrewing the boxes of the blinds in the living room and on the balcony.’ I would like to state that I was on the living room floor during the search of the flat because I could not stand. It may be confirmed by the above-mentioned witnesses that the inspectors packed my personal things into bags because I could not pack them myself. (…)

When the search was over, I did not want to sign anything and I asked for my attorney to be present. Mr. Rubelj told me and I quote: 'You will not fuck with me, I will break your arms on the way back'. I had no choice and I signed a few pages of paper that were prepared by Rubelj who did not let me read them. (…)

Consequently, it is stated in the statement of reasons of the final judgment of the Supreme Court of the Republic of Croatia that the search was lawful and that evidence was obtained thought such a lawful search.

I would like to stress the manner in which the statement was given by the witness Mrs. A." (comment - surname abbreviated by the Constitutional Court) “at the hearing of 13 July 2009 when she was interrogated as the main witness of the search of the premises. It is obvious from the records that the witness's testimony was confusing and that she started to cry at one point. After the first testimony the Court concluded that she had given her testimony and that she was free to go. (…) In her first testimony Mrs. A.” (comment - surname abbreviated by the Constitutional Court) "stated that she had come to the entrance of the flat together with the inspectors and that they rang the bell together and I unlocked the flat from the inside. This proves that I was still in the flat at that time which means that I was not even arrested. In her second testimony she stated that she and her brother waited for the inspectors in the flat and the inspectors brought Hršum. She stated that they already had the keys to the flat before the police officers came with Hršum. In one testimony she states that somebody is in the flat and in the other she denies it. (…) Furthermore, Mrs. A. and P.” (comment - surnames shortened by the Constitutional Court) “testified together and it is not lawful for the witnesses to testify together and sit next to each other in the witness booth and the state attorney's office is trying to coordinate the testimony of witnesses before the Court which is different from the testimony given by A." (comment - surname abbreviated by the Constitutional Court.)

2) Relevant law

79. The merits of the applicant's objections are assessed pursuant to Articles 198.3, 211.1 and 214.1 CrPA which at that time read as follows:

“Article 198

(…)

(3) The prosecutor and the defence counsel may be present during the search of a dwelling.”

“Article 211

(1) The search of a dwelling, ... and a person shall be carried out with the purpose of finding persons who have committed an offence or finding objects relevant

for the criminal procedure if the possibility exists that they are situated on certain premises or with a certain person.

(…)"

"Article 214

(1) Two citizens of full age shall be present as witnesses simultaneously during the entire search of a dwelling ... Before the beginning of the search, the witnesses shall be instructed to observe how the search is carried out and they are entitled, before the record of the search is signed, to place their objection if they are of the opinion that the search has not been carried out in accordance with the provision of Article 211 of this Act or that the contents of the record are incorrect.

(…)"

3) Assessment of the Constitutional Court

80. It may be concluded from the case file that, on 9 May 2008, the County Court in Split adopted order no. II KIR-461/08 on the search of the dwelling and other premises in Split, 45 Šime Ljubića Street, which was rented and used by the applicant, and on the personal search of the applicant "because it may be expected that the search of the dwelling and other premises used by the suspect and the personal search of the suspect would reveal objects that may be linked to the criminal offence of association to commit criminal offences referred to in Article 333 of the Criminal Code and robbery referred to in Article 218 of the Criminal Code, in particular cell phones, phone cards, money and similar" (vol. 48, p. 1701 of case file K-Us-25/08). Therefore, this was an emergency investigative action of search of a dwelling and person.

81. The record of the search of the dwelling of 11 May 2008 (see point 13.2 of the statement of reasons of this decision and ruling), which was prepared on a standardised form, reads as follows:

"II. The search is carried out on the basis of :

1. an order of Split County Court no. II KIR-461/08 of 9 May 2008

2. a) — pursuant to Article 213.2 of the Criminal Procedure Act

(…)

the order was served on Miroslav Hršum on 11 May 2008 at 8.30 and he was advised that he was entitled to contact his attorney before the beginning of the search:

(…)

– defence attorney Željko Lubina was informed on 10 May 2008 at 3.00 pm."

It may be concluded that the applicant was present during the search but without his defence attorney who was notified of the search on 10 May 2008 at 3.00 pm, which he later disputed on several occasions. The search was conducted by two police officers: Žaki Perić and Željko Rubelj. The following persons were present as witnesses: Ž. A. and I. M. The following objects were seized during the search: two cell phones with SIM cards and chargers, one planner, one address book, two SIM cards, one insert of a cylindrical lock and two handwritten notes.

The record was signed by the applicant, the witnesses of the search Ž. A. and I. M., police officer Gojko-Ivan Vidaković, who prepared the record, and "one representative of a state administration body" (that is, one of the two police officers,

but the signature is illegible and the Constitutional Court was unable to identify the signatory with certainty). The persons who were present did not object to the record and this was noted in writing in the record itself.

a) Alleged unlawful presence of two witnesses during search of flat

82. Having examined the case file, the Constitutional Court did not find the existence of any indications of violation of constitutional or legal requirements concerning the search of the flat in the presence of two witnesses.

83. The Constitutional Court examined the records from the trial carried out at Split County Court on 13 July 2009 (vol. 40, pp. 1494- 1497, case file K-Us-25/08) and accepts the applicant's argument that the testimony of witness Ž. A. given during that hearing was confusing and that it could have, at first sight, caused suspicion whether the legal requirements were fully complied with during the search of the applicant's flat in Split. However, even the competent court found the testimony of the above-mentioned witness confusing. In other words, the competent court took that fact into account and assessed it.

83.1. At the trial which took place on 12 January 2010, the competent court adopted a ruling rejecting the proposal of the applicant's defence attorney "to exclude from the case file the report of the search of the domicile and other premises pp 21-24" (vol. 52, p. 1797 of case file K-Us-25/08). The statement of reasons of that ruling reads:

> "... Concerning the testimony of witness Ž. A." (comment - name abbreviated by the Constitutional Court), "it was, indeed, confusing but the witness in the end confirmed that she had been present during the search of the flat and, to repeat once again, the report of the search was signed and there were no objections by any party. Therefore, it was not necessary to exclude the above-mentioned report or documents of the temporary seizure of objects obtained during the search."

84. Furthermore, in the records of the session of the second-instance panel of judges of 15 September 2010 of the Supreme Court of the Republic of Croatia in Zagreb no. I Kž-Us 79/10-5 (vol. 66, p. 2313 of case file K-Us-25/08), there is the following comment of the applicant's defence attorney, Željko Lubina: "The witness (of the search) stated that she had not been present for the entire duration of the search and that she had witnessed only the discovery of the passport and tools, and she had not seen the other found objects."

84.1. In its judgment of 15 September 2010, the Supreme Court stated the following:

> "... the defendant's objection that the search of the flat was unlawful because two witnesses of the search were not present was overruled by the testimony of witness A." (comment – surname abbreviated by the Constitutional Court) "who clearly and unequivocally stated that she had been present during the entire search in the manner laid down in Article 214.1 CrPA."

85. The Constitutional Court has established in its case law a series of principles that need to be followed for court criminal proceedings to be assessed as fair. When

adopting their decision in the course of proceedings, courts must abide by these principles by giving priority to direct interrogation, and the facts and circumstances of a specific case through the application of the relevant criminal law. The Constitutional Court must guarantee the constitutional and convention rights to a fair trial by verifying whether the relevant principles have been respected in the case in question. In addition to conducting such verification, the Constitutional Court must also examine whether the court, in the case in question, assessed the circumstances in an obviously unreasonable manner or whether it committed some other obvious error in judgment, whether it wrongly assessed the existence of an important fact or failed to examine all the relevant facts and whether it failed to take into account all the factual and legal elements that are objectively relevant for the adoption of the decision, and whether it refused to present evidence that might lead to a different decision to an extent and in a manner resulting in a violation of the constitutional right of the applicant to a fair trial.

Considering the established facts of the case in the case in question and bearing in mind the above-mentioned principles, the Constitutional Court found that there is no reason, in relation to the presence of two witnesses during the search of the applicant's flat, to replace the assessment of the competent court with its own assessment since the court decision clearly was not arbitrary or rash (cf. ECtHR, *Brennan v. the United Kingdom,* judgment, 16 October 2001, application no. 39846/98, § 51). It is clear from the records of the trial before Split County Court of 13 July 2009 that the witness A. Ž in a timely manner corrected her testimony given at the beginning of the hearing, stressing that: “Concerning my previous testimony given today, I had no intention to lie and I am deeply sorry but I was simply not interested in what was going on and this happened a year ago. ... I did not read the records in detail because I trusted the people doing the job and it all happened before my eyes. ... I am aware of the impact of my first testimony this morning, being a law graduate and a juror, but I simply stated the wrong time, for which I am deeply sorry. ... When I was brought to the courtroom once again, I apologised to the court for my mistake concerning this period of time. ... When asked by the defence attorney, the witness stated that this was the correct testimony and what happened and what I said this morning was a mistake in relation to time” (pp 1496 and 1497 of case file K-Us-25/08).

86. Consequently, the Constitutional Court found that the result of the search of the applicant's home, from the point of view of the presence of two witnesses, may be regarded as evidence in criminal proceedings against the applicant. This is not a violation of Article 29.4 of the Constitution. There is nothing to indicate a violation of Article 34.3 of the Constitution.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

b) Absence of the applicant's defence attorney during the search of the flat

87. The second disputable issue in relation to Article 29.4 of the Constitution refers to the absence of the applicant's defence attorney during the search of the applicant's flat.

88. In the records of the trial at Split County Court of 12 January 2010 (vol. 52, p. 1796 of case file K-Us-25/08), the applicant's defence attorney proposed that "the court exclude from the case file the records of the search of the flat on pp. 21- 24 of the case file. The reason is that the defence attorney was not given the opportunity to be present during the search. It is stated in the records of the search that the defence attorney had been notified of this action on 10 May at 3.00 pm. However, it is stated in the records that are to be excluded by the court that the defence attorney was notified and invited to appear at the questioning of the suspect Hršum at 3.00 pm. Witness Vidaković, who drafted the records of the search of the premises, stated in his testimony that he had not notified the defence attorney. Witness Rubelj, who was also a police officer, stated that he had not notified the defence attorney of the search either. Hršum was thus deprived of his basic right to be represented and defended by a defence attorney during the investigation... For this reason the records of the search of the premises must be excluded from the case file. It is obvious from the testimony of witness Ž. A. that she was not present for the entire duration of the search and that she saw that only passports had been seized. This is another reason why the records of the search of the flat must be excluded from the file, in particular documents on the temporary seizure of objects, all objects, except perhaps passports."

88.1. At that same trial the court adopted a ruling rejecting the proposal of the applicant's defence attorney "to exclude from the case file the records of the search of the domicile and other premises pp 21-24" (vol. 52, p. 1797 of case file K-Us-25/08). The statement of reasons of that ruling reads:

> "The request of the defence attorney of the first defendant to exclude the records of the search of the domicile and other premises, pp. 21- 24, from the file had to be rejected because the records in question read that the defence attorney Željko Lubina was notified on 10 May 2008 at 3.00 and the records were signed by Miroslav Hršum with the comment that there are no objections. The fact that witnesses Rubelj and Vidaković could not remember who notified attorney Lubina is irrelevant in relation to everything stated in the records."

89. Having examined the records of the session of the second-instance panel of 15 September 2010 of the Supreme Court of the Republic of Croatia in Zagreb no. I Kž-Us 79/10-5 (vol. 66, p. 2313 of case file K-Us-25/08), the Constitutional Court found that the applicant's defence attorney, Željko Lubina, objected to the report of the reporting judge "because it was wrongly stated that the proposal for the exclusion of... the records of the search of the domicile had not been submitted. ...the defence attorney was not notified of the search although his client asked for his attorney to be present, which is another reason for the exclusion of the records."

89.1. Concerning the applicant's claims of the unlawfulness of the search of his flat in Split due to the absence of his defence attorney, the Supreme Court judgment of 15 September 2010 reads as follows:

> "The complainant deems that the evidence and records of the search of the flat and other premises of the defendant Hršum are unlawful and claims that the defence attorney was not notified of this action in a legal manner which is why all other evidence resulting from this search is unlawful.

Contrary to the complainant's claims, it is clear from the records of the search of the domicile and other premises that the defendant's defence attorney was notified of the search on 10 May 2008 at 3.00 which was confirmed by the defendant by his signature on the records. It is a fact that the defence attorney was not present during the conducted search. Consequently, the conducted search was not unlawful and the records of the search are not unlawful evidence. The preconditions for the lawfulness of the search were fulfilled in this case, which is clear from the records of the search (p. 21 of the case file). The search was conducted on the basis of a written court order; it was conducted in the defendant's domicile after the order was served on him and the search was conducted in the presence of two witnesses, which is why pursuant to Article 217 CrPA, records of the search of the domicile are not unlawful on account of the absence of the defence attorney."

90. The Constitutional Court found that the above-mentioned statements of reasons given by the courts were a relevant and sufficient reply to the objections made by the applicant concerning the unlawful search of his domicile in Split on account of the absence of his defence attorney. The Constitutional Court found that the result of the search of the applicant's home conducted in the absence of the defence attorney may be taken as evidence in criminal proceedings against the applicant.

Article 34.3 of the Constitution guarantees the tenant the right to be present *or* to have a representative present during the search of his or her home. Consequently, there was no violation of Article 34.3 of the Constitution and neither was there a violation of Article 29.4 of the Constitution. Article 198.3 CrPA envisages the possibility of an attorney being present during the search of the domicile, but this possibility is not set as an obligation.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

V. OTHER ALLEGED VIOLATIONS OF THE RIGHT TO A FAIR TRIAL

91. The Constitutional Court also separately examined the applicant's following objections:

– that he was not informed, in his mother tongue, Serbian, of the nature and grounds for charges against him, and

– that he did not sit next to his defence attorney during the trial and was therefore unable to consult him.

92. The general provision of Article 29.1 of the Constitution from the criminal point of view reads:

"Article 29

Everyone shall be entitled to have ... suspicion or accusation of a criminal offence decided upon fairly before a legally established, independent and impartial court within a reasonable period.

(…)"

The general provision of Article 6.1 of the Convention from the criminal point of view reads:

> “Article 6
> RIGHT TO A FAIR TRIAL
> 1. ... In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

92.1. All other provisions of the Constitution and the Convention regulating the guarantees of a fair trial must be observed in the light of the above-mentioned general provisions.

A. USE OF MOTHER TONGUE IN PROCEEDINGS BEFORE THE POLICE AND THE COURT

93. The Constitutional Court examined the objections of the applicant concerning the alleged violation of his right to use his mother tongue in the light of Article 29.2.7 of the Constitution that reads:

> “Article 29
> (…)
> In the case of suspicion or accusation of a criminal offence, the suspected, accused or indicted person shall be entitled:
> (…)
> – to assistance by an interpreter free of charge insofar as he/she does not understand the language used in the court.
> (...).”

The assessment of the violation of the applicant's rights from the Convention is based on Article 6.3.e of the Convention that reads:

> “Article 6
> (…)
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (…)
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

1) Applicant's objections

94. The applicant in particular objects because of the inability to use his mother tongue (Serbian) in proceedings before the investigating bodies and the court, and states:

> “I state that I am a citizen of Bosnia and Herzegovina of Serbian nationality and, according to the Croatian Constitution and the CrPA, an alien speaking and writing in the Serbian language. It is true that I understand the Croatian language to a certain extent and that I know how to write in the Latin script to a certain extent. It is also correct that I do not know or understand the Croatian legal terminology and expressions in the Croatian CrPA.

As an alien, pursuant to Article 7.2 of the Croatian Criminal Procedure Act as a suspect in proceedings and during detention and questioning by the Croatian authorities, I am entitled to use my mother tongue and to interpretation (by a court interpreter), of which I was supposed to be informed before the first interrogation by the police and the investigating judge and which I requested to be provided. It was not noted anywhere (and it may be checked in the file that I was not provided with that by the police or the investigating judge and at the moment when I was charged and served my indictment no. Uk-137/08 of 21 October 2008) that I asked to testify before the investigating judge in my mother tongue, which I was not granted.

A copy of the previously mentioned request is enclosed as evidence. The indictment issued by the state attorney's office on 21 October 2008 was also not translated into Serbian.

When my defence attorney insisted and when I invoked Article 7.2 of the Criminal Procedure Act of the Republic of Croatia at the trial of 3 February 2010, the Court adopted a decision that a court interpreter was obligatory and I was provided with a court interpreter for the Serbian language, Mr. Andrija Rako from Split.

This was provided 1 year and 10 months after my arrest. Therefore, during the preparation of my defence and my testimony, I was deprived of my lawful right to the translation of judicial documents and of the indictment."

2) Relevant law

95. Article 7.2 CrPA read at that time:

"Article 7

(…)

(2) The parties, witnesses and other procedural participants are entitled to use their own language. If proceedings are not carried out in their language, the interpretation of statements and the translation of documents and other written evidence shall be provided. Interpretation and translation shall be carried out by a court interpreter.

(…)"

3) Assessment of the Constitutional Court

96. The applicant objects that the competent authorities never informed him of his right to use his mother tongue, not even when he was given an interpreter, and that the applicant was deprived of an interpreter until the trial before the court.

97. The Constitutional Court notes that the applicant's defence attorney submitted on 29 August 2008 a pleading to Split County Court concerning case file no. KIO-Us-13/08, objecting that the applicant was not instructed that he was entitled to use his own language (vol. 21, pp. 832 -833 of case file K-Us-25/08). Therefore he requested that the records of the questioning of the suspect of 10 May 2008 and the records of the questioning of the defendant of 12 May 2008 be excluded from the case file.

97.1. The statement of reasons of Split County Court no. Kv-785/08 of 18 December 2008 for the first time deals with the applicant's objection concerning the inability to use his mother tongue and script in the proceedings. The relevant part of the ruling reads:

"The examination of the file revealed that the defendant Miroslav Hršum presented his defence on 10 May 2008 during questioning at the police station in the

presence of his defence attorney Željko Lubina, attorney from Split. The defendant presented his detailed defence (pp. 121 – 129 of the file) in which he confessed he was guilty of committing the criminal offences in question. The defendant was informed of his rights during questioning and, according to information in the file, neither he nor his defence attorney, who was present at the questioning, asked for an interpreter for the Serbian language. When the questioning was finished, both the defendant and his defence attorney signed the records and neither of them mentioned that the defendant did not understand the Croatian language. (…) Although the defendant Hršum asked in a pleading submitted by his defence attorney Željko Lubina on 29 August 2008 that the records in question be excluded from the case file, and the investigating judge did not decide on the request, this court finds the records of the questioning of the defendant Hršum legal and concludes that the defendant's knowledge and understanding of the Croatian language and script was never an issue. ...”

98. In the minutes of the trial at Split County Court of 25 May 2009 (vol. 37, p. 1222 of case file K-Us-25/08) the competent court panel of judges found the following:

“The first defendant” (the submitter of the constitutional complaint – comment by the Constitutional Court) “following a proposal by his defence attorney and notification by the president of the panel of judges that he had already presented his defence in the presence of his attorney, that he had communicated in writing, by letter, and that he was a citizen of Bosnia and Herzegovina, born in 1962, where both the Serbo-Croatian or Croato-Serbian languages have been in use since 1990, the first defendant Miroslav Hršum stated that he would like to be provided with an interpreter for the Serbian language.

The panel of judges adopted the following

r u l i n g:

The first defendant Miroslav Hršum will be provided with a court interpreter for the Serbian language to interpret for the defendant from Croatian to Serbian and vice versa pursuant to Article 7 CrPA.

The permanent court interpreter Andrija Rako was appointed as court interpreter in these proceedings.

It is established that the permanent court interpreter Andija Rako entered the courtroom at this point and sat next to the first defendant, Miroslav Hršum.”

98.1. The applicant's defence attorney submitted on 29 May 2009 a pleading to the Split County Court (vol. 37, p. 1420 of case file K-Us-25/08), where he expressed his “objections to the report from the trial of 25 May 2009 and objections to the behaviour of the court”, in the part referred to in the previous point of the statement of reasons of this decision and the ruling. The defence attorney objected that on 22 May 2009 he had already submitted a pleading to the Split County Court asking “to be ensured that my client, Hršum, may sit together with the interpreter during the trial” (vol. 33, p. 1218 of case file K-Us-25/08). In the defence attorney's opinion, “when the defence attorney proposes to the court and asks the court to appoint an interpreter for the defendant ... the court may not ask the defendant to comment on the defence attorney's proposal, in particular, to ask the defendant for his comment, trying to make him waive his rights referred to in Article 7 of the Criminal Procedure Act.”

The applicant's defence attorney also objected in the pleading that “Hršum was never informed of his right to interpretation, including during the first questioning.” Moreover, “even after having provided Hršum with a court interpreter for the Serbian language, the Court still did not inform the party Hršum, the defendant, of his right to interpretation”.

99. In the reports of the trial before Split County Court of 13 July 2009 (vol. 40, p. 1494 of case file K-Us-25/08) the competent court panel of judges found the following:

> “It is established that the permanent court interpreter for the Serbian language, Andrija Rako, is present at the trial and that he is sitting next to the first defendant Miroslav Hršum.
>
> When asked, the first defendant, Miroslav Hršum, stated that translation was working well and that he needed the translation of every tenth word.”

99.1. A permanent court interpreter for the Serbian language, Andrija Rako, was present as the applicant's court interpreter for the Serbian language at the trial on 13 July 2009, 14 July 209, 15 July 2009 and 16 July 2009 (vol. 42, p. 1522 of case file K-Us-25/08), and 12 October 2009, 13 October 2009, 14 October 2009 (vol. 45, pp. 1577, 1582 and 1586 of case file K-Us-25/08), 14 December 2009 (vol. 50, p. 1756 of case file K-Us-25/08), 11, 12, 13, 14 and 15 January 2010 (vol. 51, p. 1791; vol. 52, pp. 1794 and 1800, vol. 53, pp. 1805 and 1824 of case file K-Us-25/08), 1 February 2010 (vol. 54, p. 1843 of case file K-Us-25/08).

99.2. During the proceedings, some individual court documents were translated into Serbian and into the Cyrillic script, including the Supreme Court ruling no. II Kž-Us 440/09-3 (vol. 42, pp. 1524 –1529 of case file K-Us-25/08), Supreme Court ruling no. II Kž 638/09 and Supreme Court ruling no. KžUs-196/09 (vol. 46, pp. 1597 – 1605; vol. 51, pp. 1785 – 1789 of case file K-Us-25/08), the first-instance judgment (vol. 61, pp. 1998 – 2061 of case file K-Us-25/08), and also the translation of the state attorney's (USKOK) appeal of 14 April 2009 against the first-instance ruling (vol. 65, pp. 2251 – 2255 of case file K-Us-25/08). According to the confirmation of delivery of those translated documents, it seems that the translation was delivered only to the submitter of the constitutional complaint.

100. Finally, in relation to the ability of the applicant to understand the course of proceedings carried out against him and to use his mother tongue, the Supreme Court rejected the objection and stated the following in the statement of reasons of the judgment of 15 September 2010:

> “The defendant's objection that he was deprived of his right under Article 7 CrPA, that is, the right to use his own language and to follow the proceedings in his own language which would constitute a serious violation of the criminal procedure provisions referred to in Article 367.1.3 CrPA.
>
> The defendant was born in 1962 and lived for a long time in the former state where the languages of the current states of Croatia and Bosnia and Herzegovina were used on an equal basis, which is why it is obvious that the defendant speaks Croatian. This is confirmed by written pleadings addressed to the first-instance court and written in the Latin script and Croatian language, and the detailed appeal personally submitted by the defendant. The procedural violation indicated by the

defendant would have been committed only if the court, contrary to the defendant's request, deprived him of the right to use his mother tongue, while in the case in question, the omission of the court to inform the party of this right does not represent a procedural violation. Furthermore, the defendant submitted a request for a court interpreter to the first-instance court, his request was satisfied and the court interpreter was present, next to the defendant Hršum, during the entire trial before the first-instance court. Therefore, there was no violation of Article 7 CrPA."

101. In *Hermi v. Italy* (judgment, Grand Chamber, 18 October 2006, application no. 18114/02) the ECtHR established the following legal positions on the right of the defendant to the free assistance of an interpreter if he does not understand or speak the language of the court, guaranteed in Article 6.3.(e) of the Convention:

"69. ... paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see *Luedicke, Belkacem and Koc against Germany*, 28 November 1978, § 48, Series A, no. 29).

70. However, paragraph 3(e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an interpreter, and not a translator. This suggests that oral linguistic assistance may satisfy the requirements of the Convention (see *Husain v. Italy* (dec.) no. 18913/03, 24 February 2005). The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events (see *Gungor v. Germany* (dec.) no. 31540/96, 17 May 2001). In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided ...

71. The Court has held that, in the context of the application of paragraph 3(e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (see, *mutatis mutandis*, *Gungor*, cited above).

72 Lastly, while it is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed (see... *Stanford v. United Kingdom*, 23 February 1994, § 28, Series A, no. 282), the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (see *Cuscani v. United Kingdom*, no. 32771/96, § 39, 24 September 2002)."

102. The Constitutional Court finds that Croatian and Serbian are two different languages, but citizens of the former SFRY understood both languages because they lived in the same country, and in schools of the former Socialist Republic of Bosnia and Herzegovina (a federal unit of the former SFRY), pupils learned both Latin and

Cyrillic script. The applicant is a citizen of Bosnia and Herzegovina who completed elementary school during that time.

102.1. The applicant did not object that he had any difficulty understanding what was said during the questioning by the police and the investigating judge. Concerning the three relevant documents – the report of the arrest of 10 May 2008, the report of the questioning of the suspect of 10 May 2008, and the report of the questioning of the defendant of 12 May 2008, the applicant was the first to sign them without any objections (see point 10.1 of the statement of reasons of this decision and ruling), and for the second he stated that he was informed that he could read the report, he stated that he listened to the oral dictation of the report and that he would sign the report without reading its contents (see point 10.2 of the statement of reasons of this decision and ruling) and for the third, after having been informed of Article 77 CrPA, he stated that he did not wish to read the report and that he would sign it (see point 11 of the statement of reasons of this decision and ruling). Concerning the criminal charges, they were read to the applicant and he stated that he understood what he was being charged with and what the grounds for suspicion against him were (see point 11 of the statement of reasons of this decision and ruling). It is, therefore, indisputable that the applicant was able to read the text in Croatian and that he understood the police officers and the investigating judge.

Moreover, the applicant chose an attorney from Split to defend him, who used the Croatian language during the proceedings. The applicant and his attorney never mentioned that that they had linguistic difficulties in mutual communication and they never asked for the assistance of an interpreter in mutual communication.

Finally, the applicant wrote pleadings to competent courts, including the Constitutional Court, in correct and appropriate Latin script where he used correct Croatian words even when he could have used their synonyms in the Serbian language.

102.2. Therefore, the Constitutional Court agrees with the statement of reasons of the judgment of the Supreme Court in relation to the objection and finds that there was no violation of the rights guaranteed in Article 29.2.7 of the Constitution and Article 6.3.(e) of the Convention.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

B. SEATING OF THE APPLICANT AND THE DEFENCE ATTORNEY AT THE TRIAL

103. The applicant further objected that he was unable to sit next to his defence attorney at the trial in Split County Court. The Constitutional Court reviewed this objection from the point of view of Article 29.2.3 of the Constitution that reads:

“Article 29

(…)

In the case of suspicion or accusation of a criminal offence, the suspected, accused or indicted person shall be entitled:

(…)

– to ... defence counsel and unrestricted communication therewith, and to be informed of this right,

(…)"

103.1. The assessment of the grounds of the applicant's objection is based on Article 6.3.c of the Convention that reads:

Article 6

(…)

3 Everyone charged with a criminal offence has the following minimum rights:

(…)

(c) to defend himself ... through legal assistance of his own choosing,

(…)"

1) Applicant's objections

104. The applicant stated the following in the constitutional complaint:

"I asked to be seated next to my attorney at the trial. The court made this possible on only one day of the trial. In this way it prevented me from consulting my attorney and from talking to him and seeking his advice, thus violating the right to defence. The court wrote that the right referred to in Article 339 CrPA is decided by the president of the panel of judges. The court forgets that this right of the defendant to consult his attorney (Article 339 CrPA) was decided upon by the Criminal Procedure Act and the court and the president of the panel may not deprive the defendant of this right.

The Supreme Court of the Republic of Croatia did not decide on this claim in the appeal.

... The fact that I sat between two judicial police officers at the trial and that I was 23 metres away from my defence attorney represents a violation of the right to defence."

2) Relevant law

105. The first part of the sentence of Article 339 CrPA read at the time:

"Article 339

The defendant may consult his or her attorney during the trial..."

3) Assessment of the Constitutional Court

106. It may be concluded from case file that the applicant's defence attorney submitted on 22 May 2009 to Split County Court a pleading in case no. K-Us-25/08 in relation to the coming trial scheduled for 25 to 29 May 2009 (vol. 33, p. 1218 of case file K-Us-25/08). He stated in this pleading that "the court foresaw that my client would not sit at the same table with me, his attorney, which is why I am writing this pleading." For that reason the applicant's defence attorney requested "to be ensured that my client, Hršum, may sit at the trial at my table, together with me, his attorney, and with the interpreter. This is because I believe that Hršum would not be able to

exercise his right to defence by not sitting next to me, at a distance of at least fifteen metres, and separately from the interpreter. Of course, in that case he would not be able to use his notes or similar."

107. The applicant's defence attorney submitted on 10 July 2009 a pleading to Split County Court (vol. 40, p. 1490 of case file K-Us-25/08), in which he reminded the court of the pleading of 22 May 2009 and of Article 339 CrPA which prescribed that the defendant may consult with his defence attorney during the trial. He stated in that pleading that during the trial, on 25 and 26 May 2009, "the court did not allow Hršum to consult with me, his defence attorney. Thus, the court violated Hršum's right to defence and it violated the right of the defence. Because it prevented Hršum from defending himself with the professional assistance of the defence attorney (Article 5.1 of the Criminal Procedure Act)... Of course, when the defence attorney sits at a table to the left of the panel of judges and when he is 23 metres from Hršum who is sitting on a chair without a table in front of him, and to the right of the panel of judges, there is no application of Article 339 of the Criminal Procedure Act. For that reason I demand that the court enables Hršum to fully realise his right to defence..."

108. In the report of the trial before Split County Court of 15 July 2009 (vol. 41, p. 1502 of case file K-Us-25/08) it can be read that the "defence attorney of the first defendant proposed in pleadings of 22 May 2009 and 10 July 2009 that the court ensures that his client Miroslav Hršum may sit at the table next to him and his interpreter because otherwise this constitutes a violation of the defendant's right referred to in Article 339 of the Criminal Procedure Act." The competent panel of judges adopted a decision that reads:

> "The panel adopted the following
>
> r u l i n g:
>
> The proposal of the first defendant's attorney is rejected as irrelevant.
>
> Statement of reasons
>
> The fact that the first defendant, Miroslav Hršum, sits at the prescribed seat for defendants in the courtroom, as well as all other defendants, and that a permanent court interpreter does not sit next to him, and that they do not sit next to the defence attorney, does not represent a violation of Article 339 CrPA which prescribes that the defendant may consult with his defence attorney during the trial. This is the right of the defence attorney and his defendant which is decided upon by the president of the panel, that is, this panel. Also, at the trial of 13 July 2009, before the interrogation of the witness P." (comment – surname abbreviated by the Constitutional Court), "the defence attorney and the defendant were able to consult. For that reason, the defence attorney's proposal to ensure that his client sits together with him and the interpreter for the duration of the trial is found irrelevant and had to be rejected."

108.1. In the judgment of 15 September 2010 the Supreme Court found the following:

> "It is not correct that the defendant Hršum's right to defence was violated because the first-instance court prevented him from sitting next to his attorney, thus preventing him from talking to and consulting his attorney during the trial. This

objection by the defendant is based on the provision of Article 339 CrPA. The place where the defendant sits is determined by the arrangements in the courtroom where the proceedings are conducted and, as a rule, defendants do not sit next to their attorneys. This does not prevent communication between the defendant and the defence attorney because they may ask at any point the president of the panel to enable such communication inside and outside the courtroom. Only the unjustified prevention of consultation by the president of the panel may represent a violation of Article 339 CrPA, which did not happen in the case in question, which is why there was no violation of the provisions of criminal proceedings in this case either."

109. The Constitutional Court examined the report of the trial carried out at Split County Court on 13 July 2009 (vol. 40, p. 1495 of case file K-Us-25/08) and verified that it read as follows: "Željko Lubina, attorney of the first defendant Miroslav Hršum, asks to be able to consult his client concerning the questions for the witness, and he is allowed to sit next to the first defendant, Miroslav Hršum. After the consultation, the defence attorney returned to his place and asked the witness a question."

Furthermore, audio recordings of the defendant's telephone calls ordered by the competent authorities between 19 and 27 April 2008 were listened to at the trial of 15 July 2009. In relation to that, the report reads as follows: "The president of the panel ordered the first defendant, Miroslav Hršum, to sit closer to the speakers during the playing of CDs related to recorded conversations and thus closer to his defence attorney and the interpreter" (vol. 41, p. 1502 of case file K-Us-25/08).

110. The Constitutional Court recalls that parties are entitled to participate efficiently and actively in court proceedings as part of the right to a public trial within the meaning of Article 6.1 of the Convention. According to the ECtHR's position, defendants in criminal proceedings are entitled not only to be present at the trial but also to express their own opinions and to follow the proceedings. This request is implicit in the concept of adversarial proceedings, and it overlaps to a certain extent with the requirements referred to in Article 6.4.(b), (c) and (e) of the Convention (ECtHR, *Stanford v. the United Kingdom*, judgment, 23 February 1994, application no. 16757/90, § 26).

110.1. In that light, the answer to the question whether the first part of the sentence in Article 339 CrPA ("A defendant may consult his attorney during the trial") and the right of the defendant to sit next to his attorney depends on the circumstances of each individual case with the main criterion being whether the applicant has been given the opportunity to participate efficiently and actively in criminal proceedings against himself, as laid down in Article 6.1 of the Convention.

In other words, the hearing must take into account the physical and psychological state, age and other personal characteristics of the parties.

110.2. The Constitutional Court recalls ECtHR's case *V. v. the United Kingdom* (judgment, Grand Chamber, 16 December 1999, application no. 24888/94), in which the defendant was a ten-year-old boy, and the trial was public and "generated extremely high levels of press and public interest, both inside and outside the courtroom" (§ 87 of the judgment). In the light of the circumstances of that case, the ECtHR concluded the following:

"90. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 § 1 that the applicant was represented by skilled and experienced lawyers. ... Here, although the applicant's legal representatives were seated, as the Government put it, 'within whispering distance', it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.

91. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1."

Therefore, the arrangement of the courtroom by allowing the defence attorney to sit next to the defendant in certain circumstances may not be sufficient to ensure a fair trial for the defendant. The meaning of the legal right of the defendant to consult his defence attorney during the trial within the meaning of Article 339 CrPA may not be successfully contested by the fact that the defendant and his defence attorney were not able to sit together in the courtroom without any objective or justified reasons related to the physical and psychological condition, age or other personal characteristics of the defendant.

111. Consequently, the Constitutional Court finds that in the applicant's case there were no special circumstances that would require departure from the usual rules for the arrangement of the courtroom in Split County Court, which was mentioned by the Supreme Court in its judgment. The applicant's right to efficient and active participation in the trial was not diminished in any way by the fact that the applicant did not sit next to his defence attorney during the trial.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

C. REPORTING ON THE STATE OF THE CASE FILE AT THE SUPREME COURT SESSION

112. The applicant also objected to the reporting on the state of the case file at the Supreme Court session of 15 September 2010 claiming that it was contrary to Article 29.1 of the Constitution (cited in point 92 of the statement of reasons of this decision and ruling).

1) Applicant's objections

113. The applicant stated the following in the constitutional complaint:

"It is written in the report that the recorder reported on the status of the case file.

It is written that the recorder was Vlasta Patrčević, senior court adviser. Those claims in the report are not accurate or true.

The state of the case file was reported by a judge of Zagreb County Court who was posted to the Supreme Court of the Republic of Croatia acting as reporting judge.

She reported on the state of the case file. (…)

Since the reporting judge did not report on the state of the case file, the public session of the panel took place in proceedings that are not regulated by the Criminal Procedure Act, and which was held contrary to the provision of paragraph 1 of Article 29 of the Constitution.

The Court violated the regulation referred to in the first sentence of paragraph 3 of Article 374 CrPA which reads: 'The session of the panel shall begin with the report of the reporting judge on the facts of the case.'

The report on the facts of the case was given at the session by a judge who is not a member of the panel, and, according to the report of the trial, it was given by the recorder.

The court reporter is not a judge, and is not, any may not be, a reporting judge, and a judge who is not a member of the panel may not be the reporting judge.

(…)

If Ms. Petrčević was not a recorder, her appearance could be taken as the appearance of a senior court adviser in which case the court violated court proceedings and the rights of the defendant. This is because only the reporting judge may report at the session of the panel.

(…)

The Criminal Procedure Act does not provide for the participation of the recorder in the work of the panel by submitting a report on the state of the case file. The Criminal Procedure Act does not provide for the participation of a court adviser in the work of the panel by submitting a report on the state of the case file.

(…)

Since the legally established court in this case consists of three judges, a president of the panel and two judges, of whom one is a reporting judge, and the 'session of the panel starts with a report of the reporting judge on the facts of the case', this means that the session does not begin with a report of the recorder, and if that happens, the session did not even start and the panel could not have adopted a decision in this matter. The same applies when the report is given by a judge who is not a member of the panel and/or by a judge who is not a member of the panel and who is not a judge of the Supreme Court of the Republic of Croatia."

2) Relevant law

114. The first sentence of Article 374.3 and Article 367.3 CrPA read at that time:

"Article 374

(…)

(3) The session of the panel shall begin with the report of the reporting judge on the facts of the case. ...

(…)"

"Article 367

(…)

(3) A substantive violation of criminal procedure provisions also exists if the court .... in the course of the trial.. fails to apply or incorrectly applies any of the provisions of this Act or violates a right of the defence at the trial, provided that this influences or could have influenced the rendering of the judgment."

115. Article 119.5 and Article 120 of the Courts Act (Official Gazette 150/05, 16/07, 113/08, 153/09, 116/10,122/10) - consolidated text, 27/11, and 130/11, hereinafter: CA/05) read at that time:

"2. Court advisers

Article 119

(…)

(5) Senior court adviser at the Supreme Court of the Republic of Croatia may be a person fulfilling the conditions laid down for a County Court judge.

Article 120

(1) Court advisers shall be authorised to independently conduct certain court proceedings, to evaluate evidence and establish facts.

(2) On the basis of proceedings conducted in the above way, the court adviser shall submit to a judge authorised by the court president in writing a proposal of a decision based on which the judge shall issue a decision. When authorised by the judge, the court adviser shall publish the adopted decision.

(3) Should the authorised judge not accept the proposed decision submitted by the court adviser, he/she shall conduct the proceedings himself/herself.

(4) Court advisers are authorised to conduct proceedings and propose decisions within the meaning of paragraphs 1 and 2 of this Article in the following proceedings:

1.in litigation proceedings for payment of a monetary claim or compensation of damages if the value of matter in controversy does not exceed 50.000,00 kuna, i.e. at commercial courts, it the value of matter in controversy does not exceeding 500.000,00 kuna;

2. in enforcement proceedings;

3. in probate proceedings;

4.in land-registry proceedings;

5. in non-contentious proceedings, except for proceedings for deprivation of business capacity, dissolution of co-ownership and disputes over landmarks;

6. in misdemeanour proceedings;

7. in second-instance proceedings and proceedings in extraordinary legal remedies, court advisors shall report on the status of the file and prepare draft decisions."

116. In the Ordinance on the internal organisation of the Supreme Court of the Republic of Croatia no. Us-3171/05-1 of 9 May 2005 (consolidated text; http://www.vsrh.hr/EasyWeb.asp? 691) it was stated:

"Article 2

The following organisational units shall be established at the Supreme Court:

(…)

2) *Court departments*

... Court advisers and senior court advisers of the Supreme Court shall participate in the work of court panels in the following manner: prepare cases and report at the sessions of the court panels and draft court decisions and write minutes of the session."

117. The Supreme Court published on 5 June 2008 on its website all the necessary information concerning the "statement of reasons for Supreme Court decisions", including the following: "The Supreme Court shall temporarily employ judges of lower courts. These judges shall take on cases, process them and present them before the panel and draft decisions and statements of reasons, as shall court advisers" (http://www.vsrh.hr/EasyWeb.asp? pcpid=794).

3) Assessment of the Constitutional Court

118. Having examined the records of the session of the second-instance panel of 15 September 2010 of the Supreme Court of the Republic of Croatia in Zagreb no. I Kž-Us 79/10-5 (vol. 66, pp. 2311 – 2314 of case file K-Us-25/08; hereinafter: report of the SCRC), the Constitutional Court found that the applicant was not present at the session but only his defence attorney, Željko Lubina.

Three judges of the Supreme Court (the president and two members) were present at the session. Neither party objected to the composition of the panel.

The session was also attended by the "senior adviser of the Supreme Court of the Republic of Croatia, Zlata Patrčević, as the recorder."

The session of the panel began with the "report of the senior court adviser, Vlata Patrčević, about the facts of the case."

With the permission of the president of the panel, "Željko Lubina, attorney of the defendant, Miroslav Hršum, objected about the table for defence attorneys and about the County Court judge Vlasta Patrčević, who, in his opinion, may not be the reporter in this case." However, the reasons for this position were not mentioned.

There are no indications in the report of the SCRC that the panel did not reply to the objections of the applicant's attorney. The following was stated at the end of the report of the SCRC: "When specifically asked, the parties stated that they did not have – do have objections to the course of the session and the contents of the report of the session ..."

119. In the judgment of 15 September 2010, the Supreme Court did not reply to the objection that the judge of the County Court in Split, Vlasta Patrčević, may not be the reporter in the applicant's case.

120. The Supreme Court noted that the applicant's defence attorney had objected to the actions of persons participating in the work of competent panels as recorders even before, in earlier stages of proceedings.

120.1. Thus, in the appeal against a ruling adopted by Split County Court no. Kv-774/08 (K-Us-25/08) of 24 October 2008, prolonging the applicant's detention following the indictment, the applicant's defence attorney objected that the "the president of the panel, Judge Tonković, opened the session and after that gave the floor to the recorder, Dinko Mešina, who reported on the case. Judge Cuzzi, who was mentioned as the second member of the panel in the introductory part of the ruling and who was supposed to be the reporting judge, did not say anything. Therefore, the reporting judge did not report on the facts of the case. The recorder reported on the facts of the case. ... Of course, it was not envisaged that the recorder may substitute for the reporting judge, or that the recorder may take on the authority of the judge referred to in the first sentence of Article 391.3" (later corrected to Article 374 – comment by the Constitutional Court) "of the Criminal Procedure Act. Thus the court violated the provisions of criminal proceedings referred to in Article 367.3 of the Criminal Procedure Act" (vol. 27, p. 1047 of case file K-Us-25/08).

Concerning that statement from the appeal, the Supreme Court gave the following reply in decision no. II Kž 684/08-3 of 12 November 2008 (vol. 28, p. 1086 of case file K-Us-25/08): “Concerning the statements in the appeal submitted by Željko Lubina, defence attorney of the defendant, Miroslav Hršum, the appellant is instructed to consult the provisions of the Courts Act (Official Gazette no.150/05, 16/07 and 113/08 ...) concerning court advisers”.

120.2. Subsequently, the applicant's defence attorney, on 22 December 2008, submitted to case file Kv-774/08 , a pleading addressed to the Supreme Court through Split County Court where he stressed that “it is not, of course, envisaged in procedural provisions for the defence attorney to submit pleadings to the case file, following a final court decision. However, I am doing precisely that. I am doing that in order to make sure that there is a written trail of a court decision that indicates that the court violated the principle of equality before the court” (vol. 29, pp. 1099 and 1105 of case file K-Us-25/08).

In the above-mentioned pleading, the applicant's defence attorney claimed that the Supreme Court had not assessed in its ruling of 12 November 2008 the appeal claim that it should have assessed. It stated its opinion that the “CrPA regulates criminal proceedings” and that it is not provided in the CrPA “for the recorder to participate in the work of the panel by submitting a report on the facts of the case.” On the other hand, Article 102.4.7 of the Courts Act prescribes that “in second-instance proceedings and proceedings in extraordinary legal remedies, court advisors shall report on the state of the file and prepare draft decisions.” However, according to the applicant's defence attorney, this Article is not applicable in “criminal proceedings, in particular in a public session of the panel because it is contrary to the Constitution of the Republic of Croatia and the Criminal Procedure Act.” Article 120.4.7 of the Courts Act is applicable, according to the applicant's defence attorney, “exclusively and only to proceedings conducted pursuant to the Civil Procedure Act and procedures conducted in compliance with the provisions of the Civil Procedure Act. This is regulated by this procedural act (Article 13 and 76 of the Civil Procedure Act).”

121. Furthermore, in the decision of Split County Court no. Kv-785/08 of 18 December 2008 rejecting the applicant's proposal of 29 August 2008 to exclude from the case file the two reports on the questioning of the suspect and the defendant of 10 May 2008 and 12 May 2008, respectively (see points 10.2 and 11 of the statement of reasons of this decision and ruling), this Court found the following: “Željko Lubina, the defence attorney of the defendant, Miroslav Hršum, submitted to the case file Kv-785/08 a pleading addressed to the Supreme Court of the Republic of Croatia referring to the work of court advisers concerning reporting in cases in a public session.” The same ruling also reads as follows: “Concerning the objections of attorney Lubina that court advisers may not be reporters in cases decided in public sessions, it must be mentioned that court advisers may be reporters in public sessions if this is not contrary to the provisions of the Criminal Procedure Act.” Furthermore, pursuant to Article 120.4.7 of the Courts Act (Official Gazette 150/05, 16/07, 113/08) regulating the work of court advisers, court advisers may report in second-instance proceedings and in proceedings conducted pursuant to extraordinary legal remedies on the state of the case file and may prepare draft decisions (vol. 29, pp. 1096 and 1098 of case file K-Us-25/08).

121.1. In the appeal against a ruling adopted by Split County Court no. Kv-785/08 of 18 December 2008 (vol. 29, pp. 1116 – 1118 of case file K-Us-25/08), the applicant claimed again that the first-instance court seriously violated the provisions of criminal proceedings referred to in Article 367.3 of the Criminal Proceeding Act that read: "The session of the panel shall begin with a report given by the reporting judge on the facts of the case" because the report on the facts of the case at the session was given by the recorder and not by the reporting judge. His arguments were identical to those stated in his pleading to the Supreme Court of 22 December 2008 (see point 120.2 of the statement of reasons of this ruling).

121.2. In its ruling No. Kv-26/09 of 12 January 2009 rejecting a request submitted by the applicant concerning the "exclusion of the president and members of the out-of court panel in criminal proceedings no.15/09 (K-Us-25/08)" (vol. 29, pp 1121 – 2314 of case file K-Us-25/08), Split County Court stated the following:

> "The defendant's defence attorney stated that, according to the Courts Act, the court adviser may not be a reporter in the case in question because this is contrary to Article 120. 4. 7 of the above-mentioned Act, and asked for the exclusion of the out-of court panel of this court which is biased and acts against the defendant.
>
> (…)
>
> It must also be mentioned that the defendant Hršum, through his attorney Željko Lubina, had already stressed in an appeal against a decision of this court concerning the prolongation of detention following the raising of the indictment that a court adviser may not be a reporter at a panel session and this was decided upon by the Supreme Court in its decision II Kž 684/08-3 of 12 November 2008 which means that this is only a repetition of the reasons that have already been decided upon."

122. Concerning the Supreme Court case law, it seems that it is usual practice at sessions of the panel that court advisers report on the state of the case file. Thus, in its decision no. II Kž 116/12-4 of 29 February 2012 the Supreme Court elaborated on the role of court advisers at the sessions of the panels:

> "Contrary to the objection by the defendant G. S. presented by the defence attorney Ž. L, attorney from S., the fact that the court adviser reported on the state of the case file at the session of the panel does not represent a violation of positive regulations. The panel was composed in compliance with the provision of Article 20.2 CrPA/97, and the court adviser who only assisted the reporting judge in reporting to the panel did not participate in the adoption and drafting of the disputed decision because it is obvious that he did not carry out any independent actions, evaluate evidence or establish facts, but participated in the work of the panel as the recorder."

123. The Constitutional Court found that the applicant, by himself and through his defence attorney, used the legal remedies at his disposal to convince the competent courts that their interpretation and application of Article 120 CA/05 was incorrect. Both Split County Court and the Supreme Court replied to that objection. The two competent courts agreed on that issue. They had a legal basis for their positions. Their positions are not arbitrary.

Considering that facts of the case, the repeated objections by the applicant, which were this time addressed to the Constitutional Court, did not open special issues from the point of view of Article 29.1 of the Constitution.

Consequently, pursuant to Articles 73 and 75 of the Constitutional Act, the constitutional complaint was rejected in relation to that objection (point III of the operative part of the decision).

124. The applicant invokes in the constitutional complaints the rights guaranteed in the following Articles of the Constitution: Article 14 (guarantee of equality before the law), Article 18.1 (guarantee of the right to appeal against individual legal acts adopted in first-instance proceedings by courts or other authorised bodies), and Article 26 (guarantee of equality of aliens with Croatian citizens before courts and governmental agencies and other bodies vested with pubic authority).

He mentioned Article 3 of the Constitution laying down the fundamental values of the constitutional order of the Republic of Croatia, Article 5.2 of the Constitution stating that “All persons shall be obliged to abide by the Constitution and law and respect the legal order of the Republic of Croatia” and Article 116.1 of the Constitution laying down that the Supreme Court, as the highest court, ensures unified application of laws and the equality of all in their application.

124.1. The Constitutional Court stresses that the assessment of all alleged violations of the constitutional rights examined in these Constitutional Court proceedings were based on equality, freedom, respect for human rights and the rule of law, as the highest values of the Constitutional order of the Republic of Croatia laid down in Article 3 of the Constitution. These are values present in the entire text of the Constitution and used for its interpretation. Since Article 5, Article 14 and Article 26 of the Constitution are only special normative aspects of these values, the Constitutional Court took them into account in the assessment of alleged violations of the constitutional rights of the applicant.

In relation to other Articles of the Constitution, mentioned in the previous item, the Constitutional Court found that the alleged violations of rights under its competence had not been clearly indicated in the constitutional complaint by the applicant and that he had not provided an explanation of why he had invoked these rights.

124.2. Therefore, these objections were decided upon as in point I, indent 2 of the operative part of the ruling.

125. Point IV of the operative of the decision and point II of the operative part of the ruling are founded on Article 29 of the Constitutional Act.

PRESIDENT OF THE COURT
Jasna Omejec, DSc, m. p.