

# Partnership for Good Governance

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legislation and judicial practice in line with European Standards in Georgia”

### **THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE APPLICATION OF COERCIVE MEASURES IN CRIMINAL PROCEEDINGS**

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## A. Introduction

1. This study is concerned with the requirements relating to the use of coercive measures that the European Court of Human Rights (“the European Court”) has recognised in its case law relating to the application of the European Convention on Human Rights (“the European Convention”) in Criminal Proceedings.
2. The study has been prepared at the request of the Council of Europe pursuant to the European Union – Council of Europe joint project “Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in Georgia in line with European standards”.
3. The specific terms of reference are to address the following issues:
  - Whether or not consent of owner of property is sufficient to conduct search and seizure without court’s order;
  - Whether or not court’s order is needed to seize the data from video surveillance camera; if the video surveillance camera is placed on public place and if such investigative action shall be considered as covert one;
  - What are the European standards of conduction search and seizure based on urgency and based on confidential information;
  - Whether or not a judge at Initial Appearance of Defendant in Court by its own initiative shall check the lawfulness of arrest of a defendant or the judge is authorized to check the lawfulness of arrest only after the request from defence council;

while not limiting the scope of the study to addressing these issues and also providing concrete recommendations on the best European Standards of protection of Human Rights while applying coercive investigative measures.

4. The provisions of the European Convention primarily engaged by these issues and the use of coercive measures more generally are Articles 3, 5, 6, 8 and 10 of the European Convention and Article 1 of Protocol No. 1.
5. The study deals first with the approach of the European Court to the circumstances in which the conduct of a search will be compatible with the requirements of the European Convention. In particular, it considers whether a court order is always required, as well as the scope for undertaking searches the reliance on confidential information and for doing so in urgent situations.
6. Thereafter, it examines: the compulsion to provide information and material and the conditions that must be fulfilled where these are imposed; the use of surveillance measures such as interception of communications, eavesdropping and audio and video-recording and the safeguards that must both be in place and observed in practice; and certain issues relating to the retention, protection and disclosure of evidence obtained through coercive measures and to the risk of a trial being rendered

unfair as a result of the coercive means used to obtain evidence considered admissible.

7. It concludes with an examination of the extent of a judge's responsibility under Article 5 of the European Convention to check the lawfulness of a defendant's arrest.
8. Particular recommendations for action that might be necessary to ensure that the use of coercive measures are in accordance with the case law of the European Court are italicised in the text.

## B. Search and seizure

9. The conduct of a search of the person or of premises<sup>1</sup> – and the subsequent seizure of items found in the course of it - will invariably entail an interference with the right to respect for private life, home and correspondence under Article 8 of the European Convention in those cases where it is conducted without the consent of the person affected. Similarly, any seizure is likely to amount to an interference with the peaceful enjoyment of possessions under Article 1 of Protocol No. 1. However, both measures can also have implications for the enjoyment of the right to a fair trial and the right to freedom of expression under Articles 6 and 10 respectively<sup>2</sup>.
10. The reference to “private life” in Article 8 of the European Convention is understood by the European Court to extend not just to an office in a person's home<sup>3</sup> but also to premises used solely for commercial and professional activities<sup>4</sup>. It will thus include not only the registered office of a company owned and run by a private individual<sup>5</sup> but also that of a legal person and its branches and other business premises<sup>6</sup>. In addition, in the case of a search of a person, it will include any bags that he or she may be carrying or have with him or her.<sup>7</sup>

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<sup>1</sup> Its formal classification under national law is not important; see, e.g., *Zosymov v. Ukraine*, no. 4322/06, 7 July 2016, in which the European Court noted that “the relevant deeds documenting the police's presence in the applicant's office, car and garage refer to this presence as “inspection” rather than “search” (see paragraph 8 above). It considers that whatever was the domestic qualification of the disputed action, for the purposes of the Convention it amounted to “interference” with the applicant's right to respect for his home” (para. 59).

<sup>2</sup> The implications for Article 6 are, however, considered in the section concerned with issues relating to evidence.

<sup>3</sup> See *Chappell v. United Kingdom*, no. 10461/83, 30 March 1989.

<sup>4</sup> See, e.g., *Niemietz v. Germany*, no. 13710/88, 16 December 1992, *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003 and *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003 (lawyers' offices).

<sup>5</sup> See, e.g., *Buck v. Germany*, no. 41604/98, 28 April 2005.

<sup>6</sup> See, e.g., *Stés Colas Est and Others v. France*, no. 37971/97, 16 April 2002, *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005 and *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013.

<sup>7</sup> See *Gillan and Quinton v. United Kingdom*, no. 4158/05, 12 January 2010, at paras. 64-65.

11. Furthermore, where a “home” is considered by the European Court to have been established, the absence of any legal basis for this to have been effected will not be considered relevant to the applicability of Article 8.<sup>8</sup>
12. “Correspondence” for the purpose of Article 8 is not limited to letters and other forms of paper communication but extends to any form of private communication, regardless of the technology involved<sup>9</sup> and even though it is not personal<sup>10</sup>. It will also cover papers and files that include correspondence.<sup>11</sup>
13. Moreover, it should be borne in mind that a reasonable expectation of privacy sufficient to engage the right under Article 8 can even arise in respect of premises over which the person affected either does not own or does not have some right to control access by others.<sup>12</sup> Thus, an expectation of privacy will normally be regarded by the European Court as justified in respect of the places where an employee keeps his or her personal belongings, at least as regards those parts of the premises concerned where he or she actually works or changes beforehand.<sup>13</sup>
14. Indeed, such an expectation is likely to be considered justified for all places of work – including those of public employees - unless there are other circumstances that might reasonably preclude it from arising, such as a regulation or stated policy of the employer or the nature of the employment.<sup>14</sup>
15. *It is thus important that any powers of search and seizure that can affect a person’s private life, home and correspondence are drafted and interpreted consistent with the European Court’s understanding of these terms.*
16. Any consent to an interference with a right or freedom under the European Convention must be consistent with the established requirements for waiver, namely, that its occurrence – whether express or tacit – must be established in an unequivocal

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<sup>8</sup> See, e.g., *Buckley v. United Kingdom*, no. 20348/92, 25 September 1996 in which a “home” was considered to have been established in a caravan placed on certain land even though there was no authorisation for it to be there. In addition, see *Paulić v. Croatia*, no. 3572/06, 22 October 2009, in which the absence of any right to occupy a flat was not considered by the European Court to preclude it from being the applicant’s home. See also *Camenzind v. Switzerland*, no. 21353/93, 16 December 1997, in which the European Court was concerned with the compatibility with Article 8 of a search of the room “occupied by the applicant” (para. 32), although it was a house which he owned.

<sup>9</sup> “It is not disputed that mail, telephone and email communications, including those made in the context of business dealings, are covered by the notions of “private life” and “correspondence” in Article 8 § 1”; *Kennedy v. United Kingdom*, no.26839/05, 18 May 2010, at para. 118.

<sup>10</sup> See, e.g., *Niemietz v. Germany*, no. 13710/88, 16 December 1992, at para. 32.

<sup>11</sup> See, e.g., *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003

<sup>12</sup> Such as under a tenancy agreement.

<sup>13</sup> See *Peev v. Bulgaria*, no. 64209/01, 26 July 2007, which concerned the search of the desks and filing cabinets used by an employee. It is probable that the right under Article 8 will also extend to the backup copy held on a company’s server of personal e-mails and correspondence of employees and other persons working for it. This was raised but not determined in *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013, at para. 107.

<sup>14</sup> There was no regulation or policy in *Peev v. Bulgaria* and, although the applicant worked in the Supreme Cassation Prosecutor’s Office, the European Court emphasised that he was not a prosecutor but a criminology expert employed by the office concerned.

manner, in full knowledge of the facts and be attended by minimum safeguards commensurate with the right or freedom.<sup>15</sup>

17. Certainly, no consent to a search will not be considered to have occurred where someone has been placed under duress but whether this has occurred will depend upon the circumstances of a case and, in particular, the manner in which the purported request for consent has been made<sup>16</sup>. Furthermore, there is probably a need for the person concerned to be informed of his or her right to refuse entry.<sup>17</sup>

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<sup>15</sup> See, e.g., *Hermi v. Italy* [GC], no. 18114/02, 18 October 2006, at para. 73 (in respect of fair trial rights).

<sup>16</sup> See *Posevini v. Bulgaria*, no. 63638/14, 19 January 2017; “the search of the first applicant’s email account was not an interference with his rights under this provision. The police were only able to go through the account because the first applicant gave them his password and invited them to do so ... There is no evidence that he did so under overt or implied coercion: that he was made to understand that he had no choice but to allow the police to access the account .... or that they would do so anyway ... The fact that the first applicant had been taken to the police station in handcuffs and was in custody does not in itself alter that conclusion” (para. 75). However, cf. *Kucera v. Slovakia*, no. 4866/99, 17 July 2007 (“121. In particular, as indicated above, the police had come to the applicant’s door in order to serve charges on him and his wife and to escort them to an investigator for questioning. There is no indication that the fulfilment of that task required the police to enter the apartment. The Government failed to provide a satisfactory and convincing explanation to justify that interference. The impugned measure must be considered disproportionate in the circumstances. 122. Furthermore, a risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in the present case where, as stated above, the applicant was confronted by a number of specially trained masked policemen at the front door of his apartment very early in the morning. In the Court’s view, safeguards should be in place in order to avoid any possible abuse in such circumstances and to ensure the effective protection of a person’s rights under Article 8 of the Convention. Such safeguards might include the adoption of regulatory measures which both confine the use of special forces to situations where ordinary police intervention cannot be regarded as safe and sufficient and, in addition, prescribe procedural guarantees ensuring, for example, the presence of an impartial person during the operation or the obtaining of the owner’s clear, written consent as a pre-condition to entering his or her premises. The Court notes that certain guarantees to that effect are incorporated in the Police Corps Act 1993 ... However, those guarantees failed to prevent the situation complained of in the instant case from occurring. 123. In view of the above considerations, the Court is not satisfied that the action in issue was compatible with the applicant’s right to respect for his home”), *Rachwalski and Ferenc v. Poland*, no. 44709/99, 28 July 2009 (“72. ...

In the Court’s opinion, considering that the police officers had come to the applicants’ house at night, it can reasonably be concluded that the applicants were left with little choice but to allow the police to enter the premises”<sup>0</sup>, *Saint-Paul S. A. v. Luxembourg*, no. 26419/10, 18 April 2013; “38. The fact that the journalist and other employees of the applicant company cooperated with the police cannot be construed as making the search and the associated seizure less intrusive. The Court has already had occasion to find that cooperation under threat of a search cannot cancel out the interfering nature of such an act ... Nor has it been alleged in the present case that failure to cooperate would have prevented the police officers from executing the legal warrant entrusted to them. On the contrary, the police officers had made clear that they could carry out the measure by force in the event of a refusal to cooperate ...”) and *Belousov v. Ukraine*, no. 4494/07, 7 November 2013 (“The Court next observes that according to the available materials, the above authorisation was signed by the applicant in the afternoon of 18 July 2005. As established above, during that period the applicant was held in unacknowledged police custody and was subjected to ill-treatment by the police. It also appears that the applicant was brought to his home for participating in its examination under close supervision of the same police officers, who were implicated by him in his ill-treatment, and that he remained handcuffed throughout the procedure (see paragraphs 9-10, 17, 75 and 83 above). It follows that the police officers obtained the applicant’s authorisation to inspect his residence in a setting in which he lacked any procedural guarantees protecting his ability to express his true will. In these circumstances, the Court finds it credible that the applicant felt coerced to give the authorisation in issue. It follows that the disputed inspection was not carried out on the basis of the applicant’s true consent and that therefore one of the conditions for the application of Article 190 of the Code of Criminal Procedure of 1960 was manifestly not met”; para. 106). See also *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016, at paras. 109-110 (in respect of a deprivation of liberty).

<sup>17</sup> This was the view taken in *Bože v. Latvia*, no. 40927/05, 18 May 2017, at para. 70 but an application for reference of this case to the Grand Chamber is still pending.

18. Nonetheless, it is well-established that a non-consensual search and seizure in connection with the investigation of criminal activity can in many instances be an admissible interference with the rights guaranteed by Article 8 of the European Convention and Article 1 of Protocol No. 1.<sup>18</sup>
19. However, this will only be so where the conduct of the search concerned is in accordance with law, which for the purposes of the European Convention means not only that it be authorised under some national law<sup>19</sup> but also that this law meet the criteria of accessibility and foreseeability established by the European Court.
20. The accessibility requirement will be satisfied by the publication of the law concerned whereas the foreseeability one needs the relevant provisions to be formulated with sufficient precision to enable a person to regulate his or her conduct.

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<sup>18</sup> See, e.g., *Funke v. France*, no. 10828/84, 25 February 1993 in which the European Court recognised that States

“may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible” (para. 56).

<sup>19</sup> This was found to be lacking, e.g., in *Yordanov v. Bulgaria*, no. 56856/00, 10 August 2006 (“112. The Court reiterates that an interference cannot be regarded as “in accordance with the law” unless, first of all, it has some basis in domestic law. In relation to paragraph 2 of Article 8 of the Convention, the term “law” is to be understood in its “substantive” sense, not its “formal” one. In a sphere covered by the written law, the “law” is the enactment in force as the competent courts have interpreted it (see, inter alia, *Société Colas Est and Others v. France*, no. [37971/97](#), § 43, ECHR 2002-III). 113. The Court notes that domestic legislation provided, at the relevant time, that a search of premises could be ordered by the trial court (during the trial phase) or by the prosecutor (during the pre-trial phase) only if there was probable cause to believe that objects or documents which may be relevant to a case would be found in them ... Such a search could also be conducted in the course of an enquiry, but only in the course of examining a crime scene and if its immediate execution was the only possibility to collect and secure evidence ... 114. In the instant case, the Court finds that it is unclear in the context of what kind of proceedings the search of the applicant's home was conducted, in so far as at the time in question no enquiry or preliminary investigation had apparently been opened. It notes in this respect that the Government have failed to argue otherwise. In addition, the search was apparently conducted only in the presence of two witnesses and without the applicant, an adult representative of the household, the residence's manager or a representative of the municipality being present (see paragraph 27 above). Accordingly, it appears that the prerequisites for performing such a search were not present and its execution was not in compliance with the relevant domestic law provisions ... 115. The Court further observes that the Government failed to provide any information and evidence to show that the said search was ordered and conducted in accordance with domestic legislation. 116. In view of the above, the Court must conclude that the search of the applicant's home of 29 December 1999 was not conducted “in accordance with the law” within the meaning of paragraph 2 of Article 8 of the Convention. Thus, there has been a violation of the said provision on account of the said search”. There were similar findings in *Dobrev v. Bulgaria*, no. 55389/00, 10 August 2006 and *Alexov v. Bulgaria*, no. 54578/0022 May 2008. The absence of sufficient clarity regarding the scope and manner of exercise of the relevant discretion was also found to be lacking in *Gutu v. Moldova*, no. 20289/02, 7 June 2007, *Betayev and Betayeva v. Russia*, no. 37315/03, 29 May 2008, *Abdulkadyrova and Others v. Russia*, no. 27180/03, 8 January 2009, *Zaurbekova and Zaurbekova v. Russia*, no. 27183/03, 22 January 2009, *Karimov and Others v. Russia*, no. 29851/05, 16 July 2009, *Rezvanov and Rezvanova v. Russia*, no. 12457/05, 24 September 2009, *Babusheva and Others v. Russia*, no. 33944/05, 24 September 2009, *Khutsayev and Others v. Russia*, no. 16622/05, 27 May 2010, *Vladimir Polishchuk and Svetlana Polishchuk v. Ukraine*, no. 12451/04, 30 September 2010, *Belozorov v. Russia and Ukraine*, no. 43611/02, 15 October 2015 and *Vardanean v. Republic of Moldova and Russia*, no. 22200/10, 30 May 2017 (homes) and in *Peev v. Bulgaria*, no. 64209/01, 26 July 2007, *Turán v. Hungary*, no. 33068/05, 6 July 2010 and *Taraneks v. Latvia*, no. 3082/06, 2 February 2014 (office premises). In the case of *Peev v. Bulgaria* the European Court also found that the unlawful search, together with the taking during of a draft resignation letter prepared by the applicant and the subsequent termination of his employment contract, amounted to an interference with his freedom of expression that was not prescribed by law.

21. The foreseeability requirement will not be achieved where the law concerned does not “indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”.<sup>20</sup> In particular, it is generally essential to have clear, detailed rules on the subject, setting out safeguards against possible abuse or arbitrariness.<sup>21</sup> Nonetheless, the necessary precision can also be provided by “a substantial body of case-law” relating to the provision concerned.<sup>22</sup>
22. The need for precision applies not only to the conduct of a search and seizure operation as such but also to its potential impact on other rights protected by the European Convention.<sup>23</sup>

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<sup>20</sup> *Kruslin v. France*, no. 11801/05, 24 April 1990, at para. 36.

<sup>21</sup> The necessary precision was not found, e.g., in *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005 (“90. The Court would emphasise that search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a “law” that is particularly precise. It is essential to have clear, detailed rules on the subject. 91. In that connection, the Court notes that the relationship between the Coercive Measures Act, the Code of Judicial Procedure and the Advocates Act (read together) was somewhat unclear and gave rise to diverging views on the extent of the protection afforded to privileged material in searches and seizures, a situation which was identified also by the Deputy Chancellor of Justice of Finland. 92. In sum, the Court finds that the search and seizure measures in the present case were implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of applicable regulations specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society (see, *mutatis mutandis*, *Narinen v. Finland*, no. [45027/98](#), § 36, 1 June 2004). 93. The Court finds that in these circumstances it cannot be said that the interference in question was “in accordance with the law” as required by Article 8 § 2 of the Convention”). There was a similar ruling in *Sorvisto v. Finland*, no. 19348/04, 13 January 2009. See also *Kilyen v. Romania*, no. 44817/04, 25 February 2014, it was considered that the vesting of “wide powers in State agents to carry out searches in situations of flagrant crimes, pursuit of criminals or anti-terrorist operations, that Law does not define with sufficient clarity the scope of those powers and the manner of their exercise, so as to afford an individual adequate protection against arbitrariness”; para. 34.

<sup>22</sup> See, e.g., *Chappell v. United Kingdom*, no. 10461/83, 30 March 1989, at para. 56 and *K S and M S v. Germany*, no. 33696/11, 6 October 2016, at para. 35.

<sup>23</sup> See *Goussev and Marenk v. Finland*, no. 35083/97, 17 January 2006 (“54. Applying the above case law *mutatis mutandis*, the Court finds that there was sufficient legal basis in domestic law for the interference as such. However, Article 10 of the Convention and the case-law regarding it prescribe that the law must be formulated with a precision that guarantees a certain foreseeability. In this respect, the relationship between the Coercive Measures Act and the Freedom of the Press Act appears problematic, as is shown by the somewhat differing views taken by, on the one hand, the Court of Appeal, and, on the other hand, the Deputy Ombudsman. While the Court of Appeal considered that the seizures of 31 May and 23 July 1996 were not manifestly illegal in view of the fact that the complainant Stockmann had filed a report of an alleged offence, the Deputy Ombudsman was of the view that at least part of the material could have lawfully been seized only on the condition that the complainant had requested the seizure. Both positions find some support in the applicable domestic law, which however at the time provided no apparent guidance as to how to resolve a conflict between the legislative regimes. It is not necessary for the Court to speculate which of these positions was correct as a matter of domestic law. In any event, the somewhat contradictory decisions indicate that it was not clear as to the circumstances in which the police could seize material which was potentially defamatory during a search which was being carried out for the purposes of finding evidence of another suspected crime and in that regard the legal situation did not provide the foreseeability required by Article 10. 55. The Court notes that the Act on the Exercise of Freedom of Expression in Mass Media, which repealed the Freedom of the Press Act as from 1 January 2004, was passed among others with the purpose to clarify the relation between legislative provisions on publications and the Coercive Measures Act as explained above ... 56. The Court finds that in light of the above circumstances the interference in the present case was not “prescribed by law”). There was a similar finding in *Soini and Others v. Finland*, no. 36404/97, 17 January 2006.



23. *There is thus a need to review the formulation of all powers of search and seizure to ensure that this is sufficiently precise.*
24. Furthermore, a non-consensual search will only be regarded as necessary in a democratic society and thus not a violation of Article 8 where the reasons adduced to justify such a measure were “relevant” and “sufficient” and the proportionality principle has been respected.
25. Respect for the principle of proportionality entails both the relevant law and practice affording individuals adequate and effective safeguards against abuse and the particular interference in being proportionate to the aim pursued.
26. In the case of the search of premises, such safeguards will generally entail the requirement of prior judicial authorisation.<sup>24</sup>
27. Nonetheless, *ex post factum* judicial review may be considered sufficient to preclude a violation of Article 8. This has been accepted as compatible with Article 8 where there the authorisation for the search is given by senior public servants<sup>25</sup> and even without such an authorisation – notably in urgent cases such as where the search is required to examine the scene of a crime before any proceedings have been instituted<sup>26</sup> or to prevent the destruction or concealment of documents and other objects<sup>27</sup> – so long as there is a legal basis for it<sup>28</sup> and there are guarantees against

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<sup>24</sup> See, e.g., *Funke v. France*, no. 10828/84, 25 February 1993 (“the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government ..., appear too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued”; para. 57) and the judgment in *Stés Colas Est and Others v. France*, no. 37971/97, 16 April 2002 to similar effect at para. 49.

<sup>25</sup> See *Camenzind v. Switzerland*, no. 21353/93, 16 December 1997 (“under the Federal Administrative Criminal Law Act ..., a search may, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants ... and carried out by officials specially trained for the purpose ...; they each have an obligation to stand down if circumstances exist which could affect their impartiality ... Searches can only be carried out in “dwellings and other premises ... if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there” ...; they cannot be conducted on Sundays, public holidays or at night “except in important cases or where there is imminent danger” ... At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search. That person or, if he is absent, a relative or a member of the household must be asked to attend. In principle, there will also be a public officer present to ensure that “[the search] does not deviate from its purpose”. A record of the search is drawn up immediately in the presence of the persons who attended; if they so request, they must be provided with a copy of the search warrant and of the record ... Furthermore, searches for documents are subject to special restrictions ... In addition, suspects are entitled, whatever the circumstances, to representation ...; anyone affected by an “investigative measure” who has “an interest worthy of protection in having the measure ... quashed or varied” may complain to the Indictment Division of the Federal Court .... Lastly, a “suspect” who is found to have no case to answer may seek compensation for the losses he has sustained”; para. 46).

<sup>26</sup> E.g., *Mastepan v. Russia*, no. 3708/03, 14 January 2010. Cf. *Gerashchenko v. Ukraine*, no. 20602/05, 7 November 2013; “135. The Court does not lose sight of the fact that the impugned search took place almost immediately after an undercover operation (even though the exact timing of the events was in dispute .... This might have implied a certain urgency with a view to securing evidence of a crime (see and compare with *Mastepan v. Russia*, no. [3708/03](#), §§ 41 and 44, 14 January 2010). In this case, however, the reliance of the investigating authorities on the search warrant of 19 May 2004 does not demonstrate such urgency”.

<sup>27</sup> As, e.g., in *Nagla v. Latvia*, no. 73469/10, 16 July 2013.

<sup>28</sup> See *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003; “697. The question remains whether the interferences were justified under paragraph 2 of Article 8 and, more particularly, whether the measures were

arbitrary intrusions<sup>29</sup>. The latter will undoubtedly include a genuine consideration of the actual need to act without first seeking judicial authorisation<sup>30</sup>.

28. However, not only must such *ex post factum* judicial review actually be available<sup>31</sup> but the actual review carried out by the courts will need to be considered efficient<sup>32</sup>.

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“in accordance with the law” for the purposes of that paragraph. In this regard the Court recalls its finding above that the applicants' apprehension and detention by the gendarmerie had failed to follow a procedure prescribed by law, there being no record of any prior or post legitimisation having been given by a Prosecutor ... Similarly, the Court finds that no search warrants were issued by a Prosecutor or Judge and no official document or note of verbal instructions describing the purpose and scope of the searches was drawn up by any judicial authority beforehand or afterwards. 698. Insofar as Article 11 of the Law No. 2935 on the State of Emergency and Article 3 of Decree No. 430 for the state of emergency region gave the Regional Governor powers to order searches and seizure where delay was deemed prejudicial (paragraph 582 above), the Court notes that no record of the Governor's instructions for these particular searches, delimiting their object and scope, was produced by the Government”.

<sup>29</sup> E.g., the *Mastepan* case the European Court – which concerned the decision of an investigator to undertake a search - observed that: “The domestic law defined the scope of the inspection as “finding and securing the traces of the crime and other physical evidence, clarifying the crime scene and other relevant circumstances”. The inspection of a crime scene was supplemented by a power of seizure and did not require prior judicial approval. The criminal proceedings could be opened either before the inspection or shortly afterwards ... The domestic law further provided that the inspection was to be conducted in the presence of attesting witnesses. Whether it was necessary for an accused, a suspect, a victim, a witness or an expert to take part was left to the discretion of the investigator. A record of the inspection had to be drawn up ... A person could *ex post facto* challenge the lawfulness of the investigator's actions before a court ... The Court is satisfied that the above restrictions and conditions of the domestic law were sufficient to exclude arbitrary intrusions into people's homes”; para. 43.

<sup>30</sup> Thus, in *Taraneks v. Latvia*, no. 3082/06, 2 February 2014, the European Court was concerned that “there was no assessment as to whether the need to search the applicant's office had arisen so suddenly that it warranted exceptional recourse to the urgent authorisation procedure provided for in Article 168 of the Code of Criminal Procedure” and that no “such assessment was explicitly required by the said provision”; para. 108.

<sup>31</sup> Thus, there was a violation of Article 8 in *Harju v. Finland*, no. 56716/09, 15 February 2011; “The Court therefore concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, that law does not provide sufficient judicial safeguards either before the granting of a search warrant or after the search. The applicant was thus deprived of the minimum degree of protection to which she was entitled under the rule of law in a democratic society” (para. 45). See the findings of a violation of Article 8 where there was no subsequent review available of searches ordered by prosecutors in *Varga v. Romania*, no. 73957/01, 1 April 2008, *Işıldak v. Turkey*, no. 12863/02, 30 September 2008 and *Taraneks v. Latvia*, no. 3082/06, 2 February 2014.

<sup>32</sup> Thus, in the case of *Smirnov v. Russia*, the European Court observed that “the *ex post factum* judicial review did nothing to fill the lacunae in the deficient justification of the search order. The Oktyabrskiy Court confined its finding that the order had been justified, to a reference to four named documents and other unidentified materials, without describing the contents of any of them ... The court did not give any indication as to the relevance of the materials it referred to and, moreover, two out of the four documents appeared after the search had been carried out”; para. 47. See also *Prezhdarovi v. Bulgaria*, no. 8429/05, 30 September 2014 (“The Court notes at the outset that the relevant domestic law made no mention of the scope of the judicial examination. Therefore the Court turns to the reasoning offered by the domestic court when approving the operation. It notes in this connection that the court limited its reasoning to describing factually the course of the search-and-seizure operation and briefly citing the text of Article 135 § 2 of the 1974 Code, stressing that there had been pressing circumstances and that an immediate search and seizure had been the only means by which the collection and preservation of the necessary evidence could be undertaken. No additional reasoning as to the lawfulness or justification of the impugned measure was given ... In conclusion, the Court finds that the lack of clear rules regarding the scope of the judicial review in such a situation, combined with the lack of any meaningful review of the lawfulness of and the justification for the measure, rendered the *post factum* judicial review ineffective for the purposes of the protection of the applicants' rights as guaranteed by Article 8 of the Convention. Moreover, while it is true, as the Government pointed out, that the applicants did not enter any objections in the search-and-seizure record, such an omission on their part did not relieve the domestic court from its obligation to provide a meaningful judicial scrutiny of the search and seizure, especially when subsequently the applicants made numerous complaints concerning the personal character of parts of the retained information”; paras. 47-50) and *Nagla v. Latvia*, no. 73469/10, 16 July 2013, in which an ostensibly rigorous control mechanism was

29. The absence of either form of judicial control will necessarily entail a violation of Article 8 of the European Convention.<sup>33</sup>

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rendered ineffective in practice (“90. The Court notes that unlike in the *Sanoma Uitgevers* case, the investigating judge has the authority under Latvian law to revoke the search warrant and to declare such evidence inadmissible ... Moreover, according to the information submitted by the Government, which the applicant did not dispute, the investigating judge also has the power to withhold the disclosure of the identity of journalistic sources ... The Court considers that the last two elements pertaining to the investigating judge’s involvement in an immediate post factum review are sufficient to differentiate this case from the above-mentioned *Sanoma Uitgevers* case ... 100. The Court has already noted above that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent searches; in such circumstances the necessary assessment of the conflicting interests could be carried out a later stage, but in any event at the very least prior to the access and use of the obtained materials (see paragraph 88 above). In Latvia, according to the Government, the assessment is carried out by the investigating judge on the next day following an urgent search. In the present case, however, no further reasons were given either by the investigating judge or by the President of the court who subsequently examined the applicant’s complaint against the decision of the investigating judge. Both judges limited themselves to finding that the search did not relate to the journalist’s sources at all, so they did not proceed to examine the conflicting interests. For the reasons explained above ... the Court cannot subscribe to such a finding. 101. The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist’s freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. In the present case, although the investigating judge’s involvement in an immediate post factum review was provided for in the law, the Court finds that the investigating judge failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist’s freedom of expression, including source protection and protection against the handover of the research material. The scarce reasoning of the President of the court as to the perishable nature of evidence linked to cybercrimes in general, as the Ombudsman rightly concluded, cannot be considered sufficient in the present case, given the investigating authorities’ delay in carrying out the search and the lack of any indication of impending destruction of evidence. Nor was there any suggestion that the applicant was responsible for disseminating personal data or was implicated in the events other than in her capacity as a journalist; she remained “a witness” for the purposes of these criminal proceedings. If the case materials did include any indication in that regard, it was the investigating judge’s responsibility to carry out the necessary assessment of the conflicting interests, which was not done”). In addition, see *Zubal v. Slovakia*, no. 44065/06, 9 November 2010, *Misan v. Russia*, no. 4261/04, 2 October 2014 and *Bože v. Latvia*, no. 40927/05, 18 May 2017.

<sup>33</sup> See, *Heino v. Finland*, no. 56720/09, 15 February 2011; “45. ... in the present case the applicant did not have any effective access, a posteriori, to a court to have both the lawfulness of, and justification for, the search warrant reviewed. The applicant's right to respect for her home was thus violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review a posteriori of either the decision to order the search or the manner in which it was conducted ... The situation was aggravated by the fact that the search took place in an attorney's office. 46. The Court therefore concludes that, even if there could be said to be a general legal basis for the impugned measures in Finnish law, that law does not provide sufficient judicial safeguards either before the granting of a search warrant or after the search. The applicant was thus deprived of the minimum degree of protection to which she was entitled under the rule of law in a democratic society”. See also the similar findings in *Varga v. Romania*, no. 73957/01, 1 April 2008, *Işıldak v. Turkey*, no. 12863/02, 30 September 2008, *M N and Others v. San Marino*, no. 28005/12, 7 July 2015, *Taraneks v. Latvia*, no. 3082/06, 2 December 2014 and *Modestou v. Greece*, no. 51693/13, 16 March 2017. See also *Zosymov v. Ukraine*, no. 4322/06, 7 July 2016; “61. ... The applicant’s efforts to obtain subsequent judicial review of the lawfulness of the measure were unsuccessful. In particular, as follows from the judgment of 24 December 2004 taken by the Court of Appeal, the relevant complaint could only be brought within the framework of the criminal trial of the case initiated by the police following the disputed visit, in the event that the investigative authority ever brought the case to that stage. In the meantime, by the time the applicant lodged the present application, the relevant criminal proceedings had remained stagnant for several years, and the applicant had not been able to obtain any procedural status in these proceedings, in spite of his numerous efforts. The Court notes that in its recent judgment in the case of *Kotiy* ... it has already found that a situation where the only possibility for the applicant to challenge the investigator’s conduct had been under Article 234 of the CCP (after the criminal case against him had been committed for trial) was incompatible with Article 8. 62. The Court considers its findings in *Kotiy* equally pertinent in the present case. In particular, it concludes that domestic law did not provide requisite

30. *There is thus a need to ensure that the possibility of conducting search and seizure operations are clearly limited to urgent situations and that law enforcement officials receive appropriate training as to when it would be justified only to seek judicial authorisation ex post factum. In addition, judges should receive appropriate training as to the requirements involved in determining whether or not a search and seizure operation should be authorised.*
31. Furthermore, the European Court has emphasised that the national authorities have an obligation to thoroughly investigate complaints that a person's property has been searched unlawfully.<sup>34</sup> Moreover, an inability to challenge a search as such, or the way in which it has been ordered or authorised would entail a violation of the right to an effective remedy under Article 13 of the European Convention.<sup>35</sup>
32. In addition, a wide range of considerations will be taken into account by the European Court when determining, whether the conduct of a search in a particular case was actually proportionate to the aim being pursued and whether the reasons adduced to justify such a measure were "relevant" and "sufficient".
33. In the first place, it will be important for there actually to be an order or warrant for the search concerned<sup>36</sup>. Furthermore, this order or warrant should contain information about the ongoing investigation, the purpose of conducting it or why it was believed that it would enable evidence of any offence to be obtained, as well as adequate record-keeping of the authorisation given.<sup>37</sup>

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guarantees against arbitrariness in respect of the police's actions complained of and did not meet the requirement of quality of law for the purposes of the Convention".

<sup>34</sup> See *H M v. Turkey*, no. 34494/97, 8 August 2006, at paras. 28-29, *Vasylchuk v. Ukraine*. No. 24402/07, 13 June 2013, at para. 84 and *Bagiyeva v. Ukraine*, no. 41085/05, 28 April 2016, at paras. 63-64.

<sup>35</sup> See, e.g. *Iliya Stefanov v. Bulgaria*, no. 65755/01, 2 May 2008, at para. 59 and *Posevini v. Bulgaria*, no. 63638/14, 19 January 2017, at paras. 86-87.

<sup>36</sup> See *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003, in which the European Court found that "no official document or note of verbal instructions describing the purpose and scope of the searches was drawn up by any judicial authority beforehand or afterwards.698. Insofar as Article 11 of the Law No. 2935 on the State of Emergency and Article 3 of Decree No. 430 for the state of emergency region gave the Regional Governor powers to order searches and seizure where delay was deemed prejudicial ..., the Court notes that no record of the Governor's instructions for these particular searches, delimiting their object and scope, was produced by the Government"; para. 697. Furthermore, in cases such as *Betayev and Betayeva v. Russia*, no. 37315/03, 29 May 2008 and *Khutsayev and Others v. Russia*, no. 16622/05, 27 May 2010, it found that "no search warrants were drawn up at all, either before or after the events in question"; paras. 114 and 154 respectively. See also *Koval and Others v. Ukraine*, no. 22429/05, 15 November 2012, at para. 111. The European Court underlined the importance of an actual order or warrant for the exercise of judicial control in *Tazyeva and Others v. Russia*, no. 50757/06, 18 July 2013, when it found a search was unlawful "in the absence of an individualised decision which would clearly indicate the purpose and scope of the search, and which could have been appealed against in a court"; para. 58. See also the similar ruling in *Kilyen v. Romania*, no. 44817/04, 25 February 2014, at paras. 34 and 37.

<sup>37</sup> See, e.g., *Ratushna v. Ukraine*, no. 17318/06, 2 December 2010, in which the European Court found: "76. As it transpires from the facts related to the subsequent investigation into the applicant's criminal complaint concerning the search in question, the Trostyanets Court had some evidence before it suggesting that the applicant's son, Mr R., could have been involved in the investigated theft and that in fact he was living, permanently or for a considerable part of the time, in the applicant's house ... Thus, there existed a witness statement, according to which a car similar to that of the applicant's son had been seen near the shop at the night of the theft. Furthermore, Mr R. was unemployed and had been reported to have friendly relations with a thief convicted in the past. Lastly, although there were witnesses' statements that the applicant's son had been based

34. Any such authorisation must be based on a reasonable suspicion that an offence has been committed by the person under investigation.<sup>38</sup>

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in a different town at the time of the events, there was factual and testimonial evidence too that he had been living with the applicant at her house. 77. The Court notes that the aforementioned evidence was capable of giving rise to the belief that the stolen items could have been kept in the applicant's household. It is to be emphasised that the facts which raise such suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation ... 78. The Court next observes that before granting the search warrant, the Trostyanets Court studied the materials of the search operations' case-file and heard the investigator in person ... It therefore formed an informed opinion that there indeed were relevant and sufficient grounds for the search applied for. 79. Moreover, it was neither alleged by the applicant nor is otherwise discernible from the case-file materials that the judge dealing with the issue had acted in bad faith or had failed, for any other reasons, to adequately implement the judicial scrutiny. 80. As regards the reasoning given in the search warrant, the Court notes that the warrant set out the suspicion having referred to the information received in the course of the search operations' measures. Provision of further details as to those measures and their results might have been rightly deemed unjustified given the very early stage of the investigation, and, in particular, the fact that some essential evidence (namely, the stolen items) was yet to be uncovered. 81. The Court also observes that the search warrant was quite specific in its scope, containing an explicit and detailed reference to the theft investigated, with indication of the stolen items and their cost .... 82. In sum, the Court considers that the search of the applicant's home complained of was based on relevant and sufficient reasons and attended by adequate safeguards against abuse and arbitrariness. The Court therefore does not regard it disproportionate to the aim pursued". Cf. *Buck v. Germany*, no. 41604/98, 28 April 2005, in which the European Court noted that: the judge of the Bad Urach District Court, before issuing the order, had also asked the municipal authorities of Dettingen to provide a passport photograph of the applicant's son. It appears that the District Court, in its judgment given only six days after the search and seizure had been ordered and executed, merely relied on this photographic evidence, whereas there is no clear indication that the material seized had been taken into account when assessing the evidence. Consequently, the search and seizure of documents on the applicant's business and residential premises had, in any event, not been the only means of establishing who was liable for the speeding offence ... [and] the latter order did not give any reasons why documents concerning business matters should be found on the applicant's private premises. Thus, the scope of the order was not limited to what was indispensable in the circumstances of the case"; paras. 49-50. Similarly, in *Smirnov v. Russia*, the European Court observed that "neither the order nor the oral statements by the police indicated why documents concerning business matters of two private companies – in which the applicant did not hold any position – should have been found on the applicant's premises"; para. 47. See also *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009; "the search warrants of 12 February 2004 were issued by the District Court on an application by the investigator. It follows from the text of the search warrants that the only piece of evidence submitted by the investigator in support of his application was the report by an expert who had been commissioned to compare the documents prepared by Mr S. and by the applicant with a view to determining whether they could have been prepared on the same printing device. The report indicated that no reliable finding could be drawn because the documents lacked any distinctive marks which could have permitted identification of the printing device (see paragraph 8 above). In his application, the investigator did not explain how the seizure of the printing device from the applicant's home or office could have furthered the investigation in the absence of any distinctive marks on the documents capable of ensuring identification of the specific device" (para. 32). See also *Avanesyan v. Russia*, no. 41152/06, 18 September 2014, at para. 44.

<sup>38</sup> See, e.g. *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008 ("40. The Court also notes that the police applied for a search warrant after obtaining statements from several witnesses, including the victim of the alleged offence and the applicant (see paragraphs 6, 8, 10 and 13 above). The information which they had elicited from these statements was capable of giving rise to the belief that extortion had been committed in the applicant's office. It is true that the application for a warrant made no mention of any specific facts. However, the judge to whom the application was made was able to review the evidence gathered up to that point, and in her decision made an express reference to Mr R.S.'s statement ... The Court is therefore satisfied that the warrant was based on a reasonable suspicion"), *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009 ("The investigator did not refer to any evidence which could have corroborated his conjecture that the applicant was involved in the printing of the documents allegedly forged by Mr S. The District Court, for its part, merely acknowledged the existence of the report without analysing its contents and findings. Whilst acknowledging that the applicant was an advocate and that he had not been charged or accused of any criminal offence or unlawful activities, the District Court did not examine whether the material gathered by the investigation was capable of founding a reasonable suspicion that he was implicated in the fraud allegedly organised by Mr S"; para. 32) and *Yuditskaya*

35. However, neither the fact that nothing was found and seized nor a subsequent acquittal of an accused will undermine the basis for the authorisation for a search linked to the investigation concerning him or her.<sup>39</sup>
36. Particularly strong justification for a search will be required where the person affected is not him or herself suspected of the offence in respect of which the investigation is being undertaken.<sup>40</sup>
37. Secondly, the offence in connection with which the search is to be undertaken should be of sufficient gravity to justify the interference with the right guaranteed by Article 8.<sup>41</sup>
38. Thirdly, consideration should have been given as to whether or not a search was really required, taking into account the possibility of achieving its objectives through a request for assistance<sup>42</sup> or some other means<sup>43</sup>.

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*and Others v. Russia*, no. 5678/06, 12 February 2015 (“the Court observes that the search warrant of 6 May 2005 was issued by the District Court upon an application by the investigator in the context of criminal proceedings against a number of persons on charges of aggravated bribery. However, the Court is mindful of the fact that – as argued by the applicants, and not contested by the Government – only lawyer I.T. had been suspected of being an accessory to the crime. The applicants were not the subjects of any criminal investigation. Nevertheless, the District Court stated that the law firm had been one of the signatories to the fictitious contract and authorised the search of the firm’s entire premises. Having regard to the above, the Court cannot accept that the search warrant was based on reasonable suspicion”; para. 28).

<sup>39</sup> See *Robathin v. Austria*, no. 30457/06, 3 July 2012 (“The Court disagrees with the applicant’s argument that his acquittal showed the lack of a reasonable suspicion from the beginning. Rather, the existence of reasonable suspicion is to be assessed at the time of issuing the search warrant. In the circumstances described above, the Court is satisfied that the search warrant was based on reasonable suspicion at that time. The fact that the applicant was eventually acquitted years later cannot change this assessment”; para. 46) and *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016 (“Neither the fact that nothing was found and seized at the law firm nor the fact that the tax audits of SNS and Draupner led to no levying of additional taxes can be taken as proof that, as has been asserted by the applicant, the Tax Agency had no “reasonable suspicion”; rather, the reasonableness of the suspicion must be assessed in the light of the information available at the time of the court’s judgment approving the search”; para. 96). See also *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017, at para. 93.

<sup>40</sup> This was not shown, e.g., in *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003, *Buck v. Germany*, no. 41604/98, 28 April 2005, *André and Another v. France*, no. 18603/03, 24 July 2008, *Zubal v. Slovakia*, no. 44065/06, 9 November 2010 and *Misan v. Russia*, no. 4261/04, 2 October 2014.

<sup>41</sup> This was doubted in *Buck v. Germany*, no. 41604/98, 28 April 2005; “the offence in respect of which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law ... In addition to that, in the instant case all that was at stake was the conviction of a person who had no previous record of contraventions of road traffic rules” (para. 47). Cf. *K S and M S v. Germany*, no. 33696/11, 6 October 2016, in which the European Court stated “As to the proportionality of the search warrant to the legitimate aim pursued in the particular circumstances of the case, the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence in respect of which the search warrant was issued was tax evasion, an offence which affects State’s resources and their capacity to act in the collective interest. As such, tax evasion constitutes a serious offence; a fact underlined in a case such as this where the suspected tax evasion related to the sum of approximately EUR 100,000 (see, in this regard, the OECD Convention on Mutual Administrative Assistance in Tax Matters, developed in 1988 and amended in 2010, according to which the tackling of tax evasion forms a top priority for all member states). Furthermore, in this field - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and the immense scope for international investment, made all the easier by the relative porousness of national borders”; para. 48.

39. Fourthly, there should have been some checking of the information or evidence relied upon<sup>44</sup>, although it remains to be determined whether or not the fact that this has been obtained unlawfully will render the issuing of it contrary to Article 8<sup>45</sup>.

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<sup>42</sup> See, e.g., *Zubal v. Slovakia*, no. 44065/06, 9 November 2010 in which the European Court found: “41. In the present case the search was carried out in the context of criminal proceedings concerning the suspected forgery of works of art. The applicant was in the position of an injured party as he was the owner of the painting. There is no indication that the authorities suspected him at any time of involvement in any unlawful action in that context. 42. The search was considered necessary with a view to securing the painting for the purposes of further criminal proceedings. In particular, the authorities presumed that the applicant might deny possession of the painting out of fear that he would be unable to obtain damages from the perpetrators of the crime. The Court is not persuaded by such an argument. The applicant, who is a collector of works of art, had bought the painting at an auction. The way in which he had acquired it was therefore easily verifiable. He had a genuine interest in having the matter elucidated and, as appropriate, claiming compensation for damage from those liable. The applicant had no apparent reason for refusing to co-operate with the prosecuting authorities and thus exposing himself to the risk of a sanction, possibly a criminal one. 43. The subsequent developments are in line with the above consideration. In particular, after the painting had not been found in the applicant's house, the prosecuting authorities did not apply for a new warrant to search the premises of the applicant's company, where, as the son of the applicant's partner informed them, the painting was likely to be. Instead, one and a half months later, the police contacted the applicant and requested, under Article 78 of the Code of Criminal Procedure, that the painting be handed over to them. The applicant complied with the request immediately. The Court sees no reason why the authorities could not have proceeded in the same manner earlier without having recourse to a search of the applicant's house ... 45. The Court considers that the search of the applicant's house, carried out without sufficient grounds, when the applicant was not suspected of any criminal offence but was an injured party in the criminal case in issue, was not “necessary in a democratic society”. See also *Buck v. Germany*, no. 41604/98, 28 April 2005, in which the European Court noted that: “the search and seizure were ordered to investigate the applicant's son's affirmation that other persons, employees of the applicant's company, could have been driving the car, that is, to verify the defence of the applicant's son. The competent judge had ordered the police to question the applicant about his company's employees at the relevant time before the search and seizure warrant was executed on the same day. Contrary to his submissions, the applicant had, therefore, been given an opportunity to present the relevant information voluntarily and thus to avoid the search”; para. 49.

<sup>43</sup> See, *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003, in which the European Court agreed “with the applicant's submission – which the Government have not contested – that measures other than searches of the applicant's home and workplace (for instance, the questioning of Registration and State-Property Department officials) might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions. The Government have entirely failed to show that the domestic authorities would not have been able to ascertain whether, in the first instance, there had been a breach of professional confidence and, subsequently, any handling of information thereby obtained without searching the applicant's home and workplace”; para. 56. See also *Saint-Paul S. A. v. Luxembourg*, no. 26419/10, 18 April 2013 (“44. The Court notes that in the instant case the journalist had signed his article “Domingos Martins”. Even though the list of officially recognised journalists in Luxembourg includes no such name, it does contain the name of “De Araujo Martins Domingos Alberto”, which comprises all the elements of the name under which the article in issue was published. Furthermore, no other name comprising these elements appears in the list. The list also points out that “De Araujo Martins Domingos Alberto” works for the newspaper *Contacto*. Therefore, the similarity in the names, the exclusiveness of the elements of the names and the connection with the newspaper in question forge an obvious link between the author of the impugned article and the person appearing on the list. Drawing on these elements, the investigating judge could have begun by ordering a less intrusive measure than a search in order to confirm the identity of the author of the article, if he had continued to deem such action necessary. Consequently, the search and seizure were unnecessary at that stage”) and *Rozhkov v. Russia (No.2)*, no. 38898/04, 31 January 2017 (“126. Whether or not the applicant was given an opportunity to present the relevant samples voluntarily and thus to avoid the search, it is reasonable to assume that the investigator might have reasons not to highlight his interest in evidence before being able to seize it. However, the fact remains that some handwritten documents were already available in the case file”).

<sup>44</sup> In *Keegan v. United Kingdom*, no. 28867/03, 18 July 2006 the police had not taken steps to verify who lived at the address a suspected robber had been known to give and the applicants rather than this person had been living there for about six months when it was searched. The European Court observed that “In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively

40. Fifthly, the scope of a particular order or warrant should not be broadly drawn<sup>46</sup> or interpreted<sup>47</sup> - although the assessment of whether or not a particular order or warrant is too broad should take account of the nature of the allegations involved<sup>48</sup> - and the

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carried out, the resulting police action, which caused the applicants considerable fear and alarm, cannot be regarded as proportionate"; para. 34.

<sup>45</sup> In *K S and M S v. Germany*, no. 33696/11, 6 October 2016 it was assumed that the relevant evidence might have been acquired unlawfully. However, in finding that there was no violation of Article 8, the European Court emphasised that there was nothing in the material before it indicating "that the German authorities, at the relevant time, deliberately and systematically breached domestic and international law in order to obtain information relevant to the prosecution of tax crimes" (para. 52) and noted that "any offence which the German authorities might have committed in purchasing the data carrier from K. would have consisted of acting as an accessory to a criminal offence and acting as an accessory to the divulgence of official secrets, and that K. might have committed the offence of industrial espionage ... Therefore, the German authorities, in issuing the search warrant, did not rely on real evidence obtained as a direct result of a breach of one of the core rights of the Convention. Moreover, the data carrier contained information concerning the financial situation of the applicants, which they were obliged to submit to the domestic tax authorities, but no data closely linked to their identity" (para. 53).

"; para. 52.

<sup>46</sup> See, e.g., *Niemietz v. Germany*, no. 13710/88, 16 December 1992 ("it ordered a search for and seizure of "documents", without any limitation, revealing the identity of the author of the offensive letter"; para. 37), *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003 ("the investigating judge instructed the investigators to "search for and seize all objects, documents, effects and/or other items that might assist in establishing the truth with respect to the above offences or whose use might impede progress in the investigation and, in particular, the document dated 23 July 1998 bearing the manuscript note to the heads of division". It thus granted them relatively wide powers"; para. 70), *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003 (the purpose of the warrants was stated to be to search for and seize "any document or object that might assist the investigation", without limitation, and no information was given about the investigation concerned, the premises to be searched or the objects to be seized), *Smirnov v. Russia*, no. 71362/01, 7 June 2007 ("the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were "of interest" for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant's personal notebook, the central unit of his computer and other materials, including his client's authority form issued in unrelated civil proceedings and a draft memorandum in another case"; para. 48). See the similar rulings in *Van Rossem v. Belgium*, no. 41872/98, 9 December 2004, *André and Another v. France*, no. 18603/03, 24 July 2008, *Misan v. Russia*, no. 4261/04, 2 October 2014, *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015, *Bagiyeva v. Ukraine*, no. 41085/05, 28 April 2016 and *Modestou v. Greece*, no. 51693/13, 16 March 2017. Cf. *Tamosius v. United Kingdom (dec.)*, no. 62002/00, 19 September 2002 (in which the European Court stated that: "the first warrant related to any items relating to serious tax fraud. However, a second warrant was issued, which included a schedule of 35 companies and individuals listed as being under investigation. It was this warrant that was executed, although the domestic courts gave the opinion that both were equally lawful. The Court is not persuaded that in these circumstances the applicant was denied sufficient indication of the purpose of the search to enable him to assess whether the investigation team acted unlawfully or exceeded their powers") *K S and M S v. Germany*, no. 33696/11, 6 October 2016 (in which the European Court observed that "it allowed the seizure of papers and other documents concerning the applicants' capital, both inside and outside Germany, especially documents concerning information on foundations and any documents that could help to determine the true tax liability of the applicants since 2002. The Court considers therefore that the search warrant was quite specific in its content and scope, containing an explicit and detailed reference to the tax evasion offence being investigated, with an indication of the items sought as evidence ... Thus, nothing indicates that the warrant was not limited to what was indispensable in the circumstances of the case" (para. 54)). See also *Société Canal Plus and Others v. France*, no. 29408/08, 21 December 2010.

<sup>47</sup> See *Taner Kılıç v. Turkey*, no. 70845/01, 24 October 2006; "The Court finds that the search warrant initially issued by the court and extended by the Public Prosecutor was interpreted by the Under-Secretary of State of the Ministry of the Interior in too broad a manner when including the home and office of the applicant, who was a board member of the İzmir branch" (para. 42).

<sup>48</sup> See *Sher v. United Kingdom*, no. 5201/11, 20 October 2015; "174. It is true that the search warrant was couched in relatively broad terms. While limiting the search and seizure of files to specific addresses, it



authorisation given should not be indefinite<sup>49</sup> and execution should not be unduly delayed<sup>50</sup>. However, although the European Court accepts that it might not be possible

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authorised in a general and unlimited manner the search and seizure of correspondence, books, electronic equipment, financial documents and numerous other items. However, the specificity of the list of items susceptible to seizure in a search conducted by law enforcement officers will vary from case to case depending on the nature of the allegations in question. Cases such as the present one, which involve allegations of a planned large-scale terrorist attack, pose particular challenges, since, while there may be sufficient evidence to give rise to a reasonable suspicion that an attack is under preparation, an absence of specific information about the intended nature of the attack or its targets make precise identification of items sought during a search impossible. Further, the complexity of such cases may justify a search based on terms that are wider than would otherwise be permissible. Multiple suspects and use of coded language, as in the present case, compound the difficulty faced by the police in seeking to identify in advance of the search the specific nature of the items and documents sought. Finally, the urgency of the situation cannot be ignored. To impose under Article 8 the requirement that a search warrant identify in detail the precise nature of the items sought and to be seized could seriously jeopardise the effectiveness of an investigation where numerous lives might be at stake. In cases of this nature, the police must be permitted some flexibility to assess, on the basis of what is encountered during the search, which items might be linked to terrorist activities and to seize them for further examination. While searches of electronic devices raise particularly sensitive issues, and arguably require specific safeguards to protect against excessive interference with personal data, such searches were not the subject of the applicants' complaints or the domestic proceedings in this case and, in consequence, no evidence has been led by the parties as to the presence or otherwise of such safeguards in English law. 175. Finally, it is of some relevance in the present case that the applicants had a remedy in respect of the seized items in the form of an *ex post facto* judicial review claim or a claim for damages (see paragraph 168 above). It is noteworthy that they did not seek to challenge the seizure of any specific item during the search, nor did they point to any item which they contend was seized or searched for unjustifiably by reference to the nature of the investigation. 176. For these reasons, the Court concludes that the search warrants in the present case cannot be regarded as having been excessively wide". See also *Posevini v. Bulgaria*, no. 63638/14, 19 January 2017; 72. The warrants were couched in relatively broad terms. Although limiting the searches to specific premises, they did not describe in detail the items which could be searched for and seized, but instead referred in more general terms to the type of items "relating to the forging of identity documents and others, relevant to the case" (see paragraphs 10 and 11 above), that is, objects which might be used to perform the activities which were the subject of the offence under investigation. The specificity of the items subject to seizure varies from case to case depending on the nature of the offence being investigated ... In this case, the prosecuting authorities and the police, which had to act quickly after the arrest of the first applicant's alleged accomplice in France ... could not have known in advance what specific items could furnish proof of the forging of identity documents of which the first applicant was a suspect. Although it might have been feasible to frame the warrants in more precise terms, it was sufficient, in the circumstances, that their scope was limited by reference to the nature of the alleged offence, thus circumscribing sufficiently the discretion of the officers who carried out the searches, who only seized items which could be seen as potentially connected with the alleged offence".

<sup>49</sup> See the view in *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017, at para. 93 that a warrant was "reasonably limited" when it was issued for "a short period of time. See also *Imakayeva v. Russia*, no. 7615/02, 9 November 2006; "185. The Government referred to the provisions of Article 13 of the Suppression of Terrorism Act which permitted persons conducting a counter-terrorist operation to enter freely dwellings and premises in the course of the operation or during the pursuit of persons suspected of having committed a terrorist action. Since there were grounds to suspect the applicant's husband of involvement in terrorist activities, the servicemen's actions in inspecting the Imakayevs' household had been in compliance with the domestic legislation and with Article 8 § 2 of the Convention ... 188. The Government's reference to the Suppression of Terrorism Act cannot replace an individual authorisation of a search, delimiting its object and scope, and drawn up in accordance with the relevant legal provisions either beforehand or afterwards. The provisions of this Act are not to be construed so as to create an exemption to any kind of limitations of personal rights for an indefinite period of time and without clear boundaries to the security forces' actions".

<sup>50</sup> See, e.g., *Gerashchenko v. Ukraine*, no. 20602/05, 7 November 2013; "133. The Court has no reasons to doubt that when issuing the search warrant on 19 May 2004 the Suvorivskyy Court had some evidence before it suggesting that the applicant could have had drugs in his possession with the intent to supply them. Namely, there had been an allegation made that the applicant was selling drugs. This warranted investigation, possibly by way of a search of his house. 134. The Court observes, however, that the police only searched the applicant's house on the basis of the aforementioned warrant one-and-a-half months later. No explanation for this delay is known to have been given. Moreover, although the Court of Appeal expressly criticised the failure of the trial

for the formulation to be elaborate where an urgent situation is involved, it will also assess whether such a less exacting approach is actually warranted in the particular circumstances of a case<sup>51</sup>.

41. Sixthly, the order or warrant should be served on those affected so as to give them precise information about the scope of the search.<sup>52</sup>
42. Seventhly, the person whose premises are being searched should generally be present when this occurs so that he or she can contest that particular items being seized are covered by the order or warrant.<sup>53</sup> However, a refusal to take part in the search will probably be taken as a waiver of this particular safeguard.<sup>54</sup>

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court to assess the timing and the context of the search warrant in question when quashing the judgment of 14 May 2005 (see paragraph 42 above), this issue was completely disregarded in the subsequent judicial decisions delivered in the criminal proceedings against the applicant”.

<sup>51</sup> See, e.g., *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008; “However, the Court notes that neither the application for its issue nor the warrant itself specified what items and documents were expected to be found in the applicant’s office, or how they would be relevant to the investigation. Moreover, in issuing the warrant the judge did not touch at all upon the issue of whether privileged material was to be removed. According to the Court’s case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds (see *Van Rossem v. Belgium*, no. 41872/98, § 45, 9 December 2004). This is all the more important in cases where the premises searched are the office of a lawyer, which as a rule contains material which is subject to legal professional privilege (see *Niemietz*, cited above, p. 35-36, § 37). The Court therefore finds that, in the circumstances, the warrant was drawn in overly broad terms and was thus not capable of minimising the interference with the applicant’s Article 8 rights and his professional secrecy. The Court is well aware that elaborate reasoning may prove hard to achieve in urgent situations. However, by the time the police applied for a search warrant they had already sealed the applicant’s office ..., thus obviating the risk of spoliation of evidence. The Court does not therefore consider that in the instant case a more thorough discussion of these matters would have been too onerous, especially considering that section 18(1) of the 1991 Bar Act was intended to provide a safeguard in this regard” (para. 41). See to similar effect *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, at para. 217.

<sup>52</sup> The European Court has found that a search was unlawful where a requirement for service in the applicable law was not complied with; *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006, at para. 51. Moreover, the fact that “no search warrant was produced to the applicant during the search and that no details were given of what was being sought” was a factor in its finding in, e.g., *Imakayeva v. Russia*, no. 7615/02, 9 November 2006, at paras. 187-189 that there were no safeguards against abuse. Similarly, in cases such as *Betayev and Betayeva v. Russia*, no. 37315/03, 29 May 2008 and *Khutsayev and Others v. Russia*, no. 16622/05, 27 May 2010, it noted that “the servicemen did not show the applicants a search warrant. Neither did they indicate any reasons for their actions”; paras. 114 and 154 respectively. However, in *Kirakosyan v. Armenia (No.2)*, no. 24723/05, 4 February 2016, the European Court did not consider that a limited opportunity to peruse the search warrant and the failure to reflect objections with complete accuracy in the search record were not of sufficient weight to warrant a finding of disproportionality; para. 65. At the same time, the breadth of the wording of an order or warrant may preclude any precise information being given, as the European Court seemed to have concluded was the case in *Modestou v. Greece*, no. 51693/13, 16 March 2017.

<sup>53</sup> This did not happen, e.g., in *Van Rossem v. Belgium*, no. 41872/98, 9 December 2004 and *Modestou v. Greece*, no. 51693/13, 16 March 2017. Moreover, see *Zubal v. Slovakia*, no. 44065/66, 9 November 2010, in which the European Court observed: “At the relevant time the applicant was abroad. His holiday was disturbed by the news of the search and the immediate arrangements which he considered it necessary to make with a view to protecting his rights” (para. 44).

<sup>54</sup> See *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017; “98. The Court also notes that the unsealing of the computer and its actual search took place in accordance with a different search warrant issued at a later date, namely on 18 November 2005. When this latter warrant was executed, the applicant and her lawyer refused to be present during the unsealing and search procedure (see paragraph 21 above). 99. Under these circumstances, the Court considers that they implicitly but unequivocally waived an important guarantee offered to them by the domestic legal system ..., which would have allowed them to perform an ex post facto check of the content of the computer in order to reveal any possible manipulation of the relevant files”.

43. Eighthly, appropriate consideration must be given to the potential impact of searches affecting the media and lawyers on the respective rights to freedom of expression and to a fair trial. In particular, the concern of the European Court will be with the potential of a search to lead to the identification of a journalist's sources<sup>55</sup> - even if already known to the authorities<sup>56</sup> - and the disclosure of documents covered by lawyer-client privilege<sup>57</sup>.

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<sup>55</sup> See *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003 (“57. In the Court’s opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant’s home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that “limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court” ... It thus considers that the searches of the first applicant’s home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*. 58. In the light of the foregoing, the Court reaches the conclusion that the Government have not shown that the balance between the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other, was maintained. In that connection, the Court would reiterate that “the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 tip the balance of competing interests in favour of the interest of democratic society in securing a free press ... 71. Above all, the ultimate purpose of the search was to establish the journalist’s source through his lawyer. Thus, the search of the second applicant’s offices had a bearing on the first applicant’s rights under Article 10 of the Convention. Moreover, the search of the second applicant’s offices was disproportionate to the intended aim, particularly as it was carried out at such an early stage of the proceedings. 72. In the light of the foregoing and for reasons analogous in part to those set out in Part I of this judgment, the Court holds that there has been a violation of the second applicant’s rights under Article 8 of the Convention”). See also *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003 (in which searches had been carried out newspapers’ offices, the head office of a broadcaster and four journalists’ homes in connection with the prosecution of members of the State legal service for breach of confidence following leaks in highly sensitive criminal cases but it had not been alleged that the journalists had written secret information concerning those cases), *Tillack v. Belgium*, no. 20477/05, 27 November 2007 (“65. The Court emphasises that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution. This applies all the more in the instant case, where the suspicions against the applicant were based on vague, unsubstantiated rumours, as was subsequently confirmed by the fact that he was not charged”), *Saint-Paul S. A. v. Luxembourg*, no. 26419/10, 18 April 2013 (“61. Even though the Court cannot deduce from the evidence provided by the parties whether the purpose of the search was to disclose the journalist’s sources, the wording of the warrant is clearly too broad to rule out that possibility. The Court cannot accept the Government’s explanation that the sources were already mentioned in the impugned article. The fact of some sources having been published did not rule out the discovery of other potential sources during the search. The Court considers that the impugned search and seizure were disproportionate inasmuch as they enabled the police officers to search for the journalist’s sources. The Court notes that the insertion of a USB memory stick into a computer is a procedure which can facilitate the retrieval of data from the computer’s memory, thus supplying the authorities with information unrelated to the offence in question. The warrant of 30 March 2009 was not sufficiently narrow in scope to prevent possible abuse. In view of the Government’s contention before the Court that the sole aim of the search was to ascertain the real identity of the journalist who had written the article, a more succinct wording only mentioning this aim would have been sufficient”) and *Nagla v. Latvia*, no. 73469/10, 16 July 2013 (discussed in n. 34 above). But cf *Stichting Ostade Blade v. Netherlands* (dec.), no. 8406/06, 27 May 2014 (discussed in n. 101 below) where a search followed a refusal to hand over a document from someone not considered to be a source.

<sup>56</sup> See, e.g., *Nagla v. Latvia*, no. 73469/10, 16 July 2013, at para. 95.

<sup>57</sup> See *Niemietz v. Germany*, no. 13710/88, 16 December 1992 (“it ordered a search for and seizure of “documents”, without any limitation, revealing the identity of the author of the offensive letter; this point is of special significance where, as in Germany, the search of a lawyer’s office is not accompanied by any special procedural safeguards, such as the presence of an independent observer. More importantly, having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that appears

44. In particular, there ought to be adequate safeguards against interference with professional secrecy, such as the need for special authorisation<sup>58</sup>, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege<sup>59</sup>, a sifting

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disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention”; para. 37) and *Mancevschi v. Moldova*, no. 33066/04, 7 October 2008 (“49. The Court also observes that the applicant himself was not charged with, or suspected of, any criminal offence or unlawful activities. On the other hand, his office contained case files of his clients. Having regard to the fact that the search was conducted at the applicant’s law office, with the implications that such a search could have for lawyer-client confidentiality, the Court would have expected the investigating judge to have given compelling and detailed reasons for authorising this course of action and for putting in place particular measures to safeguard the privileged materials protected by professional secrecy. Moreover, before being removed from the case by the investigator, the applicant had represented a person in the criminal case in connection with which the search had been ordered. The search could thus have led to the finding of items or documents obtained by the applicant as the accused’s representative, with obvious repercussions for that accused’s rights guaranteed under Article 6 of the Convention. Therefore, an even higher degree of caution was required before a search could be authorised in the applicant’s home and office. However, no analysis of any of these considerations was made by the investigating judge in her decisions of 26 May 2004. 50. In these circumstances, in particular in view of the broad formulation of the search warrant and the absence of any special safeguard to protect lawyer-client confidentiality, the Court finds that the domestic authorities failed in their duty to give “relevant and sufficient” reasons for issuing the search warrants. There has, accordingly, been a violation of Article 8 of the Convention”).

<sup>58</sup> See *Taner Kılıç v. Turkey*, no. 70845/01, 24 October 2006, in which the European Court observed that “the search and seizures were extensive and that privileged professional materials were taken without special authorisation”; para. 42.

<sup>59</sup> These were found to be lacking in, e.g., *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003, *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005, *Smirnov v. Russia*, no. 71362/01, 7 June 2007, *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008 and *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008. Thus, in the last case the European Court noted that “The search warrants delivered by the Simonovskiy District Court on 4 and 5 April 2006 gave the authorities unfettered discretion in deciding what documents to seize, and did not contain any reservation in respect of privileged documents, although the authorities knew that the applicant was a Bar Member and could have possessed documents conferred to him by his clients” (para. 216).

. However, in *Tamosius v. United Kingdom* (dec.), no. 62002/00, 19 September 2002 the European Court stated that “the search was carried out under the supervision of counsel, whose task was to identify which documents were covered by legal professional privilege and should not be removed. Though the applicant has denied that this provided any substantial safeguard, the Court notes that the counsel, nominated by the Attorney General, was under instructions to act independently from the investigation team and to give independent advice. The applicant has not claimed, in any domestic proceedings, that the counsel erred in the exercise of his judgment. The Court sees nothing sinister in the inclusion in counsel’s instructions of a reference to consulting the investigation team where necessary to clarify the alleged relevance of an item to the investigation. It would appear only logical that the investigation team be required to justify why they wish to remove certain items. Nor does the Court consider that the approach taken to legal professional privilege provides too narrow a protection as alleged by the applicant. Having regard to the definition of privilege in domestic law, a prohibition on removing documents in respect of which such privilege can be maintained provides a concrete safeguard against interference with professional secrecy and the administration of justice, bearing in mind in addition that the removal of any documents to which privilege in fact attached would have rendered the Inland Revenue liable to legal challenge and, potentially, to pay damages. The Court is not persuaded that it can be required, in order to prevent any possibility of error, that all documents to which privilege could prima facie attach should be covered”.

procedure in respect of electronic data<sup>60</sup> and suitable safeguards to ensure that any later examination of material removed does not infringe this privilege<sup>61</sup>.

45. As regards the independent observer, the European Court has emphasised that he or she should have the requisite legal qualification in order to effectively participate in the procedure, be bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of the third persons and be vested with the requisite powers to be able to prevent, in the course of the sifting procedure, any possible interference with the lawyer's professional secrecy.<sup>62</sup>

46. Moreover, any such safeguards must actually prove effective in the particular circumstances of the search concerned.<sup>63</sup>

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<sup>60</sup> See, e.g., *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007, at para. 63 and *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, at para. 34.

<sup>61</sup> As occurred in *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015. Cf. *Robathin v. Austria*, no. 30457/07, 3 July 2012; “49. In the present case, the search was carried out in the presence of the applicant, his defence counsel and a representative of the Vienna Bar Association. While all of the applicant's electronic data were copied to discs, the police officers followed the proposal of the representative of the Bar Association and copied all data containing the names “R.” and “G.” to a separate disc. All the discs were sealed. A report was duly drawn up at the end of the search, listing all the items seized. 50. The Court also notes that the applicant had a remedy against the examination of the seized data at his disposal, namely a complaint to the Review Chamber at the Regional Criminal Court. As the applicant opposed the search of the data, it was for the Review Chamber to decide which data could actually be examined. The Court has already noted above that the search warrant in the present case was couched in very broad terms whereas the description of the alleged criminal activities related exclusively to “R.” and “G.” ... Nevertheless all of the applicant's electronic data were copied to discs. 51. In these circumstances, the manner in which the Review Chamber exercised its supervisory function is of particular importance. The Court notes that the Review Chamber gave only very brief and rather general reasons when authorising the search of all the electronic data from the applicant's law office. In particular, it did not address the question whether it would be sufficient to search only those discs which contained data relating to “R.” and “G.”. Nor did it give any specific reasons for its finding that a search of all of the applicant's data was necessary for the investigation. Thus, the way in which the Review Chamber exercised its supervision in the present case does not enable the Court to establish that the search of all of the applicant's electronic data was proportionate in the circumstances. 52. However, the facts of the case show that the alleged criminal activities, necessitating a search warrant, related solely to the relationship between the applicant and “R.” and “G.” Thus, the Court finds that there should be particular reasons to allow the search of all other data, having regard to the specific circumstances prevailing in a law office. However, in the present case, there were no such reasons either in the search warrant itself or in any other document. In these circumstances, the Court finds that the seizure and examination of all data went beyond what was necessary to achieve the legitimate aim”. Similarly in *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008 it was found that, where a computer's hard drive and floppy disks were removed, there was nothing to prevent them being inspected or copied before being examined by an expert.

<sup>62</sup> See, e.g., *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008, at para. 43, *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, at para. 34, *Golovan v. Ukraine*, no. 41716/06, 5 July 2012, at paras. 62-64, *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015, at para. 30 and *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016, at paras. 98 and 99. Only in the last of these cases were these requirements found to be met. The absence of such guarantees in a search of a lawyer's office was also a factor in finding in *Annagi Hajibeyli v. Azerbaijan*, no. 2204/11, 22 October 2015 of a violation of the obligation not to hinder the effective exercise of the right of application under Article 34 of the European Convention.

<sup>63</sup> See *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007 (“62. The Court observes that the safeguards described above were fully complied with as regards the seizure of documents: whenever the representative of the Bar Association objected to the seizure of a particular document, it was sealed. A few days later the investigating judge decided in the presence of the applicant which files were subject to professional secrecy and returned a number of them to the applicant on this ground. In fact, the applicants do not complain in this respect. 63. What is striking in the present case is that the same safeguards were not observed as regards the electronic data. A number of factors show that the exercise of the applicants' rights in this respect was restricted. Firstly, the member of the Bar Association, though temporarily present during the search of the computer facilities, was mainly busy supervising the seizure of documents and could therefore not

47. Ninthly, account should also be taken of the potential adverse effects of a search on the reputation of the person affected.<sup>64</sup>
48. Finally, a search should not be carried out in a manner that is intimidating<sup>65</sup>, involve the use of excessive force<sup>66</sup>, fail to take account of the presence of others than the suspect<sup>67</sup> or go beyond what is necessary<sup>68</sup>.

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properly exercise his supervisory function as regards the electronic data. Secondly, the report setting out which search criteria had been applied and which files had been copied and seized was not drawn up at the end of the search but only later the same day. Moreover, the officers apparently left once they had finished their task without informing the first applicant or the representative of the Bar Association of the results of the search) and *André and Another v. France*, no. 18603/03, 24 July 2008 (“43. In the instant case, the Court notes that the search was accompanied by special procedural safeguards, since it was carried out in the presence of the chairman of the Bar Association of which the applicants were members. Furthermore, the presence of the chairman of the Bar Association and the observations concerning the safeguarding of professional secrecy, which the latter felt obliged to make with regard to the documents to be seized, were mentioned in the report on the operations. 44. On the other hand, besides the fact that the judge who had authorised the search was not present, the presence of the chairman of the Bar Association and his specific objections were insufficient to prevent the actual inspection of all the documents at the practice, or their seizure. As regards in particular the seizure of the first applicant’s handwritten notes, the Court notes that it is not disputed that these were the lawyer’s personal documents and subject to professional secrecy, as maintained by the chairman of the Bar Association”). See also *Xavier Da Silveira v. France*, no. 4757/05, 21 January 2010, *Vinci Construction et GTM Génie Civil et Services v. France*, no. 63629/10, 2 April 2015 and *Ferrinho Bexiga Villa-Nova v. Portugal*, no. 69436/10, 1 December 2015.

<sup>64</sup> See, e.g., *Buck v. Germany*, no. 41604/98, 28 April 2005, in which the European Court observed that: “the attendant publicity of the search of the applicant’s business and residential premises in a town of some 10,000 inhabitants was likely to have an adverse effect on his personal reputation and that of the company owned and managed by him. In this connection, it is to be recalled that the applicant himself was not suspected of any contravention or crime”; para. 51. See also *Zubal v. Slovakia*, no. 44065/66, 9 November 2010; “The Court nevertheless considers relevant the applicant’s argument that the presence of the police at his house at 6 a.m. had repercussions for his reputation” (para. 44). Cf. *K S and M S v. Germany*, no. 33696/11, 6 October 2016; “56. Lastly, having regard to possible repercussions on the reputation of the person affected, the Court observes that, in the present case, the applicants did not allege any adverse effect on their personal reputation as a consequence of the executed search of their private premises”.

<sup>65</sup> See, e.g., *Koval and Others v. Ukraine*, no. 22429/05, 15 November 2012; “further noting that criminal proceedings were instituted against the police officers for possible abuse of power and that there were other circumstances surrounding the events in question, such as the use of force against the first and third applicants and their intimidation, the Court considers that no safeguards against abuse and arbitrariness were available for the applicants” (para. 113).

<sup>66</sup> See, e.g., *Rachwalski and Ferenc v. Poland*, no. 44709/99, 28 July 2009; “73. ..., the Court has regard to the fact that the applicants were confronted by a number of police officers carrying truncheons and accompanied by dogs at the front door of their house in the middle of the night. No compelling justification was given by the Government for the use of such visible force. It must be observed that a risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in the present case ... 75. The Court further notes that, as indicated above, the police had come to the applicants’ door in order to ask them about an unlocked car parked outside the house. It has already highlighted under Article 3 the total lack of justification for the police’s heavy-handed approach to the investigation into the ownership of the car. For the Court, the decision to enter the premises can only be described as disproportionate in the circumstances”). See also *Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013; “128. The aim of the police operation at the applicants’ home that day was to arrest Mr Gutsanov, who was a suspect in a criminal case concerning misappropriation of public funds, and to carry out a search of the premises to look for physical and documentary evidence in the context of the same criminal investigation. It emerges from the evidence in the file that the investigation in question had been opened five months previously, that there were several suspects in the case and that the authorities suspected the existence of a conspiracy (see paragraph 9 ... above). The case clearly did not concern a group of individuals suspected of committing violent criminal acts. 129. With regard to Mr Gutsanov’s personality, the Court observes that he was a well-known political figure in Varna: at the material time he was Chairman of the city’s municipal council. Furthermore, there is no evidence in the file to suggest that he had a

49. In addition, a record or description should be made of any item seized, the items seized should not exceed those actually needed and authorised<sup>69</sup> and all items

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history of violence or that he might have presented a danger to the police officers conducting the operation at his home. 130. It is true that Mr Gutsanov was the lawful owner of a firearm and ammunition which he kept at his home. This fact was known to the police and had been specifically mentioned at the briefing of the police team before the operation (see paragraph 23 above). This was undoubtedly a relevant factor which had to be taken into account by the officers during the operation at the applicants' home. However, the Court considers that the presence of the weapon in the applicants' home was not sufficient in itself to justify the deployment of a special operations team or the degree of force that was used in the instant case". This contributed to a finding that he was subjected to degrading treatment contrary to Article 3 of the European Convention. See also *Vasylychuk v. Ukraine*, No. 24402/07, 13 June 2013.

<sup>67</sup> See *Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013; "131. It is clear from the file that the possible presence of Mr Gutsanov's wife and minor children was not taken into consideration at any stage in planning and carrying out the police operation. The fact was not mentioned during the pre-operation briefing ... and the police officers apparently paid no heed to the warning by the security guard that young children were present in the house ... 132. Of course, the Court cannot go so far as to require the law-enforcement agencies not to arrest persons suspected of criminal offences in their homes whenever their children or spouses are present. However, it considers that the possible presence of family members at the scene of an arrest is a circumstance that must be taken into consideration in planning and carrying out this type of police operation. This was not done in the present case and the law-enforcement agencies did not contemplate any alternative means of carrying out the operation at the applicants' home, such as staging the operation at a later hour or even deploying a different type of officer in the operation. Consideration of the legitimate interests of Mrs Gutsanova and her daughters was especially necessary since the former was not under suspicion of involvement in the criminal offences of which her husband was suspected, and her two daughters were psychologically vulnerable because they were so young (five and seven years of age). 133. The Court also observes that the lack of prior judicial review of the necessity and lawfulness of the search left the planning of the operation entirely at the discretion of the police and the criminal investigation bodies and did not enable the rights and legitimate interests of Mrs Gutsanova and her two minor daughters to be taken into consideration. In the Court's view, such prior judicial review, in the specific circumstances of the present case, would have enabled their legitimate interests to be weighed against the public-interest objective of arresting persons suspected of committing a criminal offence". This resulted in a finding that Mrs Gutsanova and the children were subjected to degrading treatment contrary to Article 3 of the European Convention.

<sup>68</sup> See *Panteleyenکو v. Ukraine*, no. 11901/02, 29 June 2006 ("Furthermore, instead of selecting the evidence necessary for the investigation, they seized all documents from the office and certain personal items belonging to the applicant which were clearly unrelated to the criminal case"; para. 51), *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009 ("After the applicant had voluntarily handed over the copying device at the request of the investigator, the latter nevertheless proceeded with a thorough search of the premises at both Gorky and Kuybyshev Streets, and seized the applicant's computers with peripherals, personal and professional records, business cards and other objects", para. 24) and *Misan v. Russia*, no. 4261/04, 2 October 2014 ("Indeed, the warrant's excessive breadth was reflected in the way in which it was executed. The seized items were not confined to ones belonging to the applicant's father but included the applicant's seaman's passport, her printer and floppy disks"; para. 62). See also *Bagiyeva v. Ukraine*, no. 41085/05, 28 April 2016. Cf. *Camenzind v. Switzerland*, no. 21353/93, 16 December 1997 ("As regards the manner in which the search was conducted, the Court notes that it was at Mr Camenzind's request that it was carried out by a single official ... It took place in the applicant's presence after he had been allowed to consult the file on his case and telephone a lawyer ... Admittedly, it lasted almost two hours and covered the entire house, but the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything"; para. 46).

<sup>69</sup> See *Imakayeva v. Russia*, no. 7615/02, 9 November 2006 ("The Government could not give any details about the items seized at the Imakayevs' house because they had allegedly been destroyed. It thus appears that no record or description of these items was made. The receipt drawn up by a military officer who had failed to indicate his real name or rank or even the state body which he represented, and which referred to "a bag of documents and a box of floppy discs" ..., appears to be the only existing paper in relation to the search"; para. 187), *Tillack v. Belgium*, no. 20477/05, 27 November 2007 ("66. The Court further notes the amount of property seized by the authorities: sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet. No inventory of the items seized was drawn up. The police even apparently lost a whole crate of papers, which were not found until more than seven months later") and *Bagiyeva v. Ukraine*, no. 41085/05, 28 April 2016 ("the Court observes that the attesting witnesses and the representative of the building maintenance

justifiably seized should not be kept for longer than necessary for the purpose of the relevant investigation or proceedings.<sup>70</sup>

50. The seizure during a search of material that was not covered by the authorisation for it, as well as of material seized during a search that has no legal basis, will constitute a violation of Article 1 of Protocol No. 1.<sup>71</sup>
51. Furthermore, any unnecessary damage to or destruction of property that occurs in the course of a search can be expected to be regarded by the European Court as amounting to a violation of the rights of its owner under Article 8 of the European Convention and Article 1 of Protocol No. 1.<sup>72</sup> There will also be a violation of the

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organisation, invited by the police to participate in the search did not ensure that the seized items were accurately listed in the report, or that the seizure fitted the scope defined in the search warrant"; para. 54).

<sup>70</sup> See *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008 ("the computer, including all its peripheral devices, was kept by the authorities for more than two months: it was seized on 30 November 2000, checked by an expert before 15 December 2000, and then kept until the proceedings were stayed on 5 February 2001 ... In the Court's view, this must have had a negative impact on the applicant's work, whereas it is hard to conceive how keeping the computer after 15 December 2000 was conducive to the investigation's goals"; para. 42), *Soini and Others v. Finland*, no. 36404/97, 17 January 2006 ("Considering also that they were returned to Ms Soini on 26 June 1996 and 9 September 1996 respectively, after they had been removed on 13 June 1996, the seizure was not disproportionately long"; para. 46) and *Prezhdarovi v. Bulgaria*, no. 8429/05, 30 September 2014 ("Furthermore, the Court notes that following the seizure, the applicants complained several times, asserting that the computers contained personal information and requesting their return. The Court observes that the scope of a search-and-seizure operation is a relevant factor to be taken into account when deciding whether the impugned measure met the requirements of Article 8 ... The Court cannot speculate on the existence of personal information on the computers but notes that on no occasion did the domestic authorities take account of the applicants' complaint in this connection: the court that approved the measure did not consider the scope of the operation and did not make a distinction between information which had been necessary for the investigation and information which had not been relevant; during the investigation the applicants requested the return of the computers, arguing that they contained personal information, but neither the prosecutor nor the relevant courts scrutinised that assertion ... While the Court accepts that, as a matter of principle, the retention of the computers for the duration of the criminal proceedings pursues the legitimate aim of securing physical evidence in an ongoing criminal investigation ..., the lack of any consideration of the relevance of the seized information for the investigation and of the applicants' complaint regarding the personal character of some of the information stored on the computers rendered the judicial review formalistic and deprived the applicants of sufficient safeguards against abuse"; (para. 49) Cf. *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015, in which the originals of computer records that had been returned but the European Court considered that there was no obligation to return copies made of them and that these could be retained throughout the limitation period for the crimes in question.

<sup>71</sup> *Zaurbekova and Zaurbekova v. Russia*, no. 27183/03, 22 January 2009 (a computer central processing unit, compact discs and a family photo album), *Karimov and Others v. Russia*, no. 29851/05, 16 July 2009 (a couch, pillows, bed linen and fabrics, personal documents, including passports and a pensioner's identity card), *Rezvanov and Rezvanova v. Russia*, no. 12457/05, 24 September 2009 (a video appliance, a leather jacket, running shoes and other items), *Babusheva and Others v. Russia*, no. 33944/05, 24 September 2009 (unspecified family possessions) and *Khutsayev and Others v. Russia*, no. 16622/05, 27 May 2010 (unspecified family possessions).

<sup>72</sup> As regards destruction, see, e.g., *Akdivar and Others v. Turkey* [GC], no. 21893/93, 16 September 1996, *Menteş and Others v. Turkey* [GC], 23186/94, 28 November 1997, *Selçuk and Asker v. Turkey*, no. 23184/94, 24 April 1998 and *Abdulkadyrova and Others v. Russia*, no. 27180/03, 8 January 2009. As regards damage, see, e.g., *Vasylchuk v. Ukraine*. No. 24402/07, 13 June 2013; "The Court considers that, even assuming that the applicant had refused to cooperate with the police officers, given the presence of S., who had presumably been brought in to identify the stolen items, the manner in which the search was conducted appears to have been disproportionate to its aim. In particular, there is no evidence to suggest that it was necessary to tear off the door to a mirrored cabinet and to throw the applicant's belongings and medication onto the floor".



latter provision in respect of any items that are unlawfully seized in the course of an authorised search and seizure operation.<sup>73</sup>

52. However, advance notice of a proposed search does not seem to be required<sup>74</sup>.
53. In addition, a search may involve the examination of material that otherwise would be considered “private” and thus protected under Article 8 from involuntary disclosure.<sup>75</sup>
54. Moreover, very limited restrictions on the activities of persons caught up in the search of premises will not give rise to violations of the European Convention where these are required for its execution.<sup>76</sup>
55. Furthermore, searches of persons present during the search of premises will need either to be specifically authorised or be necessary for the execution of the authorisation to search them.<sup>77</sup>

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<sup>73</sup> See *Vasilescu v. Romania*, no. 27053/95, 22 May 1998

<sup>74</sup> See *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016; “While the granting of the Agency’s application was obtained in an ex parte procedure, the Court considers that there may be good reason not to give forewarning of a proposed search; the scrutiny of the judge of the original application in the present case still provided an important safeguard against abuse” (para. 97).

<sup>75</sup> Thus, in *K S and M S v. Germany*, no. 33696/11, 6 October 2016 the European Court noted the applicants’ allegation that the search covered the examination of their will and stated that it attached “weight to the fact that, although a document of a very private nature, a will may contain information about property value. As the investigating officer did not seize the applicants’ will, but only one envelope with L. Bank documents and five computer files ..., the Court considers that the mere inspection of the will did not impinge on the applicants’ private sphere to an extent that was disproportionate”; para. 55. See also *Soini and Others v. Finland*, no. 36404/97, 17 January 2006; “With regard to necessity, it accepts that the seizure of the Ms Soini’s diaries was particularly invasive of her privacy. It has not, however, been alleged that their contents were revealed to third parties or that they were copied or put to any improper use” (para. 46).

<sup>76</sup> See, e.g., *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994 (in which no violation of Article 8 was considered to have occurred where persons other than a suspected terrorist were confined for a short in one room during her arrest and the search of the house in which this took place), *Nagy v. Hungary*, no. 6437/02, 20 December 2005 (in which the European Court stated that it was “satisfied that the mere fact the applicant was prevented for several minutes from providing her son with an anti-asthma spray-inhaler did not attain that Article 3 threshold. Moreover, this matter does not raise an arguable issue under Article 8 of the Convention. Furthermore, in so far as the Article 8 complaint may be understood to concern the house search itself, the Court considers that this measure, lawfully effected with a view to unravelling a rather complex case of tax fraud, was necessary in a democratic society for the prevention of crime, in order to secure evidence, and was thus justified under Article 8 § 2”; paras. 25-26) and *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017 (in which a complaint about the temporary prohibition on the use of a mobile phone in order to prevent communication with persons outside the premises being searched was considered manifestly ill-founded where there was no specific or concrete need to use it; paras. 66-67).

<sup>77</sup> See, e.g., *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, no. 27153/07, 17 January 2017; “73. The Government maintained that the body search of the applicant had been performed in accordance with Article 106 of the RCCP, arguing that such a measure could be necessary at the start of or during a home search, for safety reasons and for the purposes of an investigation ... The domestic authorities relied on similar arguments when dismissing the applicant’s complaint that the limits of the search warrant had been exceeded by the body search, namely the search performed on her bag ...74. The Court notes at the outset that, at the time of the search, criminal investigations had been initiated in respect of the applicant – in her capacity as an accounting expert – in relation to intellectual forgery. The home search warrant had been issued so as to ensure that important evidence relating to the offence of intellectual forgery – such as files, documents, a computer, a printer – was located ...75. The Court further observes that, under the relevant domestic law in force at the material time, a body search could be carried out on the order of the authority in charge of an investigation, in compliance with specific rules (see Article 106 of the RCCP ...). However, the Court takes note of the fact that the warrant issued by the Oradea District Court on 20 October 2005 ..., while making general reference to the application of Articles 103-108 of the RCCP, did not mention specifically that a body search could be

56. However, the unnecessary handcuffing of a suspect in the premises where a search is being conducted could lead to a finding that he or she has been subjected to degrading treatment contrary to Article 3 of the European Convention. This is especially likely to be so where the search takes place before the family of the person concerned or at his or her workplace as this could result in strong feelings of shame and humiliation being aroused in him or her.<sup>78</sup>
57. Searches of the person may be a condition for entering a specially designated zone as a preventive measure where there are safeguards against abuse, including restrictions on the duration of such a measure.<sup>79</sup> Otherwise there should not be any power to stop and search persons without there being reasonable suspicion that they have on them material connected to the commission or possible commission of a crime and adequate legal safeguards against abuse.<sup>80</sup>

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performed on the basis of Article 106 of the RCCP, nor did it contain any specific reasons justifying such a measure. Moreover, the prosecutor present at the search also omitted to define the purpose and scope of the body search ... 76. The Court reiterates that reference to the pertinent law in general terms cannot replace specific authorisation of a search, delimiting its purpose and scope and drawn up in accordance with the relevant legal provisions either beforehand or afterwards (see, *mutatis mutandis*, *Kilyen v. Romania*, no. [44817/04](#), § 34, 25 February 2014). 77. Accordingly, the Court considers that the search of the applicant's bag, which included the seizure of an orange notebook, was not accompanied by adequate and effective safeguards against abuse. 78. Furthermore, while accepting that certain urgent circumstances, such as the existence of specific safety reasons, may require that particular measures, including on-the-spot body searches, be taken by the authorities in charge of an investigation at the outset of a home search, the Court considers that the Government have not put forward any convincing argument to prove the existence of such reasons in the present case. 79. The Court thus concludes that, in view of the above-mentioned considerations and in the absence of a decision adapted to the applicant's case which would clearly indicate the purpose and scope of the body search, the interference with the applicant's right to a private life was not "in accordance with the law" within the meaning of Article 8 of the Convention. It is therefore not necessary to examine whether the interference pursued a legitimate aim and was proportionate".

<sup>78</sup> See, e.g., *Erdoğan Yağız v. Turkey*, no. 27473/02, 6 March 2007: "47. The Court cannot discern any ground for accepting that it was necessary for the applicant to be seen in handcuffs during his arrest and the searches. It therefore considers that in the particular context of the case, exposing him to public view wearing handcuffs was intended to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his moral resistance. 48. In the light of these considerations, the Court concludes that, in the exceptional circumstances of the applicant's case, wearing handcuffs constituted degrading treatment in breach of Article 3 of the Convention".

<sup>79</sup> See *Colon v. Netherlands* (dec.), no. 49458/06, 15 May 2012, which concerned searches for the presence of weapons to tackle antisocial behaviour in particular areas of a city. The European Court emphasised that "Before a designation order is given, the Burgomaster must consult with the public prosecutor and the local police commander. Preventive search operations must be ordered by the public prosecutor, whose powers are defined by section 52(3) of the Arms and Ammunition Act. The public prosecutor must issue an order defining the area within which preventive searching is to be carried out. No single executive authority can therefore alone order a preventive search operation. Furthermore, the public prosecutor's order may be valid for no more than twelve hours, and is not renewable"; para. 93.

<sup>80</sup> See *Gillan and Quinton v. United Kingdom*, no. 4158/05, 12 January 2010, in which a power to stop and search persons in any area specified by a senior police officer within his jurisdiction if he or she "considers it expedient for the prevention of acts of terrorism". The European Court noted that "expedient" meant no more than "advantageous" or "helpful" and that there was "no requirement at the authorisation stage that the stop and search power be considered "necessary" and therefore no requirement of any assessment of the proportionality of the measure; (para. 80). Furthermore, it considered that "83. Of still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the Code. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer's decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the "hunch" or "professional intuition" of the officer

58. The conduct of a body search is likely to be regarded as humiliating and thus a violation of the prohibition on degrading treatment in Article 3 where the person concerned is forced to undress in public or in front of persons of the opposite sex, as well as where intimate searches are conducted without respect for his or her dignity.<sup>81</sup>
59. Furthermore, other than in cases of urgency, the examination of a child for medical evidence relating to an offence should not be occur without the consent of a parent or a court order where this has been refused.<sup>82</sup>

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concerned ... Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles. As noted by Lord Brown in the House of Lords, the stop and search power provided for by section 44 “radically ... departs from our traditional understanding of the limits of police power” ... 84. In this connection the Court is struck by the statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under section 44 of the Act. The Ministry of Justice recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8 ... In his Report into the operation of the Act in 2007, Lord Carlile noted that while arrests for other crimes had followed searches under section 44, none of the many thousands of searches had ever related to a terrorism offence; in his 2008 Report Lord Carlile noted that examples of poor and unnecessary use of section 44 abounded, there being evidence of cases where the person stopped was so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop. 85. In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics ... There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention. 86. The Government argue that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised”. See also *François v. France*, no. 26690/11, 23 April 2015, which concerned an altercation between Mr François – a lawyer who had been called to assist a minor who had been taken into police custody – and the custody officer on duty that arose following a dispute concerning the written observations he wished to add to the file. The officer, who claimed to be the victim of aggressive behaviour on the part of Mr François, decided to take him into police custody and also ordered a full-body search as well as a blood alcohol test, which proved negative. The European Court found a violation of Article 5(1) that placing Mr François in police custody and subjecting him to a full body search and a blood alcohol test had exceeded the security requirements and established an intention that was unconnected with the objective of police custody. It noted, moreover, that at the time, there were no regulations authorising a body search that went beyond mere frisking and that the alcohol test had been carried out even though there was no indication that Mr François had committed an offence under the influence of alcohol.

<sup>81</sup> See, e.g., *Valašinas v. Lithuania*, no. 44558/98, 24 July 2001 (“while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him”; para. 117).

<sup>82</sup> See *M A K and R K v. United Kingdom*, no. 45901/05, 23 March 2010, in which a violation of Article 8 was found where a blood test and intimate photographs were taken of a nine year old child – who was considered to be the victim of alleged sexual abuse contrary to her parents’ express instructions. The European Court stated that it did “not accept the Government's submission that there was a pressing social need to treat the second applicant's symptoms. There is no evidence to suggest that the second applicant's condition was critical, or that

60. Moreover, while the European Court accepts that ordering a psychiatric report in order to determine the mental state of a person charged with an offence was a necessary measure and one which protected individuals capable of committing offences without being in full possession of their mental faculties, it has emphasised the need for State authorities to ensure that such a measure does not upset the fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice.<sup>83</sup>
61. *There is thus a need to ensure that those carrying out search and seizure operations, as well as those who supervise them and judges involved in criminal proceedings fully appreciate the need for all the foregoing requirements to be observed in the course of deciding to seek and of conducting such operations.*

### C. Requirements to provide information and material

62. The creation and enforcement of obligations – whether for suspects or other persons - to provide information and material relevant to an investigation of a crime or the conduct of criminal proceedings not only has the potential to encroach upon the right to respect for private life and/or correspondence guaranteed by Article 8 of the European Convention but they can also, in certain circumstances result in violations of the prohibition on torture and inhuman and degrading treatment and of the right to a fair trial under Articles 3 and 6 respectively, as well as of the right to freedom of expression under Article 10 where journalists and media organisations are affected.
63. As with other coercive measures, there will always be a need for any requirement to provide such information and material to have a legal basis in the sense understood by the European Court, in particular as regards foreseeability and lack of arbitrariness. In determining whether or not the latter requirements have been fulfilled, the European Court will have regard to the nature and extent of the interference.<sup>84</sup>

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her situation was either deteriorating or was likely to deteriorate before her mother arrived. Moreover, it has not been suggested that she was in any pain or discomfort. Finally, there was no reason to believe that her mother would withhold consent, and even if she had, the hospital could have applied to the court for an order requiring the tests to be conducted. In the circumstances, the Court can find no justification for the decision to take a blood test and intimate photographs of a nine-year old girl, against the express wishes of both her parents, while she was alone in the hospital”; para. 79.

<sup>83</sup> See *Worwa v. Poland*, no. 26624/95, 27 November 2003, in which it held that: “83. In the present case the Court finds that that balance was not preserved. The judicial authorities within the territorial jurisdiction of a single court repeatedly and at short intervals summoned the applicant to undergo psychiatric examinations, and in addition she was sent home on several occasions after travelling to the specified place having been told that no appointment had been made for the day indicated on the summons. The Nowy Targ District Court was itself obliged to remind its own district prosecutor that he had participated in proceedings in which two separate decisions requiring the applicant to undergo psychiatric examinations had been given. 84. Ruling on an equitable basis, the Court, notwithstanding the large number of disputes in which the applicant was involved, considers that the judicial authorities failed to act with due diligence. The interference with the applicant’s exercise of her right to respect for her private life was therefore unjustified”.

<sup>84</sup> See, e.g., *P G and J H v. United Kingdom*, no. 44787/98, 25 September 2001; “46. ... In this case, the information obtained concerned the telephone numbers called from B.’s flat between two specific dates. It did

64. *There is thus a need to ensure that legal provisions imposing obligations to provide information and material are formulated in a manner that satisfies the foregoing requirements.*
65. Nonetheless, such a requirement – related to an investigation of a crime or the conduct of criminal proceedings – will be seen as serving a legitimate aim for the purpose of the European Convention.<sup>85</sup>
66. As a result, unless no legal basis for a requirement to provide information or material can be demonstrated, the focus of the attention of the European Court will be on whether or not the nature and extent of a specific requirement and its application in the particular circumstances of a case can be regarded as having been necessary in a democratic society, i.e., whether or not this has been disproportionate in either its nature or effect.
67. Thus, in the case of the provision of specific billing information about calls made by a person pursuant to an obligation imposed on telecommunication companies, it was significant for the finding that Article 8 had not been violated that the information required, as well as the use that could be made of it, was “strictly limited” in that this only concerned the telephone numbers called from a suspect’s flat between two specific dates and thus did not include any information about the contents of those calls or who made or received them.<sup>86</sup>

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not include any information about the contents of those calls, or who made or received them. The data obtained, and the use that could be made of them, were therefore strictly limited. 47. While it does not appear that there are any specific statutory provisions (as opposed to internal policy guidelines) governing storage and destruction of such information, the Court is not persuaded that the lack of such detailed formal regulation raises any risk of arbitrariness or misuse. Nor is it apparent that there was any lack of foreseeability. Disclosure to the police was permitted under the relevant statutory framework where necessary for the purposes of the detection and prevention of crime, and the material was used at the applicants’ trial on criminal charges to corroborate other evidence relevant to the timing of telephone calls. It is not apparent that the applicants did not have an adequate indication as to the circumstances in, and conditions on, which the public authorities were empowered to resort to such a measure. 48. The Court concludes that the measure in question was “in accordance with the law”. See also *G S B v. Switzerland*, no. 28601/11, 22 December 2015; “78. In the present case the Federal Court has constant case-law to the effect that the provisions on administrative and criminal mutual assistance requiring third parties to provide specific types of information are of a procedural nature and therefore apply, in principle, to all proceedings that are under way or are forthcoming, even where they concern tax years preceding their enactment ... The applicant, who was duly represented by a lawyer before the domestic authorities, could not realistically have been unaware of that judicial practice. Consequently, he cannot argue before the Court that the interference took place in a manner which was unforeseeable to him.79. Nor can it be claimed that the formerly restrictive practice of the Swiss authorities in matters of administrative mutual assistance in the tax field might have prompted the applicant to expect to be able to continue to invest his assets in Switzerland shielded from scrutiny by the competent US authorities, or even merely from the possibility of retroactive scrutiny (see, conversely, *Bigaeva v. Greece*, no. [26713/05](#), § 32, 28 May 2009). 80. Having regard to all the foregoing considerations, the impugned measure must be deemed to have been “in accordance with the law” within the meaning of Article 8 § 2 of the Convention”.

<sup>85</sup> In most instances the prevention of crime but a requirement to provide information or material might also serve other interests, such as those of national security, economic well-being and the protection of the rights of others.

<sup>86</sup> “49. The Court notes that the applicants have not sought to argue that the measure was not in fact justified, as submitted by the Government, as necessary for the protection of public safety, the prevention of crime and the protection of the rights of others. 50. The information was obtained and used in the context of an investigation

68. Similarly, in one case concerning the disclosure of information about a person's bank account – which was required pursuant to a request for mutual assistance to enable the requesting State to track down any assets concealed in the receiving State – the European Court emphasised that the requested information was “purely financial” and “in no way involved the transmission of intimate details or data closely linked to his identity, which would have merited enhanced protection”.<sup>87</sup> Furthermore, it underlined that there existed procedural safeguards in the form of a right of appeal to a court and that the exercise of this right had secured the individual concerned with a hearing before a renewed decision to grant the request was taken.<sup>88</sup>
69. Nonetheless, it should be noted that the object of the request in this case was to establish whether the individual had fulfilled his tax obligations and not as part of any criminal proceedings. In cases involving the latter, the need for more substantial protection will be necessary.
70. Thus, in the case of a similar order for disclosure that an individual who was not subject to the ongoing investigation in relation to which the letters rogatory for assistance had been made and in respect of whom no clear suspicions had been advanced, the fact that this had been decided by a judicial authority was insufficient given that it could not, or in any event, had failed to make any assessment as to the need for such a wide ranging order, or its impact on the multiple third parties concerned.<sup>89</sup> Furthermore, where criminal proceedings are involved there will be a need for an affected person to have “effective control” over the disclosure requirement in the sense of being able to challenge the measure to which he or she had been subjected and thus, subsequent to the implementation of the order concerned to have available to him or her some means for reviewing it.<sup>90</sup>
71. In this connection, it is also likely that due account will need to be taken of the obligations arising from the prohibition on self-incrimination discussed below.<sup>91</sup>

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into, and trial of, a suspected conspiracy to commit armed robberies. No issues of proportionality have been identified. The measure was accordingly justified under Article 8 § 2 as “necessary in a democratic society” for the purposes identified above”; *P G and J H v. United Kingdom*, no. 44787/98, 25 September 2001.

<sup>87</sup> *G S B v. Switzerland*, no. 28601/11, 22 December 2015, at para. 93.

<sup>88</sup> *Ibid*, at para. 96. A similar conclusion was reached in *Bernh Larsen Holding SA and Others v. Norway*, no. 24117/08, 14 March 2013 regarding the requirement to provide the backup copy of the server of the applicant companies for the purpose of a tax audit, notwithstanding that this included copies of personal e-mails and correspondence of employees and other persons working for the companies.

<sup>89</sup> *M N v. San Marino*, no. 28005/12, 7 July 2015, at para. 77.

<sup>90</sup> *Ibid*, at para. 78. In this case, the European Court found that the applicant, “who was not an accused person in the original criminal procedure, was at a significant disadvantage in the protection of his rights compared to an accused person, or the possessor of the banking or fiduciary institute, subject to the exequatur decision (and who were entitled to challenge it), with the result that the applicant did not enjoy the effective protection of national law. Thus, the Court finds that, despite the wide extent of the measure which had been applied extensively and across to all banking and fiduciary institutes in San Marino, the applicant did not have available to him the “effective control” to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was “necessary in a democratic society””; para. 83.

<sup>91</sup> See paras. 82-89 below.

72. The European Court has also accepted that a requirement for doctors to give evidence about a patient and to require her medical records to be included in the investigation file did not involve a violation of Article 8 where the object was exclusively to ascertain from her medical advisers when the defendant in criminal proceedings – who was at the material time her husband - had become aware of or had reason to suspect his HIV infection since that was relevant to whether a sexual assault could constitute the attempted manslaughter with which he had been charged.<sup>92</sup>
73. In considering the requirement to give evidence to be justified, the European Court underlined that this had been imposed by a court order and that all involved in the proceedings were under a duty to keep the information disclosed confidential.<sup>93</sup> Although the inclusion of the medical files in the investigation file had been ordered by the prosecutor rather than a court, it was considered significant that the legal conditions for this purpose were essentially the same as those for the orders on the doctors to give evidence, the inclusion of the records in the file could be challenged in court by the applicant and there was no basis to question the determination as to relevance of the material in the records.<sup>94</sup>
74. It is likely that the use of compulsion to require a journalist to identify his or her source – or to disclose documents or other material which might, upon examination, lead to such identification<sup>95</sup> - will be very hard to justify as the European Court is concerned that such compulsion might lead to the vital public-watchdog role of the press being undermined and the ability of the press to provide accurate and reliable information being adversely affected. As a result, an order of source disclosure will not be regarded as compatible with Article 10 of the European Convention unless it is justified by an overriding requirement in the public interest. This will not be regarded as having been established where its objective is to guard the integrity of the police<sup>96</sup>, to prevent the disclosure of confidential information by a disloyal employee<sup>97</sup> to recover copies of illegally disclosed documents where their destruction could be supervised<sup>98</sup>.
75. A disclosure requirement affecting journalists might, however, be capable of being justified where it can be demonstrated that the disclosure of the source is necessary to secure the fair trial for an accused person.<sup>99</sup>

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<sup>92</sup> *Z v. Finland*, no. 22009/93, 25 February 1997.

<sup>93</sup> *Ibid.*, at para. 103.

<sup>94</sup> *Ibid.*, at paras. 108-109. As regards a requirement to testify where there is a risk of incriminating oneself, see n. 113 below.

<sup>95</sup> The European Court does not consider the distinction between the two requirements to be crucial; see, e.g., *Financial Times Ltd. and Others v. United Kingdom*, no. 821/03, 15 December 2009, at para. 70. The material apart from documents could include film, photographs and voice recordings; see, e.g., *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010.

<sup>96</sup> See, e.g., *Voskuil v. Netherlands*, no. 64752/01, 22 November 2007, at paras. 68-72.

<sup>97</sup> See, e.g., *Goodwin v. United Kingdom* [GC], no. 17488/90, 27 March 1996 and *Financial Times Ltd. and Others v. United Kingdom*, no. 821/03, 15 December 2009.

<sup>98</sup> See *Telegraaf Media Nederland Landelijke B.V. and Others v. Netherlands*, no. 39315/06, 22 November 2012, at para. 131.

<sup>99</sup> However, this was not established in *Voskuil v. Netherlands*, no. 64752/01, 22 November 2007; “67. The Court sees no need on this occasion to consider whether under any conditions a Contracting Party's duty to

76. Furthermore, a requirement for a journalist to disclose research material that does not entail the possible identification of his or her sources where this could assist the investigation and production of evidence in a case will not be incompatible with Article 10, so long as this was not disproportionate to that legitimate aim.<sup>100</sup> Moreover, a requirement to hand over a letter to a magazine from a person claiming to have carried out three bomb attacks, the contents of which it had subsequently published, has not been regarded as either affecting a journalistic source or as being incompatible with Article 10 given that the original document was sought as a possible lead towards identifying a person or persons unknown who were suspected of having carried out a plurality of bomb attacks.<sup>101</sup>
77. Nonetheless, even where there might be a reason for ordering the disclosure of information relating to a journalist's source that is compatible with Article 10, it will be essential other than in situations of urgency - that there should be prior judicial authorisation for such an order since judicial review *post factum* would not be capable of preventing the disclosure of the identity of the journalistic sources where the supposed reason is found to be invalid.<sup>102</sup>

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provide a fair trial may justify compelling a journalist to disclose his source. Whatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant, the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant ... That being so, this reason given for the interference complained of lacks relevance". The European Court has, however, found that a requirement for a journalist to testify regarding his contact with a person who has identified himself as the source for an article where the prosecutor considered that the case against the latter for market manipulation could be sufficiently elucidated without the former's testimony; *Becker v. Norway*, no. 21272/12, 5 October 2017, at paras. 78-84.

<sup>100</sup> See *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, 8 December 2005. The material concerned film taken by a journalist working undercover by a journalist of two persons known to the police who were unaware that they were being recorded, as well as various notes. The disclosure requirement specifically excluded material concerning journalistic sources in the traditional sense.

<sup>101</sup> *Stichting Ostade Blade v. Netherlands* (dec.), no. 8406/06, 27 May 2014; "65. In the present case the magazine's informant was not motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant, identified in 2006 as T. ... was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not, in principle, entitled to the same protection as the "sources" in cases like *Goodwin*, *Roemen* and *Schmit*, *Ernst and Others*, *Voskuil*, *Tillack*, *Financial Times*, *Sanoma*, and *Telegraaf* ... 69. Turning now to the question of "necessity in a democratic society", the Court notes that the original document received by the editorial board of the magazine *Ravage* was sought as a possible lead towards identifying a person or persons unknown who were suspected of having carried out a plurality of bomb attacks. 70. The Court is not persuaded by the applicant foundation's argument that these attacks had caused damage only to property. Nor does it see the relevance of the question whether these attacks could be labelled "terrorist" or not. It cannot but have regard to the inherent dangerousness of the crimes committed, which in its view constitutes sufficient justification for the investigative measures here in issue. At all events, the dangerousness of the perpetrator in the present case is sufficiently demonstrated, if further proof be needed, by his subsequent conviction of other crimes including bank robbery, arson and murder ... 71. Nor can it be decisive that the statement claiming responsibility for the bomb attack in April 1996 was quoted literally and in its entirety, as the applicant foundation alleges, or that other investigatory leads were available, as the applicant foundation insinuates. Even assuming such to be the case, the Court cannot find that the original document, whether on its own or in conjunction with other evidence, was incapable of yielding useful information. Indeed, if that be so then it cannot be seen what prevented the editors of the magazine from handing it over of their own accord".

<sup>102</sup> See *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010, at para. 99 and *Telegraaf Media Nederland Landelijke B.V. and Others v. Netherlands*, no. 39315/06, 22 November 2012, at para. 99.



78. The role of the judge should be to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.<sup>103</sup> In urgent cases, the European Court considers that "a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk".<sup>104</sup>
79. However, a lawyer should not be required to disclose information covered by legal professional privilege as that would strike at "the very essence of the lawyer's defence role".<sup>105</sup> Nonetheless, a requirement - supported by the liability to disciplinary action - for lawyers to report suspicious operations by people who come to them for advice would not be incompatible with Article 8 where this concerns tasks other than those relating to the defence of their clients - except where they are taking part in money-laundering activities, their legal advice is provided for money-laundering purposes or they know that the client is seeking legal advice for money-laundering purposes - and sufficient safeguards are in place.<sup>106</sup>

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<sup>103</sup> "Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources"; *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010, at para. 92. In both this case and the *Telegraaf Media* one, it was insufficient that the advice of an investigating judge had been sought by the prosecutor making the order as there was no legal basis for this involvement and, more importantly, it was not open to this judge to issue, reject or allow a request for an order, or to qualify or limit such an order as appropriate.

<sup>104</sup> *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010, at para. 92.

<sup>105</sup> *Michaud v. France*, no. 12323/11, 6 December 2012, at para. 128.

<sup>106</sup> "123. It is true that, as previously indicated, legal professional privilege is of great importance for both the lawyer and his client and for the proper administration of justice. It is without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based. It is not, however, inviolable, and the Court has already found that it may have to give way, for example, to the lawyer's right to freedom of expression ... Its importance should also be weighed against that attached by the member States to combating the laundering of the proceeds of crime, which are likely to be used to finance criminal activities linked to drug trafficking, for example, or international terrorism ... 124. As to the applicant's argument that the obligation to report is not necessary because any lawyer found to be involved in a money-laundering operation would in any event be liable to criminal proceedings, the Court is not indifferent to it. It considers, however, that that argument does not prevent a State or a group of States from combining the repressive provisions they have adopted with a specifically preventive mechanism ... 126. Lastly, and above all, two factors are decisive in the eyes of the Court in assessing the proportionality of the interference. 127. Firstly, as stated above and as the Conseil d'Etat noted, the fact that lawyers are subject to the obligation to report suspicions only in two cases: where, in the context of their business activity, they take part for and on behalf of their clients in financial or real-estate transactions or act as trustees; and where they assist their clients in preparing or carrying out transactions concerning certain defined operations (the buying and selling of real estate or businesses; the management of funds, securities or other assets belonging to the client; the opening of current accounts, savings accounts, securities accounts or insurance policies; the organisation of the contributions required to create companies; the formation, administration or management of companies; the formation, administration or management of trusts or any other similar structure; and the setting-up or management of endowment funds). The obligation to report suspicions therefore only concerns tasks performed by lawyers, which are similar to

80. *There is thus a need to ensure that those seeking and authorising obligations to provide information and material understand the need to demonstrate the relevance of what is to be sought and that this is proportionate in its extent. In addition, there ought to be appropriate procedural safeguards to ensure that legal professional privilege and the protection required for journalistic sources are respected.*

81. Furthermore, it does seem that the European Court is likely to accept some obligation being imposed on telecommunication companies and internet service providers to disclose the identity of their users where this can be shown to be necessary for the alleged perpetrator of offences such as those threatening a person's physical or moral integrity or involving the use of as hate speech to be identified and brought to justice. In imposing such an obligation, both the legal framework and the requirement in a particular case will, of course, need to take account of the rights that the alleged perpetrator has both to respect for his or her private life and correspondence and to freedom of expression.<sup>107</sup>

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those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients. Furthermore, the Monetary and Financial Code specifies that lawyers are not subjected to the obligation where the activity in question "relates to judicial proceedings, whether the information they have was received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, nor where they give legal advice, unless said information was provided for the purpose of money-laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money-laundering or terrorist financing" ...128. The obligation to report suspicions does not therefore go to the very essence of the lawyer's defence role which, as stated earlier, forms the very basis of legal professional privilege. 129. The second factor is that the legislation has introduced a filter which protects professional privilege: lawyers do not transmit reports directly to the FIU but, as appropriate, to the President of the Bar Council of the Conseil d'Etat and the Court of Cassation or to the Chairman of the Bar of which the lawyer is a member. It can be considered that at this stage, when a lawyer shares information with a fellow professional who is not only subject to the same rules of conduct but also elected by his or her peers to uphold them, professional privilege has not been breached. The fellow professional concerned, who is better placed than anybody to determine which information is covered by lawyer-client privilege and which is not, transmits the report of suspicions to the FIU only after having ascertained that the conditions laid down by Article L. 561-3 of the Monetary and Financial Code have been met ... The Government pointed out in this regard that the information is not forwarded if the Chairman of the Bar considers that there is no suspicion of money-laundering or it appears that the information reported was received in the course of activities excluded from the scope of the obligation to report suspicions. 130. The Court has already pointed out that the role played by the Chairman of the Bar constitutes a guarantee when it comes to protecting legal professional privilege ...131. In the light of the above considerations, the Court considers that, regard being had to the legitimate aim pursued and the particular importance of that aim in a democratic society, the obligation for lawyers to report suspicions, as practised in France, does not constitute disproportionate interference with the professional privilege of lawyers"; *Michaud v. France*, no. 12323/11, 6 December 2012.

<sup>107</sup> See *K U v. Finland*, no. 2872/02, 2 December 2008, which concerned the absence of a remedy for a 12 year old who had been the subject of an advertisement of a sexual nature on an Internet dating site where the law did not provide for the possibility of obtaining the identity of the person who had placed it from the Internet service provider. In finding a violation of the child's rights under Article 8, the European Court considered that: "practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case, such protection was not afforded. An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not, however, in place at the

82. However, a requirement to provide information or material should not be imposed where this would breach the right not to incriminate oneself, which the European Court considers to “lie at the heart of the notion of a fair procedure under Article 6” even though not specifically mentioned in it.<sup>108</sup>
83. A person will be regarded as incriminating him or herself not only where the statement or document concerns involves an admission of wrongdoing or is otherwise directly incriminating but also where it is exculpatory or provides information which can then be later deployed in criminal proceedings in support of the prosecution cases, e.g., to contradict or cast doubt upon other statements of the accused or evidence given by him or her during the trial or to undermine his or her credibility in some other way.<sup>109</sup>
84. It has not been possible to claim that the right not to incriminate oneself has been extinguished by the public interest in tackling complex frauds<sup>110</sup>, addressing security and public order concerns<sup>111</sup> or seeking to recover debt<sup>112</sup>.
85. The right not to incriminate oneself will be breached by any requirement to hand over evidence, to make a statement or to provide information (including to testify in court<sup>113</sup>) that is backed by criminal penalties for non-compliance with it<sup>114</sup>, as well as

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material time, with the result that Finland’s positive obligation with respect to the applicant could not be discharged”; para. 49. See also *Delfi AS v. Estonia* [GC], no. 64659/09, 16 June 2005, in which a factor in concluding that the imposition of civil liability on the owner of a news portal for hate speech posted on it was its failure to assist in identifying the author concerned.

<sup>108</sup> *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996, at para. 68.

<sup>109</sup> See, e.g., *Saunders v. United Kingdom*, at para. 71, *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010, at para. 54 and *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016, at para. 268.

<sup>110</sup> See *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996, in which the European Court stated that it “does not accept the Government’s argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings”; para. 74.

<sup>111</sup> See *Heaney and McGuinness v. Ireland*, no. 34720/91, 21 December 2000; “the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention” (para. 58).

<sup>112</sup> See *Marttinen v. Finland*, no. 19235/03, 21 April 2009; “the concerns for the effective functioning of the debt recovery procedure relied on by the Finnish Government cannot justify a provision which extinguishes the very essence of the applicant’s rights to silence and against self-incrimination guaranteed by the Convention” (para. 75).

<sup>113</sup> However, the right to incriminate oneself does not justify a refusal to testify as such but only not to answer questions that might lead to self-incrimination; “It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction. It appears, however, from the interview records, which the applicant signed, that he refused at the outset to take the oath. Yet the oath is a solemn act whereby the person concerned undertakes before the investigating judge to tell, in the terms of Article 103 of the Code of Criminal

by the use in criminal proceedings of testimony given under such compulsion even though this had occurred in a different context<sup>115</sup> and by a requirement to make a statement under oath before answering the questions of the police which then exposed the person concerned to the risk of criminal proceedings for perjury<sup>116</sup>.

86. However, a requirement to state a simple fact – backed by criminal penalties for non-compliance - where no proceedings were actually pending against the person concerned<sup>117</sup> or where the fact was only one element in the offence concerned and there was no question of a conviction arising in the underlying proceedings in respect solely of the information thereby obtained<sup>118</sup>.

87. In addition, this right is also likely to be violated where physical or psychological pressure is used to obtain real evidence or statements. Certainly, the European Court has found such a violation to have occurred where a suspect has made a statement after having been subjected to prolonged questioning without access to a lawyer<sup>119</sup>,

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Procedure, “the whole truth and nothing but the truth”. Whilst a witness’s obligation to take the oath and the penalties imposed for failure to do so involve a degree of coercion, the latter is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence. In other words, the fines imposed on Mr Serves did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose” (*Serves v. France*, no. 20225/92, 20 October 1997, at para. 47).

<sup>114</sup> See, e.g., *Funke v. France*, no. 10828/84, 25 February 1993 (an accumulating liability to pay fines for refusing to produce statements for bank accounts held by the applicant outside the country), *Heaney and McGuinness v. Ireland*, no. 34720/91, 21 December 2000 (imprisonment for failure to provide information about the applicants’ whereabouts at a particular time), *J B v. Switzerland*, no. 31827/96, 3 May 2001 (an accumulating liability to pay fines for refusing to submit documents which would have provided information as to the applicant’s income with a view to the assessment of his taxes in connection with tax-evasion proceedings instituted against him), *Shannon v. United Kingdom*, no. 6563/03, 4 October 2005 (imprisonment or fine for failure to attend an interview and give information to financial investigators seeking to trace the proceeds of crime in connection with events in respect of which the applicant had already been charged with offences) and *Martinen v. Finland*, no. 19235/03, 21 April 2009 (a fine for failure to submit information about assets in debt recovery proceedings which could have led to the applicant incriminating himself of the debtor’s fraud for which he was under investigation).

<sup>115</sup> Such as in *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996, which concerned an administrative investigation into share dealing under which refusal to provide information could be punished by fine or imprisonment.

<sup>116</sup> See *Brusco v. France*, no. 1466/07, 14 October 2010.

<sup>117</sup> See, e.g., *Weh v. Austria*, no. 38544/97, 8 April 2004, which concerned a requirement to disclose the identity of a car’s driver in connection with proceedings against unknown persons for speeding

<sup>118</sup> *O’Halloran and Francis v. United Kingdom* [GC], no. 15809/02, 28 June 2007, which also concerned a requirement to disclose the identity of a car’s driver in connection with proceedings against its registered keeper for speeding.

<sup>119</sup> As in *Magee v. United Kingdom*, no. 28135/95, 6 June 2000; “43. The Court observes that prior to his confession the applicant had been interviewed on five occasions for extended periods punctuated by breaks. He was examined by a doctor on two occasions including immediately before the critical interview at which he began to confess. Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant’s submission that he was kept in virtual solitary confinement throughout this period. The Court has examined the findings and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) in respect of the Castlereagh Holding Centre ... It notes that the criticism which the CPT levelled against the Centre has been reflected in other public documents ... The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators. Irrespective of the fact that the

has been recorded making admissions to his cell mate where the latter had persistently questioned about the alleged offence pursuant to coaching for this purpose by the police<sup>120</sup>, made a confession as a result of having been subjected to torture<sup>121</sup> or inhuman treatment<sup>122</sup> and has been subjected to a significant degree of physical compulsion that amounts to a violation of Article 3 of the European Convention in order to regurgitate something that has been swallowed<sup>123</sup>.

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domestic court drew no adverse inferences under Article 3 of the 1988 Order, it cannot be denied that the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention. 44. In the Court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 ... 45. It is true that the domestic court found on the facts that the applicant had not been ill-treated and that the confession which was obtained from the applicant had been voluntary. The Court does not dispute that finding. At the same time, it has to be noted that the applicant was deprived of legal assistance for over forty-eight hours and the incriminating statements which he made at the end of the first twenty-four hours of his detention became the central platform of the prosecution's case against him and the basis for his conviction. 46. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c) thereof as regards the denial of access to a solicitor”.

<sup>120</sup> As in *Allan v. United Kingdom*, no. 48539/99, 11 July 2006; “52. In the present case, the Court notes that in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. and instructed him to “push him for what you can”. In contrast to the position in *Khan*, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the “voluntariness” of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination”.

<sup>121</sup> See, e.g., *Leviņa v. Moldova*, no. 17332/03, 16 December 2008.

<sup>122</sup> See, e.g., *Söylemez v. Turkey*, no. 46661/99, 21 September 2006.

<sup>123</sup> As in *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006. In this case, the European Court emphasised the importance of the following factors in determining whether or not there was a violation of the right not to incriminate oneself: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put. It held that “118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3. 119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity. 120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out *lege artis*

88. Nonetheless, the right not to incriminate oneself will not be violated where the compulsion involved in obtaining material from a suspect only requires a minor interference with his or her physical integrity to be passively endured (such as when blood or hair samples or bodily tissue are taken) or any active participation on his or her part only concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples).<sup>124</sup>
89. *There is thus a need to ensure that obligations to provide information and material are formulated and applied in a manner consistent with the right not to incriminate oneself.*
90. It should also be noted that the European Court considers that a trial will be rendered unfair where any real evidence has been obtained as a result of acts of violence which can be characterised as to, irrespective of its probative value.<sup>125</sup> However, it has left open the question whether that will also be the automatic consequence of obtaining

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by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it. 121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law. 122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair".

<sup>124</sup> See *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, at paras. 112-114. However, although in the *Jalloh* drugs hidden in a person's body - which were obtained by the forcible administration of emetics - could be considered to fall into the category of material having an existence independent of the will of the suspect, the European Court found the right not to incriminate oneself applicable in this case by reference to three factors; "113. Firstly, as with the impugned measures in *Funke and J.B. v. Switzerland*, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in *Saunders* concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs. 114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health. 115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences ...".

<sup>125</sup> See *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, at para. 166.

real evidence by an act that can only be classified as inhuman and degrading treatment.<sup>126</sup>

#### D. Surveillance measures

91. The undertaking of surveillance measures such as the interception of communication, eavesdropping and audio and video-recording – as well as through the use of tracking devices - will necessarily constitute an interference with the right to respect for private life, home and correspondence under Article 8 of the European Convention to the same extent as those three concepts have been understood with regard to searches.<sup>127</sup>
92. However, that does not mean that such measures will necessarily entail a violation of that provision as the interference to the right caused will be justified if they are “in accordance with the law”, pursue one or more of the legitimate aims referred to in paragraph 2 of this provision – notably the prevention of crime - and are “necessary in a democratic society” in order to achieve the aim or aims pursued.
93. In many instances the European Court has found surveillance measures to be in violation of Article 8 simply because there was no legal basis at all for undertaking them, whether or at all<sup>128</sup> or because the limits specified in the authorisation given under the relevant provision had not been observed<sup>129</sup>.

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<sup>126</sup> See *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, at paras. 107-108 and *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, at para. 167. See n.123 above for the factors that were considered significant in the *Jalloh* case for rendering the trial unfair. In the *Gäfgen* case the European Court found that the conviction had not required recourse to the impugned real evidence as necessary proof of his guilt and so, as the applicant’s defence rights and his right not to incriminate himself had been respected, his trial as a whole must be considered to have been fair.

<sup>127</sup> See paras. 10-14 above. Thus, Article 8 will apply to the surveillance of the premises of a business (*Amann v. Switzerland* [GC], no. 27798/95, 16 February 2000) or a lawyer (*Kopp v. Switzerland*, no. 23224/94, 25 March 1998), as well as of particular persons working in them where they have a reasonable expectation of privacy (see, e.g., *Halford v. United Kingdom*, no. 20605/92, 25 June 1997 and *Copland v. United Kingdom*, no. 62617/00, 3 April 2007). As regards tracking through the use of a Global Positioning Receiver as an interference with respect for private life, see *Uzun v. Germany*, no. 35623/05, 2 September 2010, paras. 49-53.

<sup>128</sup> See, e.g., *Malone v. United Kingdom*, no. 8691/79, 2 August 1984 (telephone communications), *Khan v. United Kingdom*, no. 35394/97, 12 May 2000, *Chalkley v. United Kingdom*, no. 63831/00, 12 June 2003 and *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009 (covert listening devices) and *Copland v. United Kingdom*, no. 62617/00, 3 April 2007 (telephone, e-mail and Internet usage).

<sup>129</sup> See, e.g., *A v. France*, no. 14838/89, 23 November 1993 (the interception had not been effected pursuant to a judicial procedure and had not been ordered by an investigating judge), *Perry v. United Kingdom*, no. 63737/00, 17 July 2003 (a failure to comply with the procedures governing covert video-recording), *Heglas v. Czech Republic*, no. 5935/02, 1 March 2007 (the telephone calls intercepted included ones in the two days preceding the date of the interception order), *Kvasnica v. Slovakia*, no. 72094/01, 9 June 2009 (“it has not been shown that the guarantees were met relating to the duration of the interference, whether there had been judicial control of the interception on a continuous basis, whether the reasons for the use of the devices remained valid, whether in practice measures were taken to prevent the interception of telephone calls between the applicant as a lawyer and criminal defendants as his clients. Similarly it has not been shown that the interference restricted the inviolability of applicant’s home, the privacy of his correspondence and the privacy of information communicated only to an extent that was indispensable and that the information thus obtained was used exclusively for attaining the aim set out in section 36(1) of the Police Corps Act 1993”; para.86), *Mikhaylyuk and Petrov v. Ukraine*, no. 11932/02, 10 December 2009 (“The Court notes that those legislative provisions provided for the screening of correspondence of a particular category of persons, namely, persons held in pre-trial detention or serving their sentences in penitentiary institutions ... In this context, the Court observes that

94. *It will therefore be particularly important to ensure that the relevant legal provision take account of developments in the technology being used for the purpose of surveillance and provide authorisation for the means actually used.*
95. Furthermore, the need for a legal basis applies not only to surveillance undertaken by law enforcement officials but also to that by private individuals where they act either under the direction of those officials<sup>130</sup> or with their technical assistance<sup>131</sup>.
96. *There is thus a need to ensure that those authorising and conducting surveillance operations fully appreciate the requirements applicable under the European Convention where they involve private individuals in those operations.*
97. As with searches, it is not sufficient that there be a formal legal basis for surveillance measures to be regarded by the European Court as being “in accordance with the

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the applicant did not belong to that category of persons. Given the purpose and wording of the above legislative provisions, they were not applicable to the applicants, having regard to the mere fact that the applicants were not detained in the colony. The domestic courts' conclusions to the contrary were not supported by any reasonable explanation”; paras. 26-27) and *Karabeyoğlu v. Turkey*, no. 30083/10, 7 June 2016 (use in connection with disciplinary as opposed to criminal proceedings).

<sup>130</sup> See, e.g., *A v. France*, no. 14838/89, 23 November 1993 and *M M v. Netherlands*, no. 39339/98, 8 April 2003.

<sup>131</sup> See, e.g., *Van Vondel v. Netherlands*, 38258/03, 25 October 2007; “53. Although the Court understands the practical difficulties for an individual who is or who fears to be disbelieved by investigation authorities to substantiate an account given to such authorities and that – for that reason – such a person may need technical assistance from these authorities, it cannot accept that the provision of that kind of assistance by the authorities is not governed by rules aimed at providing legal guarantees against arbitrary acts. It is therefore of the opinion that, in respect of the interference complained of, the applicant was deprived of the minimum degree of protection to which he was entitled under the rule of law in a democratic society”. Surveillance undertaken by private individuals and companies without any involvement by public authorities can also raise issues of compliance with Article 8 where a fair balance is not struck between the competing interests. In *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010 the covert video surveillance of an employee after losses had been detected during stocktaking and irregularities had been discovered in the accounts of the drinks department in which she worked was not considered problematic given the arguable suspicion of theft committed by her and another employee, who alone were targeted by the surveillance measure, the limited duration and extent of the surveillance and the limitation on the use of the data obtained for the purpose only of terminating her employment. On the other hand, in *Vukota-Bojić v. Switzerland*, no. 61838/10, 18 October 2016 the surveillance of the applicant – who was suspected of a medical insurance fraud – in the form of following her and the production of a detailed monitoring of her activities over several days was – notwithstanding the minor nature of the interference – to amount to a violation of Article 8 as the European Court did “not consider that the domestic law indicated with sufficient clarity the scope and manner of exercise of the discretion conferred on insurance companies acting as public authorities in insurance disputes to conduct secret surveillance of insured persons. In particular, it did not, as required by the Court’s case-law, set out sufficient safeguards against abuse”; para. 77. See also *Barbulescu v. Romania* [GC], no. 61496/08, 5 September 2017, in which the monitoring of an employee’s communications over the Internet, the European Court found that there had not been adequate protection of the applicant’s right to respect for his private life and correspondence. In its view, there had been a failure “to determine, in particular, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored; nor did they have regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or to the degree of intrusion into his private life and correspondence. In addition, they failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant’s private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge”; para. 140. This case law points to the need for similar safeguards to be in place whether or not surveillance is undertaken by public authorities or by private individuals and companies.



law”. It is also essential that the law concerned meets the requirements of accessibility and foreseeability.

98. As regards the former requirement, the European Court has sometimes considered that it will be fulfilled if the legal provisions are in practice accessible, even if not officially published.<sup>132</sup>

99. In seeking compliance with the latter requirement, the European Court is concerned that the relevant provisions ensure both that there is sufficient clarity as to the scope or manner in which any discretion conferred may be exercised and that there are sufficient safeguards against abuse.

100. In order for this to be achieved, it is now established<sup>133</sup> that the legislation must specify:

- the categories of persons and communications affected<sup>134</sup>;
- the offences for which the measure may be used<sup>135</sup>;
- the basis for applying such measures<sup>136</sup>;

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<sup>132</sup> Thus, in *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 it stated that “The publication of the Order in the Ministry of Communications’ official magazine SvyazInform, distributed through subscription, made it available only to communications specialists rather than to the public at large. At the same time, the Court notes that the text of the Order, with the addendums, can be accessed through a privately-maintained internet legal database, which reproduced it from the publication in SvyazInform ... The Court finds the lack of a generally accessible official publication of Order no. 70 regrettable. However, taking into account the fact that it has been published in an official ministerial magazine, combined with the fact that it can be accessed by the general public through an internet legal database, the Court does not find it necessary to pursue further the issue of the accessibility of domestic law”; para. 242. Cf. *Mikhaylyuk and Petrov v. Ukraine*, no. 11932/02, 10 December 2009, in which the European Court observed that “As regards the instructions on dealing with correspondence by the organs of the Ministry of the Interior and the State Department for Execution of Sentences, on which the courts also relied in the applicants’ case, the Court notes that those instructions were internal and unpublished and, thus, not accessible to the public, including the applicants”; para. 28.

<sup>133</sup> See, e.g., *Huvig v. France*, no. 11105/84, 24 April 1990, *Kruslin v. France*, no. 11801/85, 24 April 1990, *Valenzuela Contreras v. Spain*, no. 27671/95, 30 July 1998, *Lavents v. Latvia*, no. 58442/00, 28 November 2002, *Prado Bugallo v. Spain*, no. 58496/00, 18 February 2003, *Narinen v. Finland*, no. 45027/98, 1 June 2004, *Weber and Saravia v. Germany* (dec.), no.54934/00, 29 June 2006, *Dumitru Popescu v. Romania* (No. 2), no. 71525/01, 26 April 2007, *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, 28 June 2007, *Liberty and Others v. United Kingdom*, no. 58243/00, 1 July 2008, *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, *Kennedy v. United Kingdom*, no. 26839/05, 18 May 2010, *Sefilyan v. Armenia*, no. 22491/08, 2 October 2012, *Dragojević v. Croatia*, no. 68955/11, 15 January 2015, *R E v. United Kingdom*, no. 62498/11, 27 October 2015, *Roman Zakharov v. Russia* [GC], *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016, *Bašić v. Croatia*, no. 22251/13, 25 October 2016 and *Matanović v. Croatia*, no. 2742/12, 4 April 2017.

<sup>134</sup> These need to be clearly defined. Thus, in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, the European Court observed that it was “unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance, protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define “national security”, “public order”, “protection of health”, “protection of morals”, “protection of the rights and interests of others”, “interests of ... the economic situation of the country” or “maintenance of legal order” for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds” (para. 46).

<sup>135</sup> These should not apply to all or even the majority of offences. Thus, in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, the European Court noted that “more than one half of the offences provided for in the Criminal Code fall within the category of offences eligible for interception warrants” (para. 44).

- the maximum duration of any measure<sup>137</sup>;
- the procedure for examining, using and storing the data gathered<sup>138</sup>;
- the permitted use of and access to the material gathered<sup>139</sup>;
- the circumstances in which the material will be destroyed or erased<sup>140</sup>; and

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<sup>136</sup> The European Court has considered it necessary to stress that “telephone tapping is a very serious interference with a person's rights and that only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it. The Court notes that the Moldovan legislation does not elaborate on the degree of reasonableness of the suspicion against a person for the purpose of authorising an interception. Nor does it contain safeguards other than the one provided for in section 6(1), namely that interception should take place only when it is otherwise impossible to achieve the aims”; *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, para. 51.

<sup>137</sup> This should not be overly long; in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, the European Court observed that “While the Criminal Code imposes a limitation of six months ..., there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months' period” (para. 45). See also *Volokhy v. Ukraine*, no. 23543/02, 2 November 2006; “53. In the instant case, the Court observes that the review of the decision on interception of correspondence under Article 187 of the Code of Criminal Procedure was foreseen at the initial stage, when the interception of correspondence was first ordered. The relevant legislation did not provide, however, for any interim review of the interception order in reasonable intervals or for any time-limits for the interference. Neither did it require or authorise more involvement of the courts in supervising interception procedures conducted by the law-enforcement authorities. As a result, the interception order in the applicants' case remained valid for more than one year after the criminal proceedings against their relative Mr V. had been terminated and the domestic courts did not react to this fact in any way”.

<sup>138</sup> Thus, in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, the European Court observed that “47. As to the second stage of the procedure of interception of telephone communications, it would appear that the investigating judge plays a very limited role. According to Article 41 of the Code of Criminal Procedure, his role is to issue interception warrants. According to Article 136 of the same Code, the investigating judge is also entitled to store “the original copies of the tapes along with the complete written transcript ... in a special place in a sealed envelope” and to adopt “a decision regarding the destruction of records which are not important for the criminal case”. However, the law makes no provision for acquainting the investigating judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with. On the contrary, section 19 of the Law on Operational Investigative Activities appears to place such supervision duties on the “Prosecutor General, his or her deputy, and the municipal and county prosecutors”. Moreover, in respect of the actual carrying out of surveillance measures in the second stage, it would appear that the interception procedure and guarantees contained in the Code of Criminal Procedure and in the Law on Operational Investigative Activities are applicable only in the context of pending criminal proceedings and do not cover the circumstances enumerated above. 48. Another point which deserves to be mentioned in this connection is the apparent lack of regulations specifying with an appropriate degree of precision the manner of screening the intelligence obtained through surveillance, or the procedures for preserving its integrity and confidentiality and the procedures for its destruction (see, as examples a contrario, *Weber and Saravia*, cited above, §§ 45-50)”.

<sup>139</sup> Thus, in *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, the European Court observed that “Russian law stipulates that data collected as a result of secret surveillance measures constitute a State secret and are to be sealed and stored under conditions excluding any risk of unauthorised access. They may be disclosed to those State officials who genuinely need the data for the performance of their duties and have the appropriate level of security clearance. Steps must be taken to ensure that only the amount of information needed by the recipient to perform his or her duties is disclosed, and no more. The official responsible for ensuring that the data are securely stored and inaccessible to those without the necessary security clearance is clearly defined (see paragraphs 51 to 57 above). Domestic law also sets out the conditions and procedures for communicating intercepted data containing information about a criminal offence to the prosecuting authorities. It describes, in particular, the requirements for their secure storage and the conditions for their use as evidence in criminal proceedings (see paragraphs 58 to 64 above). The Court is satisfied that Russian law contains clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure”; para. 253

<sup>140</sup> Thus, in *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, the European Court found that “254. As far as the destruction of intercept material is concerned, domestic law provides that intercept material must be destroyed after six months of storage, if the person concerned has not been charged with a criminal offence. If the person has been charged with a criminal offence, the trial judge must make a decision, at the end of the

- the arrangements for record-keeping<sup>141</sup> and independent supervision.<sup>142</sup>

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criminal proceedings, on the further storage and destruction of the intercept material used in evidence ...255. As regards the cases where the person concerned has not been charged with a criminal offence, the Court is not convinced by the applicant's argument that Russian law permits storage of the intercept material beyond the statutory time-limit ... It appears that the provision referred to by the applicant does not apply to the specific case of storage of data collected as a result of interception of communications. The Court considers the six-month storage time-limit set out in Russian law for such data reasonable. At the same time, it deplores the lack of a requirement to destroy immediately any data that are not relevant to the purpose for which they have been obtained (compare *Klass and Others*, cited above, § 52, and *Kennedy*, cited above, § 162). The automatic storage for six months of clearly irrelevant data cannot be considered justified under Article 8. 256. Furthermore, as regards the cases where the person has been charged with a criminal offence, the Court notes with concern that Russian law allows unlimited discretion to the trial judge to store or to destroy the data used in evidence after the end of the trial ... Russian law does not give citizens any indication as to the circumstances in which the intercept material may be stored after the end of the trial. The Court therefore considers that the domestic law is not sufficiently clear on this point".

<sup>141</sup> See, e.g., *Shimovolos v. Russia*, no. 30194/09, 21 June 2011; "69. Turning to the present case, the Court observes that the creation and maintenance of the Surveillance Database and the procedure for its operation are governed by ministerial order no. 47 ... That order is not published and is not accessible to the public. The grounds for registration of a person's name in the database, the authorities competent to order such registration, the duration of the measure, the precise nature of the data collected, the procedures for storing and using the collected data and the existing controls and guarantees against abuse are thus not open to public scrutiny and knowledge".

<sup>142</sup> In *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009 the European Court noted that "overall control of the system of secret surveillance is entrusted to the Parliament which exercises it through a specialised commission (see section 18 of the Law on Operational Investigative Activities). However, the manner in which the Parliament effects its control is not set out in the law and the Court has not been presented with any evidence indicating that there is a procedure in place which governs the Parliament's activity in this connection" (para. 49). Furthermore, in *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 it stated that "277. As regards supervision of interceptions by prosecutors, the Court observes that the national law sets out the scope of, and the procedures for, prosecutors' supervision of operational-search activities ... It stipulates that prosecutors may carry out routine and ad hoc inspections of agencies performing operational-search activities and are entitled to study the relevant documents, including confidential ones. They may take measures to stop or remedy the detected breaches of law and to bring those responsible to liability. They must submit semi-annual reports detailing the results of the inspections to the Prosecutor General's Office. The Court accepts that a legal framework exists which provides, at least in theory, for some supervision by prosecutors of secret surveillance measures. It must be next examined whether the prosecutors are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise effective and continuous control. 278. As to the independence requirement, in previous cases the Court has taken into account the manner of appointment and the legal status of the members of the supervisory body. In particular, it found sufficiently independent the bodies composed of members of parliament of both the majority and the opposition, or of persons qualified to hold judicial office, appointed either by parliament or by the Prime Minister (see, for example, *Klass and Others*, cited above, §§ 21 and 56; *Weber and Saravia*, cited above, §§ 24, 25 and 117; *Leander*, cited above, § 65; (see *L. v. Norway*, no. [13564/88](#), Commission decision of 8 June 1990); and *Kennedy*, cited above, §§ 57 and 166). In contrast, a Minister of Internal Affairs – who not only was a political appointee and a member of the executive, but was directly involved in the commissioning of special means of surveillance – was found to be insufficiently independent (see *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, §§ 85 and 87). Similarly, a Prosecutor General and competent lower-level prosecutors were also found to be insufficiently independent (see *Iordachi and Others*, cited above, § 47). 279. In contrast to the supervisory bodies cited above, in Russia prosecutors are appointed and dismissed by the Prosecutor General after consultation with the regional executive authorities ... This fact may raise doubts as to their independence from the executive. 280. Furthermore, it is essential that any role prosecutors have in the general protection of human rights does not give rise to any conflict of interest (see *Menchinskaya v. Russia*, no. [42454/02](#), §§ 19 and 38, 15 January 2009). The Court observes that prosecutor's offices do not specialise in supervision of interceptions ... Such supervision is only one part of their broad and diversified functions, which include prosecution and supervision of criminal investigations. In the framework of their prosecuting functions, prosecutors give their approval to all interception requests lodged by investigators in the framework of criminal proceedings ... This blending of functions within one prosecutor's office, with the same office giving approval to requests for interceptions and then supervising their implementation, may also raise doubts as to the

101. In addition, there should generally be a requirement for judicial authorisation where the surveillance involves criminal proceedings<sup>143</sup> but the scope of the review exercisable by judges must be “capable of ensuring that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. These

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prosecutors’ independence (see, by way of contrast, *Ananyev and Others v. Russia*, nos. [42525/07](#) and [60800/08](#), § 215, 10 January 2012, concerning supervision by prosecutors of detention facilities, where it was found that prosecutors complied with the requirement of independence vis-à-vis the penitentiary system’s bodies). 281. Turning now to the prosecutors’ powers and competences, the Court notes that it is essential that the supervisory body has access to all relevant documents, including closed materials and that all those involved in interception activities have a duty to disclose to it any material it required (see *Kennedy*, cited above, § 166). Russian law stipulates that prosecutors are entitled to study relevant documents, including confidential ones. It is however important to note that information about the security services’ undercover agents, and about the tactics, methods and means used by them, is outside the scope of prosecutors’ supervision ... The scope of their supervision is therefore limited. Moreover, interceptions performed by the FSB in the sphere of counterintelligence may be inspected only following an individual complaint ... As individuals are not notified of interceptions ..., it is unlikely that such a complaint will ever be lodged. As a result, surveillance measures related to counter-intelligence de facto escape supervision by prosecutors. 282. The supervisory body’s powers with respect to any breaches detected are also an important element for the assessment of the effectiveness of its supervision (see, for example, *Klass and Others*, cited above, § 53, where the intercepting agency was required to terminate the interception immediately if the G10 Commission found it illegal or unnecessary; and *Kennedy*, cited above, § 168, where any intercept material was to be destroyed as soon as the Interception of Communications Commissioner discovered that the interception was unlawful). The Court is satisfied that prosecutors have certain powers with respect to the breaches detected by them. Thus, they may take measures to stop or remedy the detected breaches of law and to bring those responsible to liability ... However, there is no specific provision requiring destruction of the unlawfully obtained intercept material (see *Kennedy*, cited above, § 168). 283. The Court must also examine whether the supervisory body’s activities are open to public scrutiny (see, for example, *L. v. Norway*, cited above, where the supervision was performed by the Control Committee, which reported annually to the Government and whose reports were published and discussed by Parliament; *Kennedy*, cited above, § 166, where the supervision of interceptions was performed by the Interception of Communications Commissioner, who reported annually to the Prime Minister, his report being a public document laid before Parliament; and, by contrast, *Association for European Integration and Human Rights and Ekimdzhev*, cited above, § 88, where the Court found fault with the system where neither the Minister of Internal Affairs nor any other official was required to report regularly to an independent body or to the general public on the overall operation of the system or on the measures applied in individual cases). In Russia, prosecutors must submit semi-annual reports detailing the results of the inspections to the Prosecutor General’s Office. However, these reports concern all types of operational-search measures, amalgamated together, without interceptions being treated separately from other measures. Moreover, the reports contain only statistical information about the number of inspections of operational-search measures carried out and the number of breaches detected, without specifying the nature of the breaches or the measures taken to remedy them. It is also significant that the reports are confidential documents. They are not published or otherwise accessible to the public ... It follows that in Russia supervision by prosecutors is conducted in a manner which is not open to public scrutiny and knowledge. 284. Lastly, the Court notes that it is for the Government to illustrate the practical effectiveness of the supervision arrangements with appropriate examples (see, *mutatis mutandis*, *Ananyev and Others*, cited above, §§ 109 and 110). However, the Russian Government did not submit any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach of law. It follows that the Government did not demonstrate that prosecutors’ supervision of secret surveillance measures is effective in practice. The Court also takes note in this connection of the documents submitted by the applicant illustrating prosecutors’ inability to obtain access to classified materials relating to interceptions ... That example also raises doubts as to the effectiveness of supervision by prosecutors in practice. 285. In view of the defects identified above, and taking into account the particular importance of supervision in a system where law-enforcement authorities have direct access to all communications, the Court considers that the prosecutors’ supervision of interceptions as it is currently organised is not capable of providing adequate and effective guarantees against abuse”).

<sup>143</sup> See, *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, paras. 249 and 257-267.

factors include, in particular, the authority competent to authorise the surveillance, its scope of review and the content of the interception authorisation”<sup>144</sup>.

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<sup>144</sup> *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, at para. 257. This was not the case in *Dragojević v. Croatia*, no. 68955/11, 15 January 2015 (97). It follows from the foregoing that whereas the Code of Criminal Procedure expressly envisaged prior judicial scrutiny and detailed reasons when authorising secret surveillance orders, in order for such measures to be put in place, the national courts introduced the possibility of retrospective justification of their use, even where the statutory requirement of prior judicial scrutiny and detailed reasons in the authorisation was not complied with. In an area as sensitive as the use of secret surveillance, which is tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions, the Court has difficulty in accepting this situation created by the national courts. It suggests that the practice in the administration of law, which is in itself not sufficiently clear given the two contradictory positions adopted by both the Constitutional Court and the Supreme Court ..., conflicts with the clear wording of the legislation limiting the exercise of the discretion conferred on the public authorities in the use of covert surveillance ... 98. Moreover, the Court considers that in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law. 99. This is particularly true in cases where the only effective possibility for an individual subjected to covert surveillance in the context of criminal proceedings is to challenge the lawfulness of the use of such measures before the criminal courts during the criminal proceedings against him or her ... The Court has already held that although the courts could, in the criminal proceedings, consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant’s right to respect for his private life was not “in accordance with the law”; still less was it open to them to grant appropriate relief in connection with the complaint (see *Khan*, cited above, § 44; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 86, ECHR 2001-IX; and *Goranova-Karaeneva*, cited above, § 59). 100. This can accordingly be observed in the present case, where the competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant’s Article 8 rights (see paragraphs 46 and 48 above). At the same time, the Government have not provided any information on remedies – such as an application for a declaratory judgment or an action for damages – which may become available to a person in the applicant’s situation (see *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 102). 101. Against the above background, the Court finds that the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant’s telephone was not shown to have fully complied with the requirements of lawfulness, nor was it adequate to keep the interference with the applicant’s right to respect for his private life and correspondence to what was “necessary in a democratic society”) or in *Roman Zakharov v. Russia* itself (“261. The Court notes that in Russia judicial scrutiny is limited in scope. Thus, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures may not be submitted to the judge and are therefore excluded from the court’s scope of review ... The Court considers that the failure to disclose the relevant information to the courts deprives them of the power to assess whether there is a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security ... The Court has earlier found that there are techniques that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, § 131, Reports of Judgments and Decisions 1996-V). 262. Furthermore, the Court observes that in Russia the judges are not instructed, either by the CCrP or by the OSAA, to verify the existence of a “reasonable suspicion” against the person concerned or to apply the “necessity” and “proportionality” test”. At the same time, the Court notes that the Constitutional Court has explained in its decisions that the burden of proof is on the requesting agency to show that interception is necessary and that the judge examining an interception request should verify the grounds for that measure and grant authorisation only if he or she is persuaded that interception is lawful, necessary and justified. The Constitutional Court has also held that the judicial decision authorising interception should contain reasons and refer to specific grounds for suspecting that a criminal offence has been committed, or is ongoing, or is being plotted or that activities

102. The requirement for judicial authorisation may not, however, be insisted upon in genuinely urgent cases.<sup>145</sup> Nonetheless, it is always required for any interception of communication is being undertaken to discover journalistic sources.<sup>146</sup>

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endangering national, military, economic or ecological security are being carried out, as well as that the person in respect of whom interception is requested is involved in these criminal or otherwise dangerous activities ... The Constitutional Court has therefore recommended, in substance, that when examining interception authorisation requests Russian courts should verify the existence of a reasonable suspicion against the person concerned and should authorise interception only if it meets the requirements of necessity and proportionality. 263. However, the Court observes that the domestic law does not explicitly require the courts of general jurisdiction to follow the Constitutional Court's opinion as to how a legislative provision should be interpreted if such opinion has been expressed in a decision rather than a judgment ... Indeed, the materials submitted by the applicant show that the domestic courts do not always follow the above-mentioned recommendations of the Constitutional Court, all of which were contained in decisions rather than in judgments. Thus, it transpires from the analytical notes issued by District Courts that interception requests are often not accompanied by any supporting materials, that the judges of these District Courts never request the interception agency to submit such materials and that a mere reference to the existence of information about a criminal offence or activities endangering national, military, economic or ecological security is considered to be sufficient for the authorisation to be granted. An interception request is rejected only if it is not signed by a competent person, contains no reference to the offence in connection with which interception is to be ordered, or concerns a criminal offence in respect of which interception is not permitted under domestic law ... Thus, the analytical notes issued by District Courts, taken together with the statistical information for the period from 2009 to 2013 provided by the applicant ..., indicate that in their everyday practice Russian courts do not verify whether there is a "reasonable suspicion" against the person concerned and do not apply the "necessity" and "proportionality" test. 264. Lastly, as regards the content of the interception authorisation, it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered. Such identification may be made by names, addresses, telephone numbers or other relevant information (see *Klass and Others*, cited above, § 51; *Liberty and Others*, cited above, §§ 64 and 65; *Dumitru Popescu* (no. 2), cited above, § 78; *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 80; and *Kennedy*, cited above, § 160). 265. The Court observes that the CCrP requires that a request for interception authorisation must clearly mention a specific person whose communications are to be intercepted, as well as the duration of the interception measure ... By contrast, the OSAA does not contain any requirements either with regard to the content of the request for interception or to the content of the interception authorisation. As a result, courts sometimes grant interception authorisations which do not mention a specific person or telephone number to be tapped, but authorise interception of all telephone communications in the area where a criminal offence has been committed. Some authorisations do not mention the duration for which interception is authorised ... The Court considers that such authorisations, which are not clearly prohibited by the OSAA, grant a very wide discretion to the law-enforcement authorities as to which communications to intercept, and for how long").

<sup>145</sup> The relevant requirements have been outlined in *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015; "266. The Court further notes that in cases of urgency it is possible to intercept communications without prior judicial authorisation for up to forty-eight hours. A judge must be informed of any such case within twenty-four hours from the commencement of the interception. If no judicial authorisation has been issued within forty-eight hours, the interception must be stopped immediately ... The Court has already examined the "urgency" procedure provided for in Bulgarian law and found that it was compatible with the Convention (see *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, §§ 16 and 82). However, in contrast to the Bulgarian provision, the Russian "urgent procedure" does not provide for sufficient safeguards to ensure that it is used sparingly and only in duly justified cases. Thus, although in the criminal sphere the OSAA limits recourse to the urgency procedure to cases where there exists an immediate danger that a serious or especially serious offence may be committed, it does not contain any such limitations in respect of secret surveillance in connection with events or activities endangering national, military, economic or ecological security. The domestic law does not limit the use of the urgency procedure to cases involving an immediate serious danger to national, military, economic or ecological security. It leaves the authorities an unlimited degree of discretion in determining in which situations it is justified to use the non-judicial urgent procedure, thereby creating possibilities for abusive recourse to it (see, by contrast, *Association for European Integration and Human Rights and Ekimdzhiiev*, cited above, § 16). Furthermore, although Russian law requires that a judge be immediately informed of each instance of urgent interception, his or her power is limited to authorising the extension of the interception measure beyond forty-eight hours. He or she has no power to assess whether the use of the urgent procedure was justified or to decide whether the material obtained during the previous forty-

103. Furthermore, where there will be a need to ensure that there is effective protection for communications covered by legal professional privilege.<sup>147</sup>
104. Moreover, conversations and other communications with an accused person's lawyer should not generally be subject to surveillance since the European Court considers that the right to the assistance of a lawyer under Article 6(3)(c) would lose much of its usefulness if the lawyer concerned was unable to confer with his or her client and receive confidential instructions from him or her without such surveillance.<sup>148</sup> Surveillance of these conversations and communications in respect of

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eight hours is to be kept or destroyed (see, by contrast, *Association for European Integration and Human Rights and Ekimdzhev*, cited above, § 16). Russian law does therefore not provide for an effective judicial review of the urgency procedure". The scheme reviewed in *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016 was considered acceptable in principle; "81. Furthermore, where situations of extreme urgency are concerned, the law contains a provision under which the director of the service may himself authorise secret surveillance measures for a maximum of 72 hours (see sections 58 and 59 of the National Security Act quoted in paragraph 17 above). For the Court, this exceptional power should be sufficient to address any situations in which external, judicial control would run the risk of losing precious time. Such measures must however be subject to a post factum review, which is required, as a rule, in cases where the surveillance was authorised ex ante by a non-judicial authority". However, an unacceptable discretion was found to exist in *Taraneks v. Latvia*, no. 3082/06, 2 February 2014; "88. As noted earlier ..., the Law on Operational Activities was drafted with the intention of being used only in exceptional cases, that is in situations where investigating criminal offences would be significantly hampered by having a recourse to ordinary procedures, such as, for example, those prescribed by the Code of Criminal Procedure. From the documents made available to the Court it does not appear that any reasons were given for having recourse to the Law on Operational Activities instead of the Code of Criminal Procedure. Neither does there appear to have been any analysis of whether the recording of the applicant's conversations would "significantly impinge" on his constitutional rights, such as, for example, the right to respect for his private life. 89. The reason why such analysis is absent is the fact that, according to the opinion of at least the Prosecutor General ..., at the relevant time the authorisation of the investigator's supervisor did not need to be given in writing. In other words, if an investigator and his supervisor were in agreement that a certain operational activity would not significantly impinge on the constitutional rights of persons subjected to it, a written decision to authorise such an activity was not required. The Court views that approach as incompatible with the rule of law, since it conferred unfettered and uncontrolled in the absence of a written record of the decision or the decision-making process discretion on investigative authorities (see also *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 77, ECHR 2010 (extracts)). It therefore follows that the recording of the applicant's conversations on 14 December 2001 was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention".

<sup>146</sup> See *Telegraaf Media Nederland Landelijke Media BV v. Netherlands*, no.39315/06, 22 November 2012, at paras. 89-102.

<sup>147</sup> See, e.g., *Kopp v. Switzerland*, no. 23224/94, 25 March 1998 ("73. However, the Court discerns a contradiction between the clear text of legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law has established the principle, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel. 74. Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence") and *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009 ("while the Moldovan legislation, like the Swiss legislation, guarantees the secrecy of lawyer-client communications ..., it does not provide for any procedure which would give substance to the above provision. The Court is struck by the absence of clear rules defining what should happen when, for example, a phone call made by a client to his lawyer is intercepted"; para. 50).

<sup>148</sup> See, e.g., *S v. Switzerland*, no. 12629/87, 28 November 1991, *Brennan v. United Kingdom*, 39846/98, 16 October 2001, para. 58 and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013, para. 627.

possible proceedings that a person might bring would similarly be, in most instances, an inappropriate interference with the right under Article 8.<sup>149</sup>

105. Such surveillance could, however be regarded as compatible with these rights where there is a well-founded basis for believing that genuinely improper conduct is occurring.<sup>150</sup>

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The same level of protection does not, however, apply to the surveillance of communications between a vulnerable detainee and an appropriate adult, i.e., a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people; *R E v. United Kingdom*, no. 62498/11, 27 October 2015, paras. 156-168.

<sup>149</sup> See, e.g., *Pawlak v. Poland*, no. 39840/05, 15 January 2008, paras. 66-67.

<sup>150</sup> Such as preventing information being passed on to suspects still at large, as was not demonstrated in *Brennan v. United Kingdom*, 39846/98, 16 October 2001 (“There was, however, no allegation that the solicitor was in fact likely to collaborate in such an attempt, and it was unclear to what extent a police officer would be able to spot a coded message if one was in fact passed. At most, it appears that the presence of the police officer would have had some effect in inhibiting any improper communication of information, assuming there was any risk that such might take place. While the Court finds that there is no reason to doubt the good faith of the police in imposing and implementing this measure – there is no suggestion, as pointed out by the Government, that the police sought to use the opportunity to obtain evidence for their own purposes –, it nonetheless finds no compelling reason arising in this case for the imposition of the restriction”; para. 59) and other interferences with the conduct of criminal proceedings, as was not demonstrated in *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 (“641. The Government did not claim that the authorities were aware of what had been discussed in the meeting rooms. There was nothing in the behaviour of the applicants and their lawyers during those meetings to give rise to any reasonable suspicion of abuse of confidentiality; they were not “extraordinarily dangerous [criminals] whose methods had features in common with those of terrorists” (see *S v. Switzerland*, cited above, § 47, see also *Kröcher and Möller v. Switzerland*, no. 8463/78, Commission decision of 10 July 1981, DR 26, p. 40). The applicants were accused of non-violent economic crimes and had no criminal record (compare with *Castravet v. Moldova*, no. 23393/05, § 58, 13 March 2007). There were no ascertainable facts showing that the applicants’ lawyers might abuse their professional privilege. The Court stresses that the measures complained of were not limited to the first days or weeks after the applicants’ arrest, when the risk of tampering with evidence, collision or re-offending was arguably higher, but lasted for over two years. In the circumstances the Court concludes that the rule whereby working documents of the defence, drafts, notes etc. were subject to perusal and could have been confiscated if not checked by the prison authorities beforehand was unjustified”). It would also apply to cases where there was a basis for believing the lawyer was a participant in the commission of an offence; see *Versini-Campinchi and Crasnianski v. France*, no. 49176/11, 16 June 2016. No such justification would be applicable to possible collaboration between accused persons in their defence strategy (see *S v. Switzerland*, no. 12629/87, 28 November 1991, “49. The risk of “collusion” relied on by the Government does, however, merit consideration. Accordingly to the Swiss courts there were “indications pointing to” such a risk “in the person of defence counsel”; there was reason to fear that Mr Garbade would collaborate with W.’s counsel Mr Rambert, who had informed the Winterthur District Attorney’s Office that all the lawyers proposed to co-ordinate their defence strategy ... Such a possibility, however, notwithstanding the seriousness of the charges against the applicant, cannot in the Court’s opinion justify the restriction in issue and no other reason has been adduced cogent enough to do so. There is nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy. Moreover, neither the professional ethics of Mr Garbade, who had been designated as court-appointed defence counsel by the President of the Indictments Division of the Zürich Court of Appeal ..., nor the lawfulness of his conduct were at any time called into question in this case” and the similar conclusion in *Rybacki v. Poland*, no. 52479/99, 13 January 2009, para. 59) or the discussion of defence tactics (see *Schönenberger and Durmaz v. Switzerland*, no. 11368/85, 20 June 1988, “28. To support their argument that the contested stopping of the letter was necessary the Government rely in the first place on the contents of the letter in issue: according to the Government, it gave Mr. Durmaz advice relating to pending criminal proceedings which was of such a nature as to jeopardise their proper conduct. The Court is not convinced by this argument. Mr. Schönenberger sought to inform the second applicant of his right “to refuse to make any statement”, advising him that to exercise it would be to his “advantage” ... In that way, he was recommending that Mr. Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court’s case-law - whose equivalent may be found in other Contracting States - it is open to an accused person to remain silent ... Mr. Schönenberger could also properly regard it as his duty, pending a meeting with Mr. Durmaz, to advise him of his right and of the possible consequences of



106. *There is thus a need to ensure that the legislation governing the authorisation and conduct of surveillance operations is fully compliant with the foregoing requirements.*
107. The existence of the safeguards previously itemised is sometimes also used by the European Court to judge whether or not a particular scheme governing surveillance is necessary in a democratic society.<sup>151</sup>
108. However, even where such safeguards do exist, a surveillance operation will certainly not be regarded as necessary in a democratic society where it cannot be shown that the basis for undertaking it was not substantiated<sup>152</sup> or other less intrusive means could have been used for the purpose of the investigation<sup>153</sup>.
109. Moreover, these safeguards, where they do exist, must actually be effectively applied in the particular circumstances of a case<sup>154</sup>.

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exercising it. In the Court's view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution"). Surveillance of lawyer/client communications was conceded in *R E v. United Kingdom*, no. 62498/11, 27 October 2015 as serving a legitimate aim where this had been undertaken for reasons of national security.

<sup>151</sup> See, e.g., *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29 June 2006 and *Dragojević v. Croatia*, no. 68955/11, 15 January 2015.

<sup>152</sup> See, e.g., *Kvasnica v. Slovakia*, no. 72094/01, 9 June 2009; "87. In addition, statements by several police officers and the judge involved are indicative of a number of shortcomings as regards the compliance with the relevant law in the applicant's case (see paragraphs 19, 20 and 25 above). In particular, the director of the special division of the financial and criminal police had concluded that the interference in issue had not been based on any specific suspicion against the applicant and no specific purpose had been indicated in the relevant request. In his written statement the Regional Court judge who had authorised the interception remarked that similar requests were made in writing, but were submitted by the police investigators in person. The officer submitting the request presented the case orally and the oral presentation was usually more comprehensive than the written request. As requests for authorisation had to be handled with the utmost urgency, judges had no practical opportunity to examine the case file or to verify that the request for authorisation corresponded to the contents of the case file. Depositions of the four members of the financial police investigative team involved in the case included, inter alia, the information that the request for authorisation of the interception of the applicant's telephone had been drafted without a prior consultation of the case file. The documents before the Court contain no information indicating that those statements were unsubstantiated. 88. In these circumstances, the Court cannot but conclude that the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirements of the relevant law and to be adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society". Cf. *Karabeyoğlu v. Turkey*, no. 30083/10, 7 June 2016 in which the surveillance was based on suspicion after the discovery of evidence during a search and the European Court was satisfied that there was no indication that the criminal case file had not contained sufficient information to satisfy an objective observer that the applicant might have committed the offence for which he had been placed under surveillance.

<sup>153</sup> See, e.g., *Dragojević v. Croatia*, no. 68955/11, 15 January 2015, para. 95 and *Matanović v. Croatia*, no. 2742/12, 4 April 2017 ("113. The Court notes in the case at hand that, as in the *Dragojević* case, the investigating judge's orders on the use of secret surveillance measures referred to an application for the use of secret surveillance by the competent State Attorney's Office and indicated the statutory phrase that "the investigation [could] not be conducted by other means or that it would be extremely difficult [to do so]". They did not, however, provide relevant reasoning as to the particular circumstances of the case and in particular why the investigation could not be conducted by other, less intrusive, means").

<sup>154</sup> This was not, e.g., the situation in *Bălțeanu v. Romania*, no. 142/04, 16 July 2013 ("43. The Court reiterates that the amendments to the Code of Criminal Procedure came into force during the appeal proceedings in the present case and thus allowed for increased supervision by the courts of telephone interceptions ... The system in place established a more rigorous procedure with supplementary safeguards for the persons concerned. The

110. In addition, the particular use of an authorisation for surveillance should not be disproportionate.<sup>155</sup>
111. *There is thus a need to ensure that both those who authorise and those who conduct surveillance operations receive appropriate training and guidance as to safeguards that need to be observed in practice.*
112. There is no obligation to give advance warning to anyone that might become subject to surveillance since this could seriously jeopardise the success of a

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Court will therefore only assess how those guarantees were applied by the national authorities to the applicant's particular situation ... 44. In this connection, it notes that the domestic courts did not offer a comprehensive answer to the applicant's repeated objections concerning the lawfulness of the authorisation and the accuracy of the transcripts. They merely noted that the report made by the prosecutor concerning the recordings, together with the tapes, had been attached to the court file. They accepted without questioning the prosecutor's refusal to present the authorisation ... 45. In acting in this manner, the domestic court deprived the safeguards provided by the new legislation of the respondent State of all meaning. Moreover, because the courts did not examine the lawfulness of the recordings or the accuracy of the transcripts, the applicant could not avail himself of the possibility to seek their destruction under the provisions of the Code of Criminal Procedure in force after 1 January 2004, or to seek compensation for unlawful interception under the general tort law").

<sup>155</sup> See, e.g., *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, 8 March 2011; "The information was obtained and used in the context of an investigation into, and trial of, suspected bribe-taking. No issues of proportionality have been identified. The measure was accordingly justified under Article 8 § 2 as "necessary in a democratic society" for the purpose identified above"; para. 52. See also *Uzun v. Germany*, no. 35623/05, 2 September 2010; "78. ... In examining whether, in the light of the case as a whole, the measure taken was proportionate to the legitimate aims pursued, the Court notes that the applicant's surveillance via GPS was not ordered from the outset. The investigation authorities had first attempted to determine whether the applicant was involved in the bomb attacks at issue by measures which interfered less with his right to respect for his private life. They had notably tried to determine the applicant's whereabouts by installing transmitters in S.'s car, the use of which (other than with the GPS) necessitated the knowledge of where approximately the person to be located could be found. However, the applicant and his accomplice had detected and destroyed the transmitters and had also successfully evaded their visual surveillance by State agents on many occasions. Therefore, it is clear that other methods of investigation, which were less intrusive than the applicant's surveillance by GPS, had proved to be less effective. 79. The Court further observes that in the present case, the applicant's surveillance by GPS was added to a multitude of further previously ordered, partly overlapping measures of observation. These comprised the applicant's visual surveillance by both members of the North Rhine-Westphalia Department for the Protection of the Constitution and by civil servants of the Federal Office for Criminal Investigations. It further included the video surveillance of the entry of the house he lived in and the interception of the telephones in that house and in a telephone box situated nearby by both of the said authorities separately. Moreover, the North Rhine-Westphalia Department for the Protection of the Constitution intercepted his postal communications at the relevant time. 80. The Court considers that in these circumstances, the applicant's surveillance via GPS had led to a quite extensive observation of his conduct by two different State authorities. In particular, the fact that the applicant had been subjected to the same surveillance measures by different authorities had led to a more serious interference with his private life, in that the number of persons to whom information on his conduct had become known had been increased. Against this background, the interference by the applicant's additional surveillance via GPS thus necessitated more compelling reasons if it was to be justified. However, the GPS surveillance was carried out for a relatively short period of time (some three months), and, as with his visual surveillance by State agents, affected him essentially only at weekends and when he was travelling in S.'s car. Therefore, he cannot be said to have been subjected to total and comprehensive surveillance. Moreover, the investigation for which the surveillance was put in place concerned very serious crimes, namely several attempted murders of politicians and civil servants by bomb attacks. As shown above, the investigation into these offences and notably the prevention of further similar acts by the use of less intrusive methods of surveillance had previously not proved successful. Therefore, the Court considers that the applicant's surveillance via GPS, as carried out in the circumstances of the present case, was proportionate to the legitimate aims pursued and thus "necessary in a democratic society" within the meaning of Article 8 § 2.

surveillance operation by being liable to reveal the resources of those undertaking it and the scope of information had already been gathered.<sup>156</sup>

113. However, the notification of those who have been the subject of surveillance after its occurrence after the event is required for the purpose of ensuring an effective remedy against any abuse of the powers concerned.<sup>157</sup>

## E. Certain issues relating to evidence

114. The use of coercive measures to obtain evidence for the purpose of gathering evidence to be used in criminal proceedings gives rise both to obligations as to its retention, protection and disclosure and to the possibility of the means used to obtain evidence then leading to its admissibility at a trial rendering the process unfair for the purpose of Article 6(1) of the European Convention.

115. In addition to the safeguards considered above regarding the storage, retention and access to material obtained through surveillance, the European Court has identified a number of requirements arising from the European Convention where evidence is obtained by other coercive measures.

116. Thus, the right to respect for private life under Article 8 will be violated where data kept regarding the involvement of persons in the criminal process proves to be incorrect.<sup>158</sup>

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<sup>156</sup> See, e.g., *Mersch and Others v. Luxembourg* (dec.), no. 10439/83, 10 May 1985 and *Leander v. Sweden*, no. 9248/81, 26 March 1987.

<sup>157</sup> See, e.g., *Klass and Others v. Germany*, no. 5029/71, 6 September 1978, paras. 62-72, *Sefilyan v. Armenia*, no. 22491/08, 2 October 2012, para. 132, *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 (“The Court concludes from the above that the remedies referred to by the Government are available only to persons who are in possession of information about the interception of their communications. Their effectiveness is therefore undermined by the absence of a requirement to notify the subject of interception at any point, or an adequate possibility to request and obtain information about interceptions from the authorities. Accordingly, the Court finds that Russian law does not provide for an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject”; para. 298), *Cevat Özel v. Turkey*, no. 19602/06, 7 June 2016, paras. 33-38 and *Radzhab Magomedov v. Russia*, no. 20933/08, 20 December 2016 (« 84. In response to the applicant’s request for disclosure of the court order, the national courts confined themselves to finding that the said document constituted classified information, but made no further balancing exercise as regards the applicant’s interests and those of the public in the detection and prosecution of crime. They did not specify why disclosure of the decision of 6 December 2004, after the applicant’s mobile telephone communications had already been recorded and the investigation had been completed, would have impeded the effective administration of justice. As a result, the applicant did not know whether the decision complied with the law and what its content was. In that connection, the Court emphasises that the interception of telephone communications constitutes a serious interference with the right to private life and the person affected should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles of Article 8 of the Convention. However, the applicant has not been afforded such a possibility. Against this background, the authorities’ refusal to give access to any information concerning the interception of his telephone communications amounts to a violation of Article 8 of the Convention”).

<sup>158</sup> See, e.g., *Mikolajová v. Slovakia*, no. 4479/03, 18 January 2011 (“59. For the purposes of the instant case the Court is prepared to accept that the disclosure of the police decision of 3 July 2000 to the insurance company had a legal basis and was therefore in accordance with the law, as asserted by the director of the police department in reply to the applicant's complaint ... On the other hand, the Court considers that it is not required

117. In addition, even correct data may not justifiably be retained where this would be disproportionate. That is likely to occur where it relates to events while young, does not involve serious offences and is being kept on an indefinite basis.<sup>159</sup>

118. Furthermore, there is a need to ensure that there is no disclosure of, or access to, personal information obtained through coercive measures where this would result in a disproportionate interference with the right to respect for private and family life of the person concerned. Violations of Article 8 have thus been found where there was insufficient protection for medical evidence concerning a witness<sup>160</sup>, the direct

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to decide whether the disclosure of the police decision pursued a legitimate aim. In its view, this matter is closely related to compliance with the “necessity” test. According to that test, a breach of Article 8 will be found if, in the particular circumstances of a case, an impugned measure fails to strike a fair balance between the competing public and private interests at issue. The requirement of proportionality demands that a respondent Government show relevant and sufficient reasons for the interference. While it is for the national authorities to make the initial assessment in all these respects, and a margin of appreciation must be left to the competent national authorities in this assessment, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *Coster v. the United Kingdom* [GC], no. [24876/94](#), § 104, 18 January 2001; *S and Marper v. the United Kingdom*, [GC], applications nos. [30562/04](#) and [30566/04](#), 4 December 2008, §§ 101-102). 60. In this connection, the Court considers that the police decision was couched in terms which pointed to an expression of fact and not mere suspicion and amounted to an obvious indication that the police department considered the applicant to be guilty. This, it finds, is evident in the actual words employed in the impugned decision ..., namely that: “The investigation showed that [the applicant’s] action met the constituent elements of the offence of causing injury to health pursuant to Article 221 § 1 of the Criminal Code in that she had deliberately inflicted an injury on another person.”<sup>61</sup> Of particular concern to the Court is the fact that the applicant had not been charged with a criminal offence but was nevertheless placed on record as a criminal offender. The Court has already had occasion to point to the risk of stigmatisation of individuals stemming from such practices and the threat which they represent to the principle of the presumption of innocence (see *S and Marper*, cited above, § 122). For the Court, the damage which may be caused to the reputation of the individual concerned through the communication of inaccurate or misleading information cannot be ignored either. The Court would also observe with concern that the authorities have not indicated whether the police decision remains valid indefinitely, such as to constitute, with each communication to a third party, assuming such to be in pursuit of a legitimate aim, a continuing threat to the applicant’s right to reputation. 62. In examining whether the domestic authorities have complied with the above-mentioned fair balance requirement, the Court must have regard to the safeguards in place in order to avoid arbitrariness in decision-making and to secure the rights of the individual against abuse. In the instant case, the Court cannot but note the lack of any available recourse through which the applicant could obtain a subsequent retraction or clarification of the terms of the police decision. The Court further notes that in the above-mentioned *Babjak* case the original police decision which stated that that applicant had committed a crime had been superseded by a subsequent official statement from the competent police department unequivocally clarifying that it had not been proved that he had committed any criminal offence. 63. Having regard to the above considerations, the Court finds that the domestic authorities failed to strike a fair balance between the applicant’s Article 8 rights and any interests relied on by the Government to justify the terms of the police decision and its disclosure to a third party. There has accordingly been a breach of Article 8 of the Convention”) and *Khelili v. Switzerland*, no. 16188/07, 18 October 2011 (in which the police records had referred to the applicant as a “prostitute” despite this being allegedly false).

<sup>159</sup> See, e.g., *S and Marper v. United Kingdom* [GC], no. 30562/04, 4 December 2008 (“125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary in a democratic society”) and the similar ruling in *M K v. France*, no. 19522/09, 18 April 2013.

<sup>160</sup> See, e.g., *Z v. Finland*, no. 22009/93, 25 February 1997; “111. As regards the complaint that the medical data in issue would become accessible to the public as from 2002, the Court notes that the ten-year limitation on the confidentiality order did not correspond to the wishes or interests of the litigants in the proceedings, all of whom

disclosure to the public of footage from a surveillance camera<sup>161</sup>, the publication in the media of leaked excerpts from the a prosecution file, in particular, telephone conversations that had been intercepted by the authorities<sup>162</sup> and the release to the press and the reading out in court of passages from intercepted telephone conversations<sup>163</sup>.

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had requested a longer period of confidentiality ... 112. The Court is not persuaded that, by prescribing a period of ten years, the domestic courts attached sufficient weight to the applicant's interests. It must be remembered that, as a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for her private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years is not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 (art. 8)". See also *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006; "61. It is to be noted that the Court of Appeal, having reviewed the case, came to the conclusion that the first instance judge's treatment of the applicant's personal information had not complied with the special regime concerning collection, retention, use and dissemination afforded to psychiatric data by Article 32 of the Constitution and Articles 23 and 31 of the Data Act 1992, which finding was not contested by the Government ... Moreover, the Court notes that the details in issue being incapable of affecting the outcome of the litigation (i.e. the establishment of whether the alleged statement was made and the assessment whether it was libellous; compare and contrast, *Z v. Finland*, cited above, §§ 102 and 109), the Novozavodsky Court's request for information was redundant, as the information was not "important for an inquiry, pre-trial investigation or trial", and was thus unlawful for the purposes of Article 6 of the Psychiatric Medical Assistance Act 2000. 62. The Court finds for the reasons given above that there has been a breach of Article 8 of the Convention in this respect. It does not consider it necessary to examine with respect to this measure whether the other conditions of paragraph 2 of that Article were complied with".

<sup>161</sup> *Peck v. United Kingdom*, no. 44647/98, 28 January 2003, in which the European Court did not consider that there were relevant or sufficient reasons which would justify the direct disclosure to the public of stills from the footage taken by the camera of the applicant – who had not been charged with any offence - as he attempted to commit suicide by cutting his wrists. There had been no attempt to obtain the applicant's consent or to mask his identity. In its view, "The crime-prevention objective and context of the disclosures demanded particular scrutiny and care in these respects in the present case"; para. 85.

<sup>162</sup> See, e.g., *Apostu v. Romania*, no. 22765/12, 3 February 2015; "130. It is to be noted that the public's access to information from a criminal case file is not unlimited or discretionary, even once the case has been lodged with a court. According to the applicable rules and regulations, the access of the press to the files concerning proceedings for the confirmation or authorization of telephone interceptions and recordings is limited ... Moreover, the judges might decide, in justified circumstances, not to allow a third party access to the case files. The Court cannot exclude that a judge dealing with such a request may undertake a balancing exercise of the right to respect for private life against the right to freedom of expression and information. Thus, the access to information is legitimately subject to judicial control. 131. However, no such possibility exists if, as in the present case, the information is leaked to the press. In this case, what is of the utmost importance is, firstly, whether the State organised their services and trained staff in order to avoid the circumvention of the official procedures (see *Stoll*, cited above, § 61) and, secondly, whether the applicant had any means of obtaining redress for the breach of his rights. 132. In the light of the above considerations, the Court holds that in the instant case the respondent State failed in their obligation to provide safe custody of the information in their possession in order to secure the applicant's right to respect for his private life, and likewise failed to offer any means of redress once the breach of his rights had occurred. There has consequently been a violation of Article 8 of the Convention".

<sup>163</sup> See, e.g., *Craxi v. Italy (No. 2)*, no. 25337/94, 17 July 2003; "66. The Court observes that in the present case some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant. This is not disputed by the Government ... 75. In the present case the Court recalls that disclosures of a private nature inconsistent with Article 8 of the Convention took place ... It follows that once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction

119. Moreover, there has been found to be a violation of Article 8 where there was no legal framework governing the collection and storage of data, a lack of clarity as to the scope, extent and restrictions on its retention and disclosure and no mechanism for the independent review of a decision to retain or disclose data.<sup>164</sup>
120. In addition, the loss of, or damage to, items that have been seized can result in a violation of the right to property under Article 1 of Protocol No. 1.<sup>165</sup>
121. *There is thus a need to ensure that the foregoing requirements relating to the retention, protection and disclosure of evidence obtained through the use of coercive measures are reflected in the relevant legislation and that appropriate training and monitoring is undertaken to ensure that these requirements are observed in practice.*
122. No rules as to admissibility of evidence are prescribed in the European Convention and the European Court thus regards this issue as primarily one for regulation under national law.<sup>166</sup> Its concern is rather with the question of whether the proceedings as a whole, including the way in which the evidence was obtained, can be regarded as fair.<sup>167</sup>

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the persons responsible for the shortcomings which had occurred. In fact, by reason of their failure to start effective investigations into the matter, the Italian authorities were not in a position to fulfil their alternative obligation of providing a plausible explanation as to how the applicant's private communications were released into the public domain. 76. The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicant's right to respect for his private life and correspondence ... 79. In the applicant's submissions, according to Article 268 of the CPP, before presenting them in open court, the Public Prosecutor should have filed the transcripts of the intercepted conversations with the registry, thus allowing the defence to present their comments; moreover, a specific hearing should have been held in private in order to proceed to the exclusion (*stralcio*) of the material which could not have been used ... 80. In the Court's view, the aim of this was to provide the parties and the judge with an opportunity to select the interceptions which were of no avail for the purposes of the judicial proceedings and whose disclosure could have adversely, and uselessly, interfered with the accused person's right to respect for private life and correspondence. Its application therefore constituted a substantial safeguard for the right secured by Article 8 of the Convention. 81. In using its uncontested right to interpret domestic law, the Milan District Court held that Article 268 did not apply in the applicant's case, this provision concerning only the wire-tapings made during the preliminary investigations ... However, the Court notes that according to one of the provisions on which the domestic jurisdiction based its reasoning, namely Article 295 § 3 of the CPP, when telephone interceptions were ordered with a view to facilitating the researches of a person who was deliberately evading the court's jurisdiction, Article 268 should apply "if possible" ... However, nothing in the Milan District Court's order of 19 October 1995 explains why during the trial phase the guarantees provided by this Article could not be observed. 82. In the light of the above, the Court considers that the applicant was deprived of a substantial procedural safeguard provided by domestic law for the protection of his rights under Article 8 of the Convention without proper explanations being given by the competent domestic tribunals. In these circumstances, it cannot conclude that the interference complained of was "in accordance with the law", the Italian authorities having failed to follow, before the reading out of the telephone interceptions at the hearing of 29 September 1995, the procedures prescribed by law. 83. Moreover, the Court notes that the interpretation of the domestic provisions given by the Milan District Court amounted to a recognition of the absence, in the legislative framework concerning wire-tapings, of safeguards to protect the rights secured by Article 8 of the Convention. Such interpretation would therefore in any case raise serious concerns about the respect, on the part of the State, of its positive obligations to endorse the effective protection of these rights".

<sup>164</sup> See *M M v. United Kingdom*, no. 24029/07, 13 November 2012. This case concerned data about cautions issued by the police to deal with less serious offenders but the approach seen in it would be equally relevant for data acquired on a coercive basis.

<sup>165</sup> Both of which were found to have occurred in *Tendam v. Spain*, no. 25720/05, 13 July 2010.

<sup>166</sup> *Schenk v. Switzerland*, no. 10862/84, 12 July 1988, at para. 46.

<sup>167</sup> *Ibid.*

123. Certainly, the mere fact that evidence has been obtained illegally will not lead to the proceedings as being unfair.<sup>168</sup>
124. As a result, proceedings will not be so regarded by the European Court where evidence on which a conviction was based had been obtained in breach of the rights guaranteed by Article 8 on account of the means used not having been “in accordance with the law” as required by paragraph 2 of that provision.<sup>169</sup>
125. Rather, the concern in such instances will be whether the rights of the defence have been respected and the strength of the evidence, especially where there are no doubts as to its authenticity.<sup>170</sup>
126. Nonetheless, the European Court does expect any use of unlawful methods to obtain evidence to be condemned as a preliminary matter.<sup>171</sup>
127. Furthermore, the use of evidence obtained contrary to the privilege against self-incrimination will render a trial unfair<sup>172</sup>, as will the use of confession obtained without the assistance of a lawyer<sup>173</sup>. Neither should thus be admitted.

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<sup>168</sup> See, e.g., *Parris v. Cyprus* (dec.), 56354/00, 4 July 2002 (an illegal post mortem).

<sup>169</sup> See, e.g. *Schenk v. Switzerland* (recording telephone conversation), *Khan v. United Kingdom*, no. 35394/97, 12 May 2000 (covert listening device), *Perry v. United Kingdom* (dec.), 63737/00, 26 September 2002 (video surveillance) and *Lee Davies v. Belgium*, no. 18704/05, 28 July 2009 and *Duško Ivanovski v. “the former Yugoslav Republic of Macedonia”*, no. 10718/05, 24 April 2014 (unlawful searches).

<sup>170</sup> In *Schenk v. Switzerland* there was corroborating evidence and in *Khan v. United Kingdom*, *Perry v. United Kingdom* and *Lee Davies v. Belgium* there was found to be ample opportunity to challenge both the authenticity and the use of the evidence concerned. The latter conclusion was also reached in *Dragojević v. Croatia*, no. 68955/11, 15 January 2015 and *Bašić v. Croatia*, no. 22251/13, 25 October 2016. However, in *Lisica v. Croatia*, no. 20100/06, 25 February 2010, the European Court held that: “60. ... In the present case the search of the VW Golf vehicle carried out by the police on 24 May 2000 as well as the entry of the police into the first applicant's vehicle on 26 May 2000, both without the applicants or their counsel being present or even informed of these acts and without a search warrant for the search of the BMW on 26 May 2000, produced an important piece of evidence. The Court stresses that it was the only evidence which established direct links with the first applicant's vehicle and the Golf II vehicle driven by the robbers, while all other evidence had circumstantial quality. However, the circumstances in which it was obtained cannot eliminate all doubt as to its reliability and affected the quality of the evidence in question. 61. Viewed in light of all the above-mentioned principles, the foregoing considerations are sufficient to enable the Court to conclude that the manner in which this evidence was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial. 62. There has accordingly been a violation of Article 6 § 1 of the Convention”. See, to similar effect, the rulings in *Botea v. Romania*, no. 40872/04, 10 December 2013, *Beraru v. Romania*, no. 40107/04, 18 March 2014, *Layijov v. Azerbaijan*, no. 22062/07, 10 April 2014, *Nițulescu v. Romania*, no. 16184/06, 22 September 2015 and *Sakit Zahidov v. Azerbaijan*, 51164/07, 12 November 2015.

<sup>171</sup> See, e.g., *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003; “Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence ... Although it is not its task to examine in the abstract the issue of the admissibility of evidence in criminal law, the Court finds it regrettable that ... the National Security Court did not determine that issue before going on to examine the merits of the case. Such a preliminary investigation would clearly have given the national courts an opportunity to condemn any unlawful methods used to obtain evidence for the prosecution” (para. 91).

<sup>172</sup> See, e.g., *Allan v. United Kingdom*, 48539/99, 5 November 2002, at para. 52 and *Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010, at paras. 57-60.

<sup>173</sup> See, e.g., *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, at para. 62 and *Dvorski v. Croatia* [GC], 25703/11, 20 October 2015, at para. 111. However, the admissibility of other statements that are prejudicial to the defence where there has been some delay in obtaining access to legal assistance might not render a trial

128. Similarly, it will be unfair for a conviction to be founded upon evidence obtained through the incitement to commit an offence<sup>174</sup> and there should also be an adequate investigation into allegations that it has been so obtained<sup>175</sup>.
129. Moreover all evidence obtained by torture must be inadmissible<sup>176</sup> regardless of against whom such torture has been used<sup>177</sup> or in which country where that torture actually occurred<sup>178</sup>.
130. In addition, evidence obtained through the use of inhuman and degrading treatment will in certain circumstances also be regarded as rendering a trial unfair<sup>179</sup>

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unfair where the investigation of a terrorist incident is involved; see *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016, at paras. 280-294 and 298-311.

<sup>174</sup> See, e.g., *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008, at para. 73

<sup>175</sup> See, e.g., *Lagutin and Others v. Russia*, 6228/09, 24 April 2014, at paras. 121-123. See also para. 92 above.

<sup>176</sup> *Harutyunyan v. Armenia*, 36549/03, 28 June 2007, at para. 66.

<sup>177</sup> *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012, at para. 282.

<sup>178</sup> *El Haski v. Belgium*, no. 649/08, 25 September 2012, at para. 85.

<sup>179</sup> As in *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006; “107. ... the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant’s conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant’s conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation. 108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair”. Cf. *Kirakosyan v. Armenia (No. 2)*, no. 24723/05, 4 February 2016 (“77. It is true that, strikingly, the domestic courts failed to make a detailed assessment of the applicant’s allegations of unlawful conduct of the search – a fact which was also pointed out by the Ombudsman ... The Court notes, however, that the applicant had ample opportunity to examine the attesting witnesses, G.G. and M.S., who were both present at the trial but maintained their initial statements that they had personally witnessed the discovery of cannabis during the search. Although the applicant submitted statements by the attesting witnesses that they were persuaded and bullied by the police officers to sign the search record ..., these allegations were raised for the first time before the Court. The attesting witnesses did not make any such statements before the trial court. In such circumstances, and in the absence of any strong evidence to the contrary, the Court cannot find that the proceedings against the applicant fell short of the requirements of Article 6 of the Convention due to the use of the impugned evidence and the resultant findings”) and *Prade v. Germany*, no. 7215/10, 3 March 2016 (“39. The Court must examine next the quality of the evidence in question. As concerns the level of intrusiveness, the Court notes that the present case significantly differs from the case of *Jalloh* ... In *Jalloh* the authorities subjected the applicant to a grave interference with his physical and mental integrity against his will and the evidence was therefore obtained by a measure which breached Article 3 of the Convention, one of the core rights guaranteed by the Convention ..., whereas in the present case the evidence was obtained by a measure which was in breach of domestic law, which did not breach Article 3. As regards the question whether the circumstances in which the evidence was obtained cast doubt on its reliability or accuracy, the Court notes that it is undisputed between the parties that the evidence was found in a room within the flat used exclusively by the applicant ... Furthermore, the amount and quality of the hashish has been determined by an expert whose findings have not been challenged by the applicant at any stage of the proceedings. Thus nothing casts any doubts on the reliability or accuracy of the evidence (contrast *Layijov v. Azerbaijan*, no. [22062/07](#), § 75, 10 April 2014; *Horvatić v. Croatia*, no. [36044/09](#), § 84, 17 October 2013 and *Lisica*, cited above, § 57). 40. As regards the importance of the disputed evidence for the criminal conviction of the applicant (compare *Lisica*, cited above, § 57), the Court notes that, according to the Federal Constitutional Court’s findings, the contested material in the present case was in effect the only evidence against the applicant ... It further notes that the Regional Court relied on the statement the applicant himself made in writing to the effect



but this will not be so if that evidence does not actually have a bearing on the outcome of the proceedings against the defendant, that is, an impact on his or her conviction or sentence<sup>180</sup>.

131. *A court must thus always make – and be shown to have been made – a thorough assessment as to whether or not the means by which particular evidence has been obtained would render unfair its use in the trial which it is conducting.*

#### F. The judicial responsibility to check the lawfulness of a person's arrest

132. It is of vital importance for the European Convention guarantee of the right to liberty and security that there be effective judicial control over any instance of its deprivation.

133. In particular, it is in the process of judicial control that the requirements governing initial apprehension of a suspected offender and the merits of arguments for the imposition (or continuation) of coercive measures should be put to the test.

134. However, it needs to be appreciated that Article 5 of the European Convention requires two distinct forms of judicial control; the first – under paragraph 3 - relates to the justification for the imposition of coercive measures involving deprivation of liberty, including a person's initial apprehension or arrest pursuant to Article 5(1)(c) and the second – under paragraph 4 - concerns the determination of challenges to the

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that he was in possession of the drugs. The Court recalls that the relevance of the existence of evidence other than the contested evidence depends on the circumstances of the case. In the present circumstances, where the substances found in the applicant's home were strong evidence, and where there was no risk of the evidence being unreliable, the need for supporting evidence was correspondingly weaker (compare Lee Davies, cited above, § 52). 41. Lastly, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual's interest that the evidence against him be gathered lawfully. The Court notes that the national courts addressed in detail the applicant's arguments regarding the use of the evidence and thoroughly reasoned why they were of the opinion that the evidence, although obtained by an unlawful house search, could be used as evidence in the criminal proceedings at issue. They weighed the public interest in prosecuting the crime of drugs possession against the applicant's interest in respect for his home. Unlike in the case of Jalloh ..., where the domestic authorities considered the admittance of evidence obtained by the forcible administration of enemetics authorized by domestic law, in the present case the national courts were aware of their discretion to exclude the unlawfully obtained evidence when they considered the evidence at hand. In these circumstances, and further given that the considerable amount of hashish which had been detected (in contrast to the case of Jalloh in which only a small amount of cocaine was found) was taken into consideration by the domestic courts, their conclusion that the public interest outweighed the applicant's basic rights was carefully and thoroughly reasoned and did not disclose any appearance of arbitrariness or disproportionality. 42. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the unlawfulness, and the use which was made of the material obtained through the impugned search, the Court finds that the proceedings in the applicant's case, considered as a whole, were not contrary to the requirements of a fair trial").

<sup>180</sup> As in *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010; "the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence" (para. 187). Cf. *Turbylev v. Russia*, 4722/09, 6 October 2015; "the domestic courts' use in evidence of the statement of the applicant's surrender and confession obtained as a result of his ill-treatment in violation of Article 3 and in the absence of access to a lawyer has rendered the applicant's trial unfair" (para. 97).

lawfulness of any deprivation of liberty pursuant to all of the grounds specified in Article 5(1).

135. The possibility of instituting judicial control under paragraph 3 is the responsibility of the prosecutor whereas that pursuant to paragraph 4 is a right exercisable by or on behalf of the person deprived of his or her liberty.
136. The fulfilment of judicial control for the purposes of paragraph 3 thus does not depend on any request being made by the person who has been deprived of his or her liberty.<sup>181</sup>
137. Any deadline for the first appearance before a judge under paragraph 3 that is prescribed by national law must be observed. However, the European Court has also identified the following considerations as important: namely, that four days will generally be regarded as too long<sup>182</sup>, judicial and other holidays cannot justify delay<sup>183</sup>, emergencies and practical difficulties can be relevant but this should not be taken for granted<sup>184</sup> and the need to consider the particular situation of children<sup>185</sup>.
138. The judge must actually hear the person deprived of his or her liberty as this is a vital safeguard for any person apprehended against the possible misuse of power regarding any continued deprivation of liberty.<sup>186</sup>
139. The specific responsibility of the judge under paragraph 3 is to determine whether or not a person should be released or be subjected to coercive measures – whether remand in custody or others such as bail, compulsory residence orders, house arrest, police supervision and the surrender of a passport.
140. In approaching this task, the judge is particularly required to address the following issues
- is there still a reasonable suspicion that an offence has been committed by the person concerned;
  - does at least one of the four admissible grounds for imposing coercive measures exist<sup>187</sup>;

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<sup>181</sup> See, e.g., *T W v. Malta*, no. 25644/94 [GC], 25 April 1999, *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006 and *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.

<sup>182</sup> See, e.g., *Brogan and Others v. United Kingdom*, no. 11209/84, 29 November 1988 and *Harkmann v. Estonia*, 2192/03, 11 July 2006.

<sup>183</sup> *Koster v. Netherlands*, no. 12843/87, 28 November 1991.

<sup>184</sup> See, e.g., *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, *Rigopoulos v. Spain* (dec.), no. 37388/97, 12 January 1999, *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010 and *Vassis and Others v. France*, no. 62736/09, 27 June 2013.

<sup>185</sup> *Ipek and Others v. Turkey*, no. 17019/02, 3 February 2009.

<sup>186</sup> *De Jong, Baljet and Van Den Brink v. Netherlands*, no. 8805/79, 22 May 1984 and *Mamedova v. Russia*, no. 7064/05, 1 June 2006.

<sup>187</sup> I.e., a risk of absconding, a risk to the administration of justice; a risk of further offences being committed and a threat to public order and the need for the protection of detainee. The judge must give relevant and sufficient reasons (i.e., one of these four grounds) for a person's detention at the time of the first decision ordering his or her detention on remand, that is to say "promptly" after his or her arrest; *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016.

- is there an actual need to impose coercive measures on account of one or more of those grounds existing; and
- has the suitability of alternatives to remand in custody first been considered.<sup>188</sup>

141. In performing this task the judge will have to consider whether or not the continued detention of the arrested person would be lawful.<sup>189</sup> However, his or her role under Article 5(3) does not expressly refer to any requirement that he or she addresses the lawfulness of the arrest itself.

142. Nonetheless, in determining whether or not there is still a reasonable suspicion, the judge will inevitably have to consider whether or not such a suspicion existed at the time of the person's initial apprehension. In so doing, the judge will thus have to address an issue that goes to the very lawfulness of that apprehension<sup>190</sup>.

143. The existence of a reasonable suspicion does not entail definite proof since this standard is not the same as that required for a conviction<sup>191</sup> but there must always be a plausible basis for depriving someone of his or her liberty so that a genuineness of belief will be insufficient to establish a reasonable suspicion; there must also be an objective link between the person concerned and the offence supposed to have been committed or to be about to be committed<sup>192</sup>.

144. This can only be established through a proper scrutiny of the facts being relied upon.<sup>193</sup>

145. In particular, it is crucial that the facts said to give rise to a reasonable suspicion actually involve the constituent elements of the alleged offence.<sup>194</sup>

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<sup>188</sup> “The review required under Article 5 § 3, being intended to establish whether the deprivation of the individual’s liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention”; *T W v. Malta*, no. 25644/94, 29 April 1999, para. 46.

<sup>189</sup> Thus, Article 5(3) “enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons”; *T W v. Malta*, no. 25644/94, 29 April 1999, para. 41.

<sup>190</sup> The nature of the review being undertaken in a challenge under paragraph 4 to the lawfulness of a deprivation of liberty is, however, broader in scope than that under paragraph 3. In particular, it should entail addressing the relevance of the facts of the case to any issues affecting the lawfulness of the deprivation of liberty (see, e.g., *Nikolova v. Bulgaria* [GC], no. 31195/95, 25 March 1999 and *Grauslys v. Lithuania*, no. 36743/97, 10 October 2000), a willingness to hear evidence (*Ignatenko v. Moldova*, no. 36988/07, 8 February 2011) and a readiness to go beyond a focus just on formal compliance with the law (see, e.g., *Nestak v. Slovakia*, no. 65559/01, 27 February 2007 and *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013). Furthermore, arguments about lawfulness can even require constitutional arguments to be considered, as well as those relating to rights under the European Convention.

<sup>191</sup> See *Ferrari-Bravo v. Italy*, no. 9627/81, 14 March 1984 and *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994.

<sup>192</sup> See, e.g., *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86, 30 August 1990, *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994, *Ipek and Others v. Turkey*, no. 17019/02, 3 February 2009 and *Kotiy v. Ukraine*, no. 28718/09, 5 March 2015.

<sup>193</sup> See, e.g., *Erdagöz v. Turkey*, no. 21890/93, 22 October 1997 and *Creangă v. Romania* [GC], no. 29226/03, 23 February 2012.

<sup>194</sup> See *Lukanov v. Bulgaria*, no. 21915/93, 20 March 1997 (“43. However, none of the provisions of the Criminal Code relied on to justify the detention - Articles 201 to 203, 219 and 282 ... - specified or even

146. In those cases where a judge finds that there was no reasonable suspicion at the time of the initial apprehension – which issue he or she is thus bound to address – there will therefore have to be a ruling on the lawfulness of that apprehension since the absence of such a suspicion will render a deprivation of liberty pursuant to Article 5(1)(c) unlawful for the purpose of the European Convention, if not also national law.

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implied that anyone could incur criminal liability by taking part in collective decisions of this nature. Moreover, no evidence has been adduced to show that such decisions were unlawful, that is to say contrary to Bulgaria's Constitution or legislation, or more specifically that the decisions were taken in excess of powers or were contrary to the law on the national budget. In the light of the above, the Court is not persuaded that the conduct for which the applicant was prosecuted constituted a criminal offence under Bulgarian law at the relevant time. 44. What is more, the public prosecutor's order of detention of 9 July 1992 and the Supreme Court's decision of 13 July upholding the order referred to Articles 201 to 203 of the Criminal Code ... As appears from the case-law supplied to the Court, a constituent element of the offence of misappropriation under Articles 201 to 203 of the Criminal Code was that the offender had sought to obtain for himself or herself or for a third party an advantage ... The order of 9 July in addition referred to Article 282 which specifically makes it an offence for a public servant to abuse his or her power in order to obtain such advantage ... However, the Court has not been provided with any fact or information capable of showing that the applicant was at the time reasonably suspected of having sought to obtain for himself or a third party an advantage from his participation in the allocation of funds in question (see, for instance, the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, p. 25, para. 51). In this connection it is to be noted that the Government's submission that there had been certain "deals" was found by the Commission to be unsubstantiated and was not reiterated before the Court. Indeed, it was not contended before the Convention institutions that the funds had not been received by the States concerned. 45. In these circumstances, the Court does not find that the deprivation of the applicant's liberty during the period under consideration was "lawful detention" effected "on reasonable suspicion of [his] having committed an offence") and *Kandzhov v. Bulgaria*, no. 68294/01, 6 November 2008 "58. The Court must therefore examine whether the applicant's arrest and detention on charges of hooliganism and insult were "lawful" within the meaning of Article 5 § 1 and whether his deprivation of liberty was based on a "reasonable suspicion" of his having committed an offence. 59. In so far as insult is concerned, the Court observes that, following the March 2000 amendments to the 1968 Criminal Code, at the relevant time it was a privately prosecutable offence and could not attract a sentence of imprisonment (see paragraph 30 above). The levelling of charges of insult could not therefore have served as a basis for the applicant's detention between 11 and 14 July 2000 under Article 152a § 3 of the 1974 Code of Criminal Procedure (see, as an example to the contrary, *Douiye v. the Netherlands* [GC], no. [31464/96](#), § 46, 4 August 1999). By making an order to this effect the Pleven District Prosecutor's Office blatantly ignored the clear and unambiguous provisions of domestic law. It is not for the Court to speculate whether this happened because that Office was not aware of the March 2000 amendments to the 1968 Criminal Code or for other reasons. As regards the immediately preceding period, when the applicant was in police detention, the Court notes that section 70(1)(1) of the 1997 Ministry of Internal Affairs Act does not distinguish between privately and publicly prosecutable offences (see paragraph 31 above). However, it is apparent from the interpretation given to this provision by the Supreme Administrative Court that the powers which it bestows upon the police are ancillary to their duty to investigate crime (see paragraph 32 above). It is clear that the police have no power to conduct preliminary investigations in respect of privately prosecutable offences such as insult. The applicant's police detention on this basis was therefore also unlawful. 60. As regards hooliganism, the Court observes that the applicant's actions consisted of the gathering of signatures calling for the resignation of the Minister of Justice and displaying two posters calling him a "top idiot". When examining the criminal charges against the applicant the Supreme Court of Cassation specifically found that these actions had been entirely peaceful, had not obstructed any passers-by and had been hardly likely to provoke others to violence. On this basis, it concluded that they did not amount to the constituent elements of the offence of hooliganism and that in convicting the applicant the Pleven District Court had "failed to give any arguments" but had merely made blanket statements in this respect ... Nor did the orders for the applicant's arrest under section 70(1) of the 1997 Ministry of Internal Affairs Act and for his detention under Article 152a § 3 of the 1974 Code of Criminal Procedure – which were not reviewed by a court – contain anything which may be taken to suggest that the authorities could reasonably believe that the conduct in which he had engaged constituted hooliganism, whose elements were comprehensively laid down in the Supreme Court's binding interpretative decision of 1974 (see paragraphs 28 and 29 above, as well as *Lukanov*, §§ 43 and 44; *mutatis mutandis*, *Steel and Others*, § 64, and, as an example to the contrary, *Włoch*, §§ 111 and 112, all cited above). 61. On the basis of the foregoing, the Court concludes that the applicant's deprivation of liberty between 10 and 14 July 2000 did not constitute a "lawful detention" effected "on reasonable suspicion" of his having committed an offence").

147. Furthermore, the European Court has concluded that the consequence of this finding is that the detained person should be released<sup>195</sup>. As a result, the judge before which the person has been brought cannot then proceed to consider whether there is a basis for imposing any coercive measures on him or her. This will only be possible after there has been a lawful arrest pursuant to Article 5(1)(c).

148. *Thus, it is essential that the judge before an arrested person is initially brought addresses the lawfulness of the arrest in question and, if this is found to be unlawful, orders that person's release.*

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<sup>195</sup> See *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006; “40. The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release”.