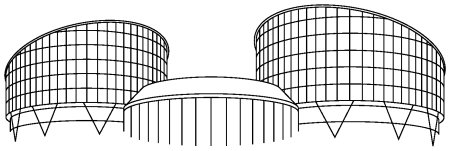

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF Y. v. SLOVENIA

(Application no. 41107/10)

JUDGMENT

STRASBOURG

28 May 2015

FINAL

28/08/2015

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

In the case of Y. v. Slovenia,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 31 March 2015,

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

PROCEDURE

1. The case originated in an application (no. 41107/10) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Ms Y. ("the applicant"), on 17 July 2010. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr J. Ahlin, a lawyer practising in Ljubljana. The Slovenian Government ("the Government") were represented by their Agent, Mrs B. Jovin Hrastnik, State Attorney.

3. The applicant alleged that the criminal proceedings concerning the sexual assaults against her had been unreasonably delayed, lacked impartiality, and exposed her to several traumatic experiences violating her personal integrity.

4. On 20 February 2012 the application was communicated to the Government.

THE FACTS

1. I. THE CIRCUMSTANCES OF THE CASE

2. A. The background

5. The applicant was born in Ukraine in 1987 and arrived in Slovenia in 2000 with her sister and mother, who had married a Slovenian.

6. Between July and December 2001, at the age of 14, she was allegedly repeatedly sexually assaulted by a family friend, X, 55 years old at the time, who together with his wife often took care of her and helped her in preparations for beauty contests.

7. In July 2002 the applicant told her mother about the alleged sexual assaults by X, but was unwilling to talk about them with anyone else.

8. On 15 July 2002 a priest gave a statement to the Maribor police, in which he said that the applicant's mother had told him about her concern that the applicant had been raped by X.

3. B. The police investigation

9. On 16 July 2002 the applicant's mother lodged a criminal complaint against X, in which she alleged that X had forced the applicant to engage in sexual intercourse with him on several occasions.

10. On 17 July 2002 the applicant was questioned by Maribor police officers and described how X had forced her to engage in various sexual activities. As regards the time frame of the assaults, the applicant stated that X had first attempted to kiss her before July 2001, when she had started modelling for fashion shows. She proceeded to give an account of a number of occasions when X had sexually assaulted her. On one occasion X had lain on top of her while she was sleeping at his house and had attempted to have sexual intercourse with her, spreading her legs with one hand and putting his other hand over her mouth to prevent her from screaming, but he was interrupted by his younger son coming up the stairs. On another occasion, when they were at a swimming pool, he had groped her in the water. On yet another occasion X had allegedly taken the applicant to an abandoned workshop owned by his family and performed oral sex on her. Moreover, according to the applicant, X had forced her to perform oral sex on him at least three times, once at his home, once at his company's garage, and the third time in his van, which he had parked in woods near the town. On that last occasion the applicant had allegedly tried to escape; however, being unfamiliar with the surroundings, she had come back to the van. The applicant stated that X had on several occasions attempted to have intercourse with her, but that she had not been certain whether he had managed to achieve penetration. She further stated that she had tried to defend herself by crying and pushing X away, but without success.

11. The applicant was also examined by an expert in gynaecology, who found that her hymen was intact. Moreover, in the course of July and August 2002 the police questioned X, who denied any sexual relations with the applicant, and three other people.

12. Following a series of unsuccessful attempts to obtain specific information from the police as regards the progress of the investigation, the applicant's mother complained to the Maribor District State Prosecutor's Office (hereinafter "the State Prosecutor's Office").

13. On 27 June 2003 the State Prosecutor's Office sent a letter to the Maribor police, urgently requesting a copy of the criminal complaint lodged against X.

14. On 18 August 2003 the police sent a report to the State Prosecutor's Office stating that the applicant had failed to provide a detailed account of her allegations or to indicate the locations where the alleged rapes had taken place. The police noted that the applicant had given the impression of being under severe psychological stress and in fear of her mother's reaction. They concluded that it was impossible to confirm her allegation of rape, and equally impossible to establish the reasons for her serious emotional distress.

4. C. The judicial investigation

15. On 28 August 2003 the State Prosecutor's Office lodged a request for a judicial investigation in respect of X based on charges of sexual assault on a minor below the age of fifteen. The request alleged that X had forced the applicant to engage in oral sex and had had sexual intercourse with her on at least three occasions, despite her refusal and attempted resistance.

16. On 7 January 2005 X was summoned to appear before the investigating judge of the Maribor District Court. He refused to give an oral statement. On 10 March 2005 X, represented by a lawyer, submitted a written statement in which he denied the charges. He also submitted a medical report which indicated that his left arm had been disabled since birth.

17. On 26 May 2005 the investigating judge issued a decision to open a criminal investigation in respect of X. An appeal by X against this decision was rejected by the pre-trial panel of the Maribor District Court.

18. On 17 October 2005 the applicant was examined as a witness before the Ljubljana District Court, which had been asked to carry out the witness examination because the applicant lived in the area. The examination resumed on 8 November 2005. Neither X nor his counsel was informed of this examination. The applicant testified in detail as to when, where and how the alleged offences had taken place. She first described the assault which had occurred in X's house, while she had been sleeping there, reiterating that X had been disturbed by his son. According to the applicant's statement, the second assault had occurred when, instead of driving the applicant home, X had parked in the woods and started to kiss her forcefully. X had then undressed the applicant, parted her legs with one hand and held her wrists with the other and again attempted to have intercourse with her, but there had been no penetration. The applicant further recounted that X had on another occasion taken her to the family's abandoned workshop and had performed oral sex on her. She stated that she had attempted to free herself of his grip, but that X had again pinned her wrists down and also slapped her across the face. Again, vaginal intercourse

had been attempted but had not actually occurred. X had ordered her not to talk to anyone about this, or he would have her and her family deported from Slovenia. The applicant added that she remembered these three occasions well and the events had occurred just as she described them, and that there had been a number of other similar incidents between July and December 2001.

19. On 13 and 20 December 2005 X's wife and another witness were examined by the investigating judge of the Maribor District Court.

20. On 13 January 2006 the Koper District Court, at the request of the Maribor District Court, examined witness D., who testified that the applicant had told her of the alleged rape.

21. On 14 April 2006 the investigating judge examined witness H., who was an employee of the company owned by X and his wife. H. testified that she had not seen X behaving improperly towards the applicant on the company's premises.

22. On 16 May 2006 the investigating judge appointed an expert in gynaecology, B., in order to establish the probability that the applicant had engaged in sexual intercourse in the period between July and December 2001. The latter carried out a consultation with the applicant, who refused a clinical examination. She told B., among other things, that despite the attempts made by X there had been no actual sexual penetration. During the consultation, B. confronted the applicant with an orthopaedics report stating that X could not have used his left arm in the ways described by her, to which the applicant answered that she had seen X use it to lift heavy items. B. also presented the applicant with the police report stating that she had not been able to give a detailed account of the sexual assaults and specific locations, and asked her why she had not defended herself against X, for instance by scratching or biting. The applicant replied that she had not defended herself and had been unable to do so. On 19 June 2006 the expert prepared his report, which was based on the evidence in the file, including a gynaecological report from 2002 which showed that the applicant's hymen was intact at that time, and the conversation with the applicant. He found that there was nothing to indicate with certainty that the applicant had had sexual intercourse with X at the material time. In addition to his medical opinion, the expert commented that there were certain inconsistencies in the applicant's account of the events in issue. It can be seen from the report that neither of the alleged inconsistencies was related to any medical issue.

23. On 20 June 2006 the investigating judge appointed an expert in clinical psychology, R. The latter, after holding a consultation with the applicant, submitted her report on 4 July 2006, and concluded as follows:

> "Since 2001 Y. has shown all the symptoms of a victim of sexual and other kinds of abuse (emotional, behavioural and physical symptoms) ...

> In addition to the emotional consequences, the girl shows very typical behavioural patterns relating to the abuse experienced by her, and also some physical symptoms (disturbed sleep, nightmares, collapsing). The symptoms are indicated in the report ...
>
> The gravity of the consequences – physical and sexual in particular – is difficult to assess at the present time. But, like the short-term ones, the long-term consequences can be predicted. Their real extent will become apparent at key stages of the girl's life and in stressful situations ...
>
> Because of these effects, which are most serious in her psychological sphere ... it is of very marginal importance whether during the perpetrator's violent behaviour the child victim experienced hymen defloration or not ...
>
> Sexual behavioural patterns can only be assessed properly by an expert in clinical psychology ..."

24. On 15 September 2006 the Maribor district prosecutor's office indicted X for sexual assault of a child below the age of fifteen under Article 183 §§ 1 and 2 of the Criminal Code. An objection by X to the indictment was rejected by the pre-trial panel of the Maribor District Court on 20 October 2006.

5. D. The trial

25. The Maribor District Court scheduled a hearing for 27 June 2007. However, the hearing was adjourned at X's request on the basis of a document which showed that he was now on sick leave for several weeks.

26. A hearing was then scheduled for 3 October 2007, but adjourned at X's counsel's request. The next hearing was to be held on 12 November 2007. However, owing to the absence of a jury member, the hearing was adjourned. Subsequently, X informed the court that he was about to go on a business trip, for which reason the next hearing was postponed until 16 January 2008.

27. On 16 January 2008 X failed to appear before the court. On 17 January 2008 he submitted a sick-leave certificate.

28. On 25 January 2008 X's counsel informed the court that X had revoked his power of attorney and that he would be represented by another lawyer, M., from then on. However, the court received no new power of attorney authorising M. to act as X's counsel. Since X was accused of a criminal offence requiring mandatory representation, on 28 January 2008 the court appointed M. as counsel for X .

29. On 14 March 2008 the court held a hearing, from which the public was excluded on the grounds of protection of privacy and public morals. The court heard evidence from X. At the hearing the applicant's counsel sought to have M., X's counsel, disqualified on the ground that in 2001 the applicant and her mother had sought advice from him on the matters in issue. Furthermore, the applicant's mother had been intimately involved with him. M. denied that he had ever seen the applicant or her mother and said that he only knew that the lawyer at whose firm he had been working at that time had represented the applicant's mother's estranged husband in

divorce proceedings. The panel dismissed the application, ruling that no statutory grounds existed for disqualifying M. as counsel.

30. On 14 March 2008 X submitted written pleadings, claiming that he would have been unable to use physical force on the applicant, as his left arm had been seriously disabled since birth and was 15 cm shorter than his right arm. X alleged that he had practically no use of his disabled arm. Moreover, he asserted that he and his family had been helping the applicant and her sister to integrate into their new community and learn Slovene, while their mother had been busying herself with her private activities. According to X, the charges of sexual assault were prompted by the applicant's mother, who wished to extort money from him.

31. On 14 April 2008 the court held a second hearing in the case. X was questioned by the State prosecutor, mostly about the use of his left arm, and in this connection conceded that, although he usually drove automatic cars, he did occasionally drive a smaller manual transmission car. However, when asked whether he had ever driven a truck, X replied that this had no bearing on the case, acknowledging nevertheless that he had a licence to drive all categories of road vehicles. Then the applicant was summoned to testify, the court granting her request for X to be absent from the hearing room. While recounting the instances of sexual abuse by X, the applicant cried repeatedly and the hearing was adjourned for a few minutes on that account. X's counsel M. then questioned the applicant, asking her how tall she had been and how much she had weighed at the material time. The applicant became very agitated and asked M. why, having been the first to hear her story, he was asking those questions and was now acting as X's counsel. M. commented that this was part of the tactics. The hearing was then adjourned owing to the applicant's distress.

32. On 9 May 2008 the court held a third hearing. The questioning of the applicant continued in the absence of X. When asked how she felt about the situation with hindsight, she cried and said that no one had helped her and that the proceedings had been dragging on for several years, during which she had had to keep reliving the trauma.

33. On 27 August 2008 the applicant lodged a supervisory appeal under the Protection of the Right to a Hearing without Undue Delay Act of 2006 (hereinafter "the 2006 Act") with a view to accelerating the proceedings.

34. On 26 September 2008 the court held a fourth hearing, from which the public was excluded, at which X personally asked the applicant over a hundred questions, starting with a comment in the form of a question "Is it true that you have told and showed me that you could cry on cue and then everybody would believe you?" It does not appear from the record of the hearing that the applicant made any reply. X then asked the applicant a series of questions aimed at proving that they had seen each other mainly at gatherings of their families or when the applicant, in need of transport or other assistance, had actively sought his company. Among the questions

asked by X were the following: “Is it true that I could not have abused you on the evening of the event as you stated on 14 April?”, “Is it true that if I had wished to satisfy my sexual needs, I would have called you at least once?”; “Why did you call me in September and ask me to take you out of town if I had already raped you five times before that date?”, “Why were you calling me, because I certainly never called you?”, or “Is it true that you specifically asked that we drive out of town alone, because you wished to talk to me and to celebrate your success at a beauty pageant?” The applicant insisted that she had not called X, nor had she initiated any outings with him, but that he had called her. X also asked the applicant whether she had told him that, once she had a boyfriend, she would always be on top, as she wanted to be the mistress.

35. Moreover, X claimed that the charges of rape were fabrications by the applicant’s mother. Hence, he asked the applicant numerous questions about her mother, including about her knowledge of Slovene, her work, and her personal relationships. Further, X confronted the applicant with the medical report which indicated that his left arm was seriously disabled. The applicant insisted that she had seen X using his left arm in his daily life, including driving cars, lifting and carrying his children and their school bags, and carrying boxes and bottles. Throughout the questioning, X disputed the accuracy and credibility of the applicant’s answers, extensively commenting on the circumstances described by her and rejecting her version of events. He continued to do so even after the presiding judge explained to him that he would have the opportunity to make his comments after the applicant’s questioning.

36. During the cross-examination, X repeated a number of questions and was eventually warned against doing this by the presiding judge. Moreover, the presiding judge ruled out of order seven questions that she perceived had no bearing on the case in issue.

37. On three occasions, when the applicant became agitated and started crying, the court ordered a short recess. After one of these recesses X asked the applicant whether she would feel better if they all went to dinner, just as they used to, and maybe then she would not cry so much.

38. At one point the applicant requested the court to adjourn the hearing as the questions were too stressful for her. However, after being told by X that the next hearing could not be held until after 19 November 2008 when he would be back from a business trip, the applicant said, while crying, that he should continue with his questioning as she wanted to get it over with. Eventually, after four hours of cross-examination of the applicant, the presiding judge adjourned the hearing until 13 October 2008.

39. X’s wife, mother-in-law and an employee of his company were examined at the next hearing, all three of them asserting that X had very little use of his left arm and certainly could not lift any burdens.

40. On 24 November 2008 a sixth hearing was held. The questioning of the applicant by X took an hour and a half. When questioned by X's counsel M., the applicant again asserted that she had told him the whole story a long time ago. M. denied this, stating that if he had been informed he would have advised the applicant to go to hospital and to the police. Once the applicant's questioning was over, her mother was questioned, mostly about her private relationships.

41. At the end of the hearing X's counsel M. confirmed that he had encountered the applicant's mother when he was working at a law firm with a lawyer who had represented her in certain court proceedings. He also stated that he would inform the court within three days as to whether he would request leave to withdraw from representing X in the proceedings in issue. On 25 November 2008 M. requested leave from the court to withdraw from the case, as he had been personally affected by certain statements made by the applicant's mother.

42. At a hearing of 15 December 2008 the court dismissed the request by X's counsel M., finding that there were no statutory grounds disqualifying him from representing M. The gynaecologist, B., was examined as a witness. He acknowledged that in order to clarify the circumstances he had also addressed certain issues in his report that had not been part of the investigating judge's request. Moreover, he reiterated that the applicant's hymen had been intact at the material time.

43. On 22 January 2009 the court held an eighth hearing in the case and examined the expert in clinical psychology, R., who again stated that sexual abuse which had happened long ago could not be proved by any material evidence, and that only the psychological consequences could be assessed. She further reiterated that the applicant displayed clear symptoms of sexual abuse.

44. On 20 February 2009 the court appointed T., another expert in gynaecology, to give an opinion on whether the applicant could have had sexual intercourse at the material time, given the results of her medical examination (see paragraph 11 above). On 10 March 2009 the expert submitted his report, which stated that those results were not inconsistent with the applicant's account of the events in issue.

45. On 16 March 2009 the court held a hearing at which it appointed N., an expert in orthopaedics, to prepare an opinion as to whether, in view of his disabled left arm, X could have performed the acts described by the applicant.

46. On 5 May 2009 N. submitted his report, in which he found that X's left arm was severely disabled, and that for those reasons some of the events could not have happened in the way described by the applicant.

47. On 8 June 2009 the court held a hearing at which N. was questioned. Further to questions put by the applicant's counsel, N. explained that he had

based his opinion on the documents in X's medical file, the X-rays brought to him by X, and an examination of X.

48. A hearing was held on 9 July 2009. The applicant requested that N. be questioned further.

49. On 29 September 2009 the court held the twelfth and last hearing in the case. At the hearing the applicant and the State Prosecutor questioned N., who stated, *inter alia*, that X could only use his left arm to assist the right arm in carrying out specific tasks, and that he had practically no strength in his left arm. In the expert's opinion, X would not have been able to spread the applicant's legs with his left arm, and neither would he have been able to take off his trousers as alleged by her. After being asked by the prosecutor whether his assessment was based on the assumption that the applicant had used all her strength to resist X, N. stated: "I did not base my conclusion on that assumption, as I did not know whether she had resisted or whether she had willingly submitted." After being asked whether the applicant, who was 14 years old at the time, could have resisted X, who had allegedly been lying on top of her, he said he believed so. N. also testified that although X had more than ordinary strength in his right arm, he could not have assaulted the applicant in the way she alleged.

50. After the examination of N., the applicant, who had sought and obtained an opinion from another orthopaedist outside the court proceedings which indicated that X might still have limited use of his left arm, asked for another orthopaedics expert to be appointed, on the grounds that there was doubt about N.'s conclusions. This request was rejected by the court as unnecessary, as was the applicant's request for the court also to call as witnesses her sister and her mother's former husband, who had allegedly seen X rowing with both arms. A request by the prosecutor for the applicant to be examined again was also rejected.

51. At the end of the hearing the court pronounced judgment, acquitting X of all charges. In view of this verdict, the court recommended that the applicant pursue her claim for damages, which she had submitted in the course of the proceedings, before the civil court.

52. On 15 December 2009 the applicant lodged a new supervisory appeal under the 2006 Act. On 22 December 2009 she received a reply from the court informing her that the reasoning of the judgment had been sent to her that day.

53. In the written grounds the court explained that the expert orthopaedics report contested X's ability to carry out certain acts described by the applicant, for which he would have had to use both arms. As explained by the expert, X was not capable of even moving his left hand in a position which would have allowed him to take his trousers off or spread the applicant's legs. According to the court, the fact that some of the applicant's allegations were disproved by the expert raised some doubts as to her entire version of the events. On the basis of the principle that any reasonable doubt

should benefit the accused (*in dubio pro reo*), the court had acquitted X. As regards the report by the expert in psychology R., which found that the applicant had suffered sexual abuse, the court noted that it could not ignore the judgment delivered in another set of proceedings concerning the applicant's mother's estranged husband, in which the competent court had accepted that he had engaged in sexual activity in front of the applicant and her sister and had also behaved inappropriately towards the applicant.

54. On 30 December 2009 the State Prosecutor lodged an appeal, in which she criticised the court for not considering the fact that owing to his age, gender and body mass X was much stronger than the applicant, and was also in a position of power on account of his economic and social status. Moreover, she pointed out that X had operated manual transmission vehicles, which required him to use both his arms. The prosecutor further argued that the criminal offence in question did not require the sexual act to have been committed by force; it was sufficient that the applicant opposed it. She also stressed that the proceedings had already been pending for eight years, which had aggravated the trauma suffered by the applicant.

55. The appeal was dismissed by the Maribor Higher Court on 26 May 2010, which found that the reasoning of the first-instance court's judgment was clear and precise regarding the doubt that X had committed the alleged criminal acts.

56. The applicant subsequently asked the Supreme State Prosecutor to lodge a request for the protection of legality (an extraordinary remedy). On 28 July 2010 the Supreme State Prosecutor informed the applicant that the aforementioned request could only concern points of law and not the facts, which the applicant had called into question.

6. E. Compensation for delays in the criminal proceedings

57. On 11 February 2011 the applicant and the Government reached an out-of-court settlement under the 2006 Act in the amount of 1,080 euros (EUR), covering all pecuniary and non-pecuniary damage incurred by the applicant as a result of a violation of her right to a trial without undue delay in the criminal proceedings in issue. The applicant also received EUR 129.60 in respect of the costs incurred in the proceedings.

7. II. RELEVANT LAW AND PRACTICE

8. A. Relevant domestic criminal law

58. Article 183 §§ 1 and 2 of the Criminal Code regulating the criminal offence of sexual assault on a person younger than 15 years, as in force at the material time, reads as follows:

> "(1) A person who engages in sexual intercourse or any other sexual act with a person of the opposite or same sex who is not yet fifteen years old, and where the

maturity of the perpetrator and that of the victim are obviously disproportionate, shall be punished with imprisonment of one to eight years.

(2) A person who commits the above act against a person who is not yet ten years old, or against a vulnerable person who is not yet fifteen years old, or by using force or threat to life or limb, shall be punished with imprisonment of three years or more ..."

59. Section 148 of the Criminal Procedure Act, as in force at the material time, provides that the police, having concluded the preliminary investigation of an alleged criminal offence, will draw up a criminal complaint based on the information collected and send it to the State Prosecutor's Office. However, even if the information gathered does not appear to provide any grounds for such a criminal complaint to be made, the police must submit a report on their actions to the State Prosecutor.

60. As regards the protection of under-age victims of criminal offences of a sexual nature during judicial investigations, the Criminal Procedure Act includes a number of provisions aimed at protecting under-age victims of or witnesses to criminal proceedings. In proceedings regarding criminal offences against sexual integrity, minors must, from the initiation of the criminal proceedings onwards, have counsel to protect their rights. Under-age victims who have no lawyer are assigned one by the trial court. Moreover, the defendant cannot be present during the examination of witnesses below the age of 15 years who claim to be victims of criminal offences against sexual integrity. In this regard, section 240 of the Act provides that minors, especially those who have been affected by the criminal offence, should be examined with consideration for their age, to avoid any harmful effects on their mental state.

61. In order to ensure the smooth running of a judicial investigation, the parties and the victim may, under section 191 of the Criminal Procedure Act 1994, complain to the president of the court charged with the investigation about any delays or other irregularities. Upon the examination of the complaint, the president is required to inform the complainant of any steps taken in this regard.

62. As to the time frame for scheduling a criminal trial, section 286(2) of the Criminal Procedure Act provides that the presiding judge shall schedule a first hearing within two months of receipt of an indictment. If he fails to do so, he must inform the president of the court accordingly, and the latter is required to take the necessary steps to schedule a hearing.

63. As regards the conduct of the hearing, section 295 of the Criminal Procedure Act provides that the public may be excluded from the hearing if so required, for example for the protection of the personal or family life of the defendant or the victim. In accordance with section 299 of the Act, the presiding judge conducts the hearing, grants the parties the right to address the court, and questions the defendant, witnesses and experts. Moreover, it is the presiding judge's duty to ensure that the case is presented fully and

clearly, that the truth is established, and that any obstacles protracting the proceedings are eliminated.

64. The defendant may be temporarily removed from the courtroom if a witness refuses to testify in his presence. The witness's statement is then read to him and he is entitled to put questions to him or her. Nonetheless, pursuant to section 334(2) of the Criminal Procedure Act the presiding judge will prohibit any questions that have already been asked, that bear no relation to the case, or that in themselves suggest how they should be answered.

9. B. Relevant domestic civil law and practice

10. 1. Civil action for compensation

65. Article 148 of the Code of Obligations regulating the liability of legal persons for damage inflicted by one of their subsidiary bodies, which also applies to the determination of the State's liability for damages, provides that a legal person is liable for damage inflicted on a third party by one of its subsidiary bodies in the exercise of its functions or in connection therewith. In order for a claimant to be awarded compensation for damage inflicted by the State, he or she is required to prove all four elements of the State's liability, that is, unlawfulness of the State's action, existence of damage, causal link, and negligence or fault on the part of the State.

66. By virtue of Article 179 of the Code of Obligations, which constitutes the statutory basis for awarding compensation for non-pecuniary damage, such compensation may be awarded in the event of the infringement of a person's personality rights, as well as for physical distress, mental distress suffered due to the reduction of life activities, disfigurement, defamation, death of a close relative, or fear, provided that the circumstances of the case, and in particular the level and duration of the distress and fear caused thereby, justify an award.

67. According to the decision of the Supreme Court no. II Ips 305/2009, an award of compensation for non-pecuniary damage is strictly limited to the categories of damage specified in the Code of Obligations, adhering to the principle of *numerus clausus*. The Supreme Court thus decided that non-pecuniary damage resulting from excessive length of proceedings could not be classified among the categories of damage recognised by the Code of Obligations, as the right to trial within a reasonable time could not be interpreted as a personality right.

11. 2. Protection of the Right to a Hearing without Undue Delay Act of 2006 ("the 2006 Act")

68. Under section 1 of the 2006 Act, any party to court proceedings – including a victim of a criminal offence – is guaranteed the right to have his or her rights decided upon by the court without undue delay.

12. C. Relevant international law

69. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly resolution 40/34 of 29 November 1985 provides that victims of crime should be treated with compassion and respect for their dignity (Annex, Article 4). Moreover, the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by, *inter alia*, taking measures to minimise inconvenience to victims, protecting their privacy when necessary, and ensuring that they and their families and witnesses on their behalf are protected from intimidation and retaliation (Annex, Article 6 (d)).

70. Victims of criminal offences further enjoy protection under the legislation of the European Union. In 2001, a Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) was adopted with a view to introducing minimum standards on the rights and protection of victims of crime. Article 2 of the Framework Decision requires the Member States to ensure that victims have a real and appropriate role in its criminal legal system and that they are treated with due respect for the dignity of the individual during proceedings. Moreover, Article 3 provides that victims must be afforded the possibility to be heard during proceedings and to supply evidence; however, appropriate measures must be taken to ensure that they are questioned by the authorities only in so far as necessary for the purpose of criminal proceedings. Article 8 requires the Member States to provide a number of measures aimed at protecting the victims' safety and privacy in the criminal proceedings. Among others, measures must be taken to ensure that contact between victims and offenders within courts premises may be avoided, unless such is required in the interests of the criminal proceedings. Also, the Member States must ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, they may be entitled to testify in a manner which enables this objective to be achieved, by any appropriate means compatible with its basic legal principles.

71. Moreover, the EU Member States' ambition to reinforce the rights of the victims of crime led to the adoption, on 25 October 2012, of the Directive of the European Parliament and of the Council (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The relevant part of the Directive, which is to be implemented into the national laws of the EU Member States by 16 November 2015, provides as follows:

Recital 19

"A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them ..."

Article 20 – Right to protection of victims during criminal investigations

"Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

(a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;

...

(d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings."

Article 22 – Individual assessment of victims to identify specific protection needs

"1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

2. The individual assessment shall, in particular, take into account:

(a) the personal characteristics of the victim;

(b) the type or nature of the crime; and

(c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

..."

Article 23 – Right to protection of victims with specific protection needs during criminal proceedings

"1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical

constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

...

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

...

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public."

72. On 5 May 2011 the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force on 1 August 2014. The Convention was signed by Slovenia on 8 September 2011, but has not yet been ratified. The relevant part of the Convention provides as follows:

Article 49 – General obligations

"1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention."

Article 54 – Investigations and evidence

"Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary."

Article 56 – Measures of protection

"1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

(a) providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

(b) ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;

(c) informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

(d) enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

(e) providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;

(f) ensuring that measures may be adopted to protect the privacy and the image of the victim;

(g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;

(h) providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;

(i) enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child."

THE LAW

13. I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

73. The applicant complained under Articles 3 and 8 of the Convention that the criminal proceedings concerning the sexual assaults against her had been at variance with the respondent State's positive obligation to provide effective legal protection against sexual abuse, as they had been unreasonably delayed, lacked impartiality, and had exposed her to several traumatic experiences by violating her personal integrity. Moreover, the applicant claimed not to have had an effective remedy in respect of her complaints, as required by Article 13 of the Convention.

74. Having regard to the nature and the substance of the above complaints, the Court considers that the alleged delays and bias of the

domestic courts fall to be examined solely under Article 3 of the Convention (see *P.M. v. Bulgaria*, no. 49669/07, § 58, 24 January 2012), which reads as follows:

Article 3

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

75. The applicant's remaining complaints regarding the lack of protective measures afforded to her in the criminal proceedings raise certain questions about the scope of the State's obligation to protect victims of crime appearing as witnesses in criminal proceedings. In the specific circumstances of the present case, the Court takes the view that these issues should be considered under Article 8 of the Convention, which reads as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

14. A. Admissibility

15. 1. Non-exhaustion of domestic remedies

76. The Government argued that the applicant had failed to exhaust domestic remedies because she had not brought an action against the State for compensation for non-pecuniary damage caused by the State authorities based on Articles 148 and 179 of the Code of Obligations. According to the Government, any unlawful conduct on the part of the authorities could potentially constitute a violation of an individual's personality rights. In support of their submissions, they cited eight decisions of the Supreme Court adopted between 1999 and 2009, and three decisions of the Ljubljana Higher Court of 2010 and 2011, showing that the State had in some cases been found by the domestic courts to be liable for damages related to the work of its employees and the exercise of their powers. Moreover, the Government submitted several decisions of the Supreme Court, the Ljubljana Higher Court, and the Maribor Higher Court, adopted between 1992 and 2011, in which a wide range of rights, such as the rights to personal dignity, to physical and mental integrity, to family life, to a healthy living environment, to personal liberty, to respect for the deceased and to the inviolability of the home, had been considered personality rights by the

courts, and their unlawful infringement had been found to cause mental distress warranting compensation.

77. The applicant challenged the Government's arguments, observing that non-pecuniary damages could only be claimed under Article 179 of the Code of Obligations in cases falling under one of the categories listed therein, and that there was no indication that the domestic courts considered the positive obligations of the State as belonging to one of these categories or, specifically, as personality rights. The applicant pointed out that the case-law submitted by the Government was not relevant to her case, and concluded that the remedy proposed by the Government was not established in practice. Moreover, the applicant took the view that in cases such as hers the protection afforded by civil law was insufficient, since an award of compensation could not satisfy the procedural requirements of Articles 3 and 8 of the Convention.

78. The Court notes that the Government raised a similar objection of non-exhaustion of domestic remedies based on the alleged availability of a civil action for compensation already in *W. v. Slovenia* (no. 24125/06, §§ 75-77, 23 January 2014). In that case, the Court found that all of the domestic decisions advanced by the Government related to substantive rights and not to rights arising from the State's positive obligation to conduct an effective investigation and criminal trial. Thus, it held that the action for compensation had not offered the applicant reasonable prospects of success, and rejected the Government's objection. Having regard also to the strict interpretation of categories of legally recognised non-pecuniary damage in the jurisprudence of the domestic courts (see paragraph 67 above), the Court sees no reason to depart from the conclusion reached in *W. v. Slovenia*.

79. Neither is the Court convinced that an action for compensation against the State offered the applicant effective relief in respect of the full range of her complaints of psychological trauma incurred as a result of her personal cross-examination by the defendant, the participation in the proceedings of the defendant's counsel who had allegedly previously been consulted by her on the same matter, and the allegedly inappropriate questioning by the expert in gynaecology. In this connection, the Court notes that in domestic compensation proceedings the applicant would have been required to prove, among other things, that the alleged deficiencies were unlawful in terms of domestic law in order to be entitled to compensation (see paragraph 66 above, and *L.M. v. Slovenia*, no. 32863/05, §§ 168-69, 12 June 2014). However, it appears that the involvement of the defendant's counsel in the proceedings was not contrary to domestic law (see paragraphs 29 above and 91 below). Moreover, the case-law submitted by the Government does not indicate whether the scope of the State's liability extends to the conduct of court-appointed expert witnesses.

80. Having regard to the foregoing considerations, the Court rejects the Government's objection of non-exhaustion of domestic remedies.

16. 2. Lack of victim status

81. The Government argued that the applicant was precluded from raising the issue of promptness of the investigation and the ensuing trial, as an out-of-court settlement had been reached awarding her compensation under the 2006 Act (see paragraph 57 above).

82. The applicant pointed out that the settlement concerned only a violation of her rights under Article 6 of the Convention, and that the 2006 Act did not apply to complaints of violations of the rights protected under Articles 3 and 8 of the Convention.

83. Although the Court does not exclude the possibility that the compensation awarded pursuant to this Act – which is in principle aimed at remedying violations of the right to trial within a reasonable time – may provide effective redress for the breach of the State's procedural requirements under other Convention provisions (see *W. v. Slovenia*, cited above, § 76), it does not appear that in the present case the breach of Article 3 was acknowledged at the domestic level (see, conversely, ibid., § 78). Moreover, it is not clear whether the compensation only applied to the trial stage of the proceedings or also covered the investigation stage. In this light, the Court considers that the award of compensation did not deprive the applicant of her victim status with regard to the delays in the criminal proceedings.

17. 3. Conclusion

84. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

18. B. Merits

19. 1. The parties' submissions

20. (a) The applicant

85. The applicant alleged that the investigation of the sexual assaults on her and the ensuing judicial proceedings had been unreasonably delayed and ineffective, the authorities having been biased against her due to her Ukrainian origin. Firstly, she contended that the Maribor Police had left the investigation of her complaints dormant for a year, and had only sent a report to the Maribor District State Prosecutor's Office when urged to do so by the Prosecutor's Office. Moreover, the Maribor District Court had not conducted the trial in compliance with the time-limits set out in the domestic legislation. In this connection, the applicant also maintained that it

had not been her responsibility to attempt to accelerate the course of judicial proceedings.

86. Secondly, the Maribor District Court had refused to call important witnesses or to appoint a new expert in orthopaedics in order to clarify whether X's disability had in fact prevented him from performing the acts of force alleged by the applicant. Also, the court had lacked impartiality, relying predominantly on the orthopaedics report, which was based on the assumption that the applicant had been capable of actively defending herself. Moreover, that report was at variance with certain other evidence showing that X may not have been completely without the use of his left arm.

87. Further, the applicant complained that the State had failed to protect her personal integrity during the proceedings. In this connection, she asserted that the expert in gynaecology B. had exceeded the scope of his duty and, instead of answering the investigating judge's question regarding the probability of sexual intercourse, had set out to discover whether a criminal offence had been committed, asking the applicant a number of questions which had put her in the position of having to defend herself against him (see paragraph 22 above).

88. Moreover, although the applicant had been questioned during the investigation, she had subsequently had to testify at four hearings before the Maribor District Court at which the defendant had been allowed personally to torment her with numerous provocative and repetitive questions, despite the fact that he was legally represented and those questions could have been asked by his counsel. This questioning had caused her intense psychological suffering; she had felt frustrated, humiliated and helpless. Moreover, the defendant had been represented by a lawyer to whom she had previously spoken about the events in issue and was therefore in a position to misuse or even abuse the information received. In this connection, the applicant, relying on the Court's case-law, and in particular the judgments in the cases of *Doorson v. the Netherlands* (26 March 1996, *Reports of Judgments and Decisions* 1996-II); *Van Mechelen and Others v. the Netherlands* (23 April 1997, *Reports* 1997-III); and *S.N. v. Sweden* (no. 34209/96, ECHR 2002-V), maintained that the domestic legislation did not provide for the accused's rights of defence under Article 6 of the Convention to be weighed against the personal integrity and privacy of the victims protected by Articles 3 and 8. According to the applicant, her trauma had caused her severe and permanent psychological difficulties which had also led to her immune system being compromised. Lastly, the applicant complained that the domestic legislation had not afforded her an effective remedy in respect of her complaints.

21. (b) The Government

89. The Government argued that the investigation of the alleged sexual assaults on the applicant and the ensuing trial had been effective. The police had questioned the applicant and X, as well as all the relevant witnesses, and, according to the Government, there was no proof that the criminal complaint would not have been forwarded to the Prosecutor's Office had it not been for the latter's intervention. The judicial investigation had been duly conducted and followed by an indictment against X.

90. The Government also maintained that the trial had been conducted without bias. With regard to the orthopaedics report allegedly contradicted by other evidence, they pointed out that the report had been based on medical documentation and a clinical examination of X, and had contained no contradictions or deficiencies capable of raising doubts as to its accuracy. Since the alleged acts of sexual abuse had not been seen by any witnesses, nor had they been supported by the results of gynaecological examinations, the Maribor District Court had acquitted X. While it was true that the applicant had shown symptoms of sexual abuse, the court could not disregard the fact that another set of criminal proceedings had been pending at the time against another person suspected of having sexually abused the applicant, which had not been taken into account in the preparation of the opinion by the expert in psychology. Secondly, the Government argued that the expert in gynaecology had not "questioned" the applicant, but had had a conversation with her outside the court hearing. In the Government's opinion, the applicant could have asked for the expert to be sanctioned if she had believed that he was not performing his work in an appropriate manner.

91. Further, as regards X's court-appointed counsel M., the Government argued that, X having been entitled to mandatory representation, the Maribor District Court had followed the statutory provisions regulating court-ordered appointments. Moreover, in her application to have M. disqualified from representing X the applicant had failed to adduce any grounds which, under the domestic law, would justify a decision in her favour; thus, the court had had no duty to hear the parties on the matter. The Government added that the fact that M. had once worked for a law firm representing the applicant's mother's husband in divorce proceedings did not give rise to the conclusion that M. should not have defended X.

92. Moreover, the Government asserted that a number of measures had been adopted, both during the investigation and at the trial, in order to prevent aggravation of the applicant's trauma. During the investigation, the applicant had been questioned in the absence of X and his counsel. Thus, the trial hearing had been the first opportunity for the defendant to put questions to the applicant, and consideration had to be given to the fact that she had been the only witness to X's alleged criminal acts. In this connection, the Government were of the view that the applicant's case had not warranted a limitation of the defendant's rights of defence to the extent that would prevent him from cross-examining her. They pointed out that the

present case differed from *Doorson*, *Van Mechelen and Others* and *S.N. v. Sweden*, as the applicant's safety had not been at stake, nor had she been a minor. However, the Government emphasised that the Maribor District Court had excluded the public from the hearing and removed X from the courtroom during the applicant's testimony. After the applicant had given her testimony, the court had granted her request for the defendant to cross-examine her at the next hearing.

93. In this connection, the Government pointed out that X had not been allowed to ask the applicant certain questions that were not related to the case or were otherwise prohibited. Moreover, the court had on several occasions ordered breaks to be taken during the applicant's cross-examination; the Government asserted that the applicant could have requested further breaks if she had considered that necessary. Also, the applicant had been represented by a lawyer throughout the proceedings.

94. Lastly, as regards the delays in the proceedings the Government pointed out that during the investigation stage of the proceedings the applicant could have complained about the delays to the president of the competent court (see paragraph 61 above), but had not done so. The Government did, however, acknowledge that the applicant had lodged two supervisory appeals under the 2006 Act (see paragraphs 33 and 52 above). The Maribor District Court had responded appropriately on both occasions: the first time a hearing had been scheduled within a month, while the second time the reasoning of the judgment had been prepared and sent to the applicant within a few days of the appeal. It was true that the trial hearing had been adjourned nine times for various reasons; however, only the first time had the hearing been adjourned for a longer period, and this had been on account of X's illness. The Government further maintained that the large quantity of evidence that needed to be taken had also contributed to the overall duration of the trial.

22. 2. The Court's assessment

23. (a) The State's positive obligation to investigate and prosecute cases of sexual abuse

95. The relevant principles concerning the State's obligation inherent in Article 3 of the Convention to investigate cases of ill-treatment, and in particular sexual abuse, committed by private individuals, are set out in *M.C. v. Bulgaria* (no. 39272/98, §§ 149, 151 and 153, ECHR 2003-XII).

96. As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence, and a requirement of

promptness and reasonable expedition is implicit in this context (see *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009, with further references). The promptness of the authorities' reaction to the complaints is an important factor (see *Labita v. Italy* [GC], no. 26772/95, §§ 133 et seq., ECHR 2000-IV). Consideration has been given in the Court's judgments to matters such as the opening of investigations, delays in identifying witnesses or taking statements (see *Mătăsaru and Saviţchi v. Moldova*, no. 38281/08, §§ 88 and 93, 2 November 2010), the length of time taken for the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001), and unjustified protraction of the criminal proceedings resulting in the expiry of the statute of limitations (see *Angelova and Iliev v. Bulgaria*, no. 55523/00, §§ 101-103, 26 July 2007). Moreover, notwithstanding its subsidiary role in assessing evidence, the Court reiterates that where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny, even if certain domestic proceedings and investigations have already taken place (see *Cobzaru v. Romania*, no. 48254/99, § 65, 26 July 2007).

97. The applicant alleged that X's acquittal was the result of the domestic courts' bias against her, claiming that their findings were based on inaccurate assumptions and that they had neglected to call important witnesses. In this connection, the Court observes that the domestic courts were faced with the difficult task of having to decide on a sensitive issue of sexual abuse on the basis of irreconcilable statements and without any physical evidence supporting either the applicant's or X's version of the events. In the course of the investigation and the ensuing trial, the domestic authorities examined a number of witnesses and received three expert reports in attempts to elucidate the situation. While the two gynaecological reports neither confirmed nor disproved the applicant's allegations (see paragraphs 22, 42 and 44 above), the other two expert reports resulted in contradictory conclusions. The expert in clinical psychology established that the applicant clearly showed symptoms of sexual abuse (see paragraphs 23 and 43 above). On the other hand, the expert in orthopaedics was of the view that, owing to his disability, X lacked sufficient strength to overpower the applicant. After weighing up that contradictory evidence, and having regard to the possibility that the applicant's symptoms were caused by inappropriate conduct on the part of her mother's former husband, the domestic courts were convinced by the opinion of the orthopaedics expert.

98. The Court notes that, contrary to the applicant's argument, it does not appear that the expert's conclusions relied on an assumption as to whether or not the applicant was able to resist actively (see paragraph 49 above), but rather on the limits of X's physical abilities, the expert stating that X could not have used his left arm in some of the ways described by the applicant. Indeed, it appears that this opinion was decisive for the outcome of the trial; however, having regard to the considerable body of evidence

considered by the first-instance court in addition to the statements made by the applicant and X (see paragraphs 39 and 43-49 above), and to the fact that it was essentially the latter's word against the applicant's, the Court does not consider it unreasonable that the Maribor District Court refused to admit additional evidence or that it considered objective medical evidence of X's disability as a crucial factor in its assessment.

99. However, the Court notes with concern that the proceedings were marked by a number of longer periods of complete inactivity. Firstly, the police did not submit an incident report of the applicant's complaint to the competent state prosecutor's office until a full year after their investigation had been concluded, and only on being urged by the prosecutor to do so (see paragraphs 12-14 above). The State prosecutor then promptly requested that a judicial investigation be initiated against X (see paragraph 15 above); however, the investigating judge took twenty-one months to decide on the request (see paragraphs 16-17 above). Once the investigation was concluded, the trial hearing was scheduled eight months after the indictment against X had been confirmed (see paragraph 25 above), in contravention of the domestic procedural rules (see paragraph 62 above). However, owing to several adjournments the first hearing was actually held almost a year and a half after X had been indicted. In sum, more than seven years elapsed from the time the applicant lodged her complaint until the first-instance judgment was rendered. While it is not possible to speculate whether these delays, for which no justification has been put forward by the Government, prejudiced the outcome of the proceedings in any way, in the Court's opinion they cannot be reconciled with the procedural requirement of promptness.

100. Accordingly, there has been a violation of the respondent State's procedural obligations under Article 3 of the Convention.

24. (b) The protection of the applicant's personal integrity in the criminal proceedings concerning sexual abuse against her

101. The Court is called upon to examine whether in the criminal proceedings concerning alleged sexual assaults against the applicant the State afforded sufficient protection to her right to respect for private life, and especially for her personal integrity. Thus, what is in issue is not an act by the State, but the alleged lack or inadequacy of measures aimed at protecting the victim's rights in the criminal proceedings. In this connection the Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91).

102. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *White v. Sweden*, no. 42435/02, § 20, 19 September 2006).

103. As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the Court has already held on several occasions that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify (see *Doorson*, cited above § 70). Notably, criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. Therefore, in such proceedings certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence (see *S.N. v. Sweden*, cited above, § 47, and *Aigner v. Austria*, no. 28328/03, § 35, 10 May 2012).

104. In the cases hitherto before the Court, the question of whether the domestic authorities succeeded in striking a fair balance between the competing interests of the defence, especially the right of the accused set out in Article 6 § 3 (d) to call and cross-examine witnesses, and the rights of the victims under Article 8 was raised by the accused. Conversely, in the present case the Court is called upon to examine this issue from the perspective of the alleged victim. In addressing the question, the Court will take into account the criteria laid down in the relevant international instruments (see paragraphs 69-72 above). In this connection, the Court notes that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires the Contracting Parties to take the necessary legislative and other measures to protect the rights and interests of victims. Such measures involve, *inter alia*, protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator. In addition, the EU Directive establishing minimum standards on the rights, support and protection of victims of crime provides, *inter alia*, that interviews with victims are to be conducted without unjustified delay and that medical examinations are to be kept to a minimum.

105. As regards the manner in which the applicant's rights were protected in the criminal proceedings in issue, the Court observes, firstly,

that her testimony at the trial provided the only direct evidence in the case. In addition, other evidence presented was conflicting, the psychologist's report confirming sexual abuse being countervailed by the orthopaedics report. In this light, it must be reiterated that the interests of a fair trial required the defence to be given the opportunity to cross-examine the applicant, who by that time was no longer a minor. Nevertheless, it needs to be determined whether the manner in which the applicant was questioned struck a fair balance between her personal integrity and X's defence rights.

106. In this connection the Court reiterates that, as a rule, the defendant's rights under Article 6 §§ 1 and 3 (d) require that he be given an adequate and proper opportunity to challenge and question a witness against him either when he makes his statements or at a later stage of the proceedings (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). Furthermore, the Court must be cautious in making its own assessment of a specific line of questioning, considering that it is primarily the role of the competent national authorities to decide upon the admissibility and relevance of evidence (see *Schenk v. Switzerland*, 12 July 1988, § 46, Series A no. 140, and *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22). This being said, the Court has also already held that a person's right to defend himself does not provide for an unlimited right to use any defence arguments (see, *mutatis mutandis*, *Brandstetter v. Austria*, 28 August 1991, § 52, Series A no. 211). Thus, since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatisation on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are.

107. The applicant's questioning stretched over four hearings (see paragraphs 31, 32, 34-38 and 40 above) held over seven months, a lengthy period, which, in the Court's opinion, in itself raises concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings X, the defendant, who was otherwise represented by counsel throughout the proceedings, personally cross-examined the applicant. In addition to claiming that he was physically incapable of assaulting her, X based his cross-examination on the premise that the applicant had considered him a person of trust and had sought his company, rather than the other way round, and that her accusations against him were prompted by her mother's wish to extort money from him. Accordingly, most of X's questions were of a distinctly personal nature.

108. The Court notes that some of the questions asked by X were phrased in such a manner as to suggest the answers, and a number of others were asked more than once (see paragraphs 34 and 36 above). X also continually contested the veracity of the applicant's answers, advancing his own version

of events. Of course, the defence had to be allowed a certain leeway to challenge the reliability and credibility of the applicant and to reveal possible inconsistencies in her statement. However, the Court considers that cross-examination should not be used as a means of intimidating or humiliating witnesses. In this connection, the Court is of the view that some of X's questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men, were not aimed only at attacking the applicant's credibility, but were also meant to denigrate her character.

109. The Court considers that it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial. In its opinion, the sensitivity of the situation in which the applicant was questioned directly, in detail and at length by the man she accused of sexually assaulting her, required the presiding judge to oversee the form and content of X's questions and comments and, if necessary, to intervene. Indeed, the record of the hearing indicates that the presiding judge prohibited X from asking certain questions which were of no relevance to the case. However, the Court takes the view that X's offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction. Considering the otherwise wide scope of cross-examination afforded to X, in the Court's opinion curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant (see paragraphs 37 and 38 above).

110. Further, as regards the applicant's assertion that X's counsel M. should have been disqualified from representing X in the proceedings, having been consulted by her regarding the sexual assaults even before the police were informed about the matter, it is not the Court's task to speculate on whether, and if so in what capacity, the applicant and M. might have known each other prior to the trial, that being the task of the domestic authorities. However, it appears that under domestic law the possibility of prior informal consultation between the applicant and M. did not raise an issue of conflict of interests which could lead to the latter's disqualification (see paragraphs 29, 31 and 40-42 above). Hence, finding that no statutory ground had been adduced by the applicant in support of her application to have M. disqualified, the Maribor District Court dismissed it.

111. Nevertheless, assuming that the applicant's allegation was true, the Court cannot but consider that the negative psychological effect of being cross-examined by M. considerably exceeded the apprehension that the applicant would have experienced if she had been questioned by another lawyer. Accordingly, this was a consideration which should not have been

entirely disregarded in deciding whether M. should be disqualified as X's counsel. Moreover, on a more general note, the Court would add that any information that M. might have received from the applicant in his capacity as a lawyer, even without a retainer agreement, should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter. Thus, the Court finds that the domestic law on disqualification of counsel, or the manner in which it was applied in the present case, did not take sufficient account of the applicant's interests.

112. Lastly, the applicant complained that B., the expert in gynaecology who was called upon to establish whether she had engaged in sexual intercourse at the material time, had made her answer a number of accusatory questions unrelated to his task. In this connection, the Court considers firstly that the personal integrity of the victims of crime in criminal proceedings must, by the very nature of the situation, be primarily protected by the public authorities conducting the proceedings. In this regard, the Court is of the view that the authorities are also required to ensure that other participants in the proceedings called upon to assist them in the investigation or the decision-making process treat victims and other witnesses with dignity, and do not cause them unnecessary inconvenience. As regards the present case, it is noted that, irrespective of B.'s status in the proceedings, the Government did not dispute that the State could be held responsible for his conduct. The Court sees no reason to hold otherwise, observing that the expert was appointed by, and the disputed examination ordered by, the investigating judge in the exercise of his judicial powers.

113. Further, regarding B.'s examination of the applicant, the Court notes that he confronted the applicant with the findings of the police and orthopaedics reports, and questioned her on why she had not defended herself more vigorously (see paragraph 22 above), thus addressing issues that were indeed not related to the question he was requested to examine. In the Court's opinion, B.'s questions and remarks, as well as the legal findings he made in his expert opinion, exceeded the scope of his task, as well as of his medical expertise. Moreover, it does not appear that B. was trained in conducting interviews with victims of sexual abuse; hence, it is difficult to see what purpose was to be served by his intervention in matters within the jurisdiction of the prosecuting and judicial authorities. More importantly, as argued by the applicant, she was put in a defensive position which, in the Court's opinion, unnecessarily added to the stress of the criminal proceedings.

114. The Court is mindful of the fact that the domestic authorities, and in particular the judge presiding over the trial in issue, had the delicate task of balancing the competing interests and of ensuring effective exercise of the defendant's rights to legal assistance and to examine witnesses against him. It is also true that a number of measures were taken to prevent further traumatisation of the applicant. Her statement before the investigating judge

was taken in the absence of the defendant and his counsel, the public was excluded from the trial, and the defendant was removed from the courtroom when she gave her testimony (see paragraphs 18, 29, 31 and 34 above). Owing to the applicant's stress during her testimony and cross-examination, the trial hearings were on several occasions adjourned for a few minutes or rescheduled to another date (see paragraphs 31, 37 and 38 above). Furthermore, the presiding judge warned the defendant against repeating questions in cross-examination and prohibited a number of them (see paragraph 36 above). Nevertheless, in the Court's opinion, the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age – she was a minor when the alleged sexual assaults took place – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue. Taking into account the cumulative effect of the factors analysed above, which adversely affected the applicant's personal integrity (see paragraphs 107-13 above), the Court considers that they substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial.

115. Therefore, the Court is of the view that the manner in which the criminal proceedings were conducted in the present case failed to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention.

116. It follows that there has been a violation of Article 8 of the Convention.

25. II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. Article 41 of the Convention provides:

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

26. A. Damage

118. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage, arguing that the sexual assaults and the secondary victimisation she had endured in the criminal proceedings had severely affected her psychological health and caused her mental anguish and distress. The applicant submitted that during the proceedings she had suffered from depression, anxiety, and inability to concentrate, necessitating psychiatric help; she had even come to the hearings accompanied by her

psychiatrist. Moreover, she had subsequently become afflicted with multiple sclerosis.

119. The Government took the view that the applicant had not shown causal links between her health problems and the alleged violations of the Convention. Moreover, they maintained that, were the Court to find a violation of the applicant's Convention rights and award the applicant just satisfaction, it should be taken into account that the applicant had already received monetary compensation in the amount of EUR 1,080 from the State for the violation of her right to trial within a reasonable time.

120. Having regard to the medical certificate issued by the applicant's psychiatrist in 2010, the psychological distress experienced by the applicant in that period could, at least in part, be attributed to the criminal proceedings in issue which, as found by the Court, lacked effectiveness and disproportionately interfered with the applicant's personal integrity. Thus, the Court considers that some compensation should be awarded to the applicant for non-pecuniary damage in that respect. However, the Court notes that the domestic courts did not find the applicant's allegations of sexual assaults to have been established. Neither can the Court speculate as to whether the outcome of the domestic proceedings would have been different had there been no breach of the Convention. Accordingly, it considers that no award can be made to the applicant in respect of that claim.

121. As regards the Government's objection that compensation was awarded to the applicant at the domestic level, it is true that the applicant received EUR 1,080 from the State for the excessive length of the criminal proceedings in issue. However, as it does not appear that the out-of-court settlement also covered the State's positive obligations under Article 3 (see paragraph 83 above) and, consequently, this award had no bearing on the applicant's victim status under that provision (see, conversely, *W. v. Slovenia*, cited above, § 91), it cannot be taken into consideration in determining the amount of compensation to be awarded under Article 41 in respect of the violations found by the Court.

122. Making an assessment on an equitable basis, the Court awards the applicant EUR 9,500 in respect of non-pecuniary damage.

27. B. Costs and expenses

123. The applicant also claimed EUR 7,462.50, plus VAT at 20%, amounting to a total of EUR 8,955 for costs and expenses incurred before the Court.

124. The Government contended that the claim was disproportionately high in comparison to the amounts that could be charged with regard to the costs of proceedings before the Strasbourg Court in accordance with the national Lawyers' Fees Act. The maximum fee stipulated in that Act for the

proceedings in issue amounted to EUR 2,625 if a hearing was held before the Court and EUR 1,500 if there was no hearing.

125. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,000, not including VAT, for the proceedings before the Court. As regards the claim that the amount should be increased by the rate of VAT, the Court reiterates that, although costs and expenses are frequently subject to value-added tax paid to the State by lawyers, translators and other professionals, the tax is nevertheless billed to the applicants and is ultimately payable by them. Applicants should be protected against this additional charge. For this reason alone, in the operative part of its judgments the Court directs that any tax that may be chargeable to the applicant is to be added to the sums awarded in respect of costs and expenses (see *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 127, ECHR 2014, and *Association Les Témoins de Jéhovah v. France* (just satisfaction), no. 8916/05, § 37, 5 July 2012).

28. C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the failure of the authorities of the respondent State to ensure a prompt investigation and prosecution of the applicant's complaint of sexual abuse;

3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention in respect of the failure of the authorities of the respondent State to protect the applicant's personal integrity in the criminal proceedings concerning sexual abuse against her;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 9,500 (nine thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 May 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

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

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA

Whilst I fully share the position of the majority to the effect that the investigation into the applicant's complaint of sexual abuse lasted too long, in breach of Article 3, I cannot agree that Article 8 was also violated in the present case.

The case concerns the fair balance which is to be struck between the interests of the defence in a criminal trial and those of a victim who is called upon to testify. Having carefully studied the available case materials, I find it difficult for the international court to suggest what additional steps could have been taken by the presiding judge to protect the applicant's interests to an extent which would not have amounted to a violation of the fair-trial rights of the defendant.

This Court has examined under Article 8 a number of cases introduced by rape victims, in which the authorities failed to meet their positive obligations to conduct an effective investigation into the allegations of sexual abuse (see, among the most recent examples, the cases of *C.A.S. and C.S. v. Romania* and *D.J. v. Croatia*, with further references[1]); however, it had not previously examined in such detail the issue of questioning during the trial proceedings.

Moreover, in its innovatory judgment in the case of *M.C. v Bulgaria*[2] the Court stated that in the circumstances of that case its task was limited "to examin[ing] whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention...The Court [was] not concerned with allegations of errors or isolated omissions in the investigation..."

Nonetheless, in that case the Court criticised the authorities for the failure to "explore all the facts and decide on the basis of an assessment of all the surrounding circumstances..." (see paragraph 181 of the *M.C.* judgment). In the present case, in contrast, it appears that the domestic judicial authorities are being criticised for a failure to disallow questions which might potentially have shed additional light on the circumstances of the case.

Practising lawyers know only too well how difficult it is to prosecute rape cases successfully, for a number of reasons – these crimes are rarely witnessed by others, corroborating physical evidence is lacking, there is an obvious difficulty in proving the accusation, and so on.

The prosecution thus tends to rely heavily on victim testimony, which quite often serves as the main ground for conviction. The only defence

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1. No. 26692/05, 20 March 2012 and no. 42418/10, 24 July 2012.
2. No. 39272/98, ECHR 2003-XII.

tactic for a defendant in such cases is to disprove the veracity of the victim's statements and to challenge her credibility. It is therefore unsurprising that the questions put by a defendant can be too intimate and intrusive – precisely in order to allow the judge to observe the victim's demeanour under cross-examination. This is the very core of a defendant's right to examine witnesses against him.

Some 120 years ago the US Supreme Court defined the "primary object" of the confrontation clause as being "to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief[1].

The right to confrontation has a long and rich history dating back to Roman law and has become widely developed in common-law systems, where its crux lies in a belief that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back', and "even if the lie is told it will often be told less convincingly". This was explained by Justice Antonin Scalia in the US Supreme Court's landmark judgment in this respect, *Coy v. Iowa*[2]. In that judgment Justice Scalia traced the history of the right to confront as a "face-to-face encounter", illustrated in Shakespeare's Richard II:

> "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say:
>
> 'Then call them to our presence—face to face, and
>
> frowning brow to brow, ourselves will hear the accuser
>
> and the accused freely speak.'[3]"

He concluded that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution'". In *California v. Green* the right to confrontation was described as the "greatest legal engine ever invented for the discovery of the truth"[4].

Contrary to the USA Constitution, the Convention does not guarantee as such a right to face-to-face confrontation between the accused and victim. Still, in many cases, also related to the sexual abuse of minors, the Court has found that the guarantees of a fair trial were not respected if at no stage of

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1. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).
2. 487 US 1012, 1016 (1988).
3. *Richard II*, Act I, scene I.
4. 399 US 149 (1970).

the proceedings the defendant was able to put questions to an alleged victim (see, as one of the recent examples, the case of *Vronchenko v. Estonia*[1]). The aim of the guarantee in Article 6 § 3 (d) of the Convention is the same – to assist the court in observing the demeanour of a witness under direct examination. This provision not only operates to protect the interests of the defence; it also serves justice in a more general way – it assists in establishing the truth, since questions put by the defence not only allow the witness's credibility to be tested, they also bring to light further elements of fact which may be important for the court's conclusions[2]. In my opinion, in this recent case the majority disregarded this essential element of the defendant's right to examine the key witness against him.

In the case at hand, the applicant was an alleged victim of sexual assault, which is one of the gravest crimes against one's physical integrity, and one which causes deep trauma to a victim. It has been argued that "[e]xcept for murder, the crime of rape is the ultimate invasion, the one with the most severe physical and psychological consequences for its victim"[3]. It goes without saying that the court proceedings represent additional trauma for a rape victim, especially for one who is a minor. Thus, it is obvious that considerations of ensuring sufficient psychological comfort of the victim are important and may, in certain cases, outweigh the accused's right to confrontation.

The Directive of 25 October 2012 of the European Parliament and of the Council (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime, indicates that measures are to be available for the most vulnerable victims, including "measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence", and "measures allowing a hearing to take place without the presence of the public" (Article 23 § 2 (c) and (d)).

Other international documents on protection of victims, including those cited in the judgment, whilst concentrating on victims' rights in the course of criminal proceedings, also stress the importance of the rights of the defence. It appears uncontested that completely sacrificing the right of the accused in order to ensure the victim's psychological comfort is a step towards obtaining a wrong decision.

In the present case it worth mentioning that although the alleged events occurred when the applicant was between 14 and 15 years old, the court proceedings took place five or six years later, when, firstly, her trauma cannot be said to have still been rankling to the same extent as immediately after the event, and, secondly, she was already an adult. It is therefore

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1. No. 59632/09, 18 July 2013.
2. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 293.
3. Janet L. Barkas, Victims, New York: Scribner's, 1978.

difficult to argue that she was particularly vulnerable at the time of the court examination.

Furthermore, it is of utmost importance that the applicant's questioning took place in the absence of the public (see the above-mentioned Directive). Moreover, the court granted her requests to have X removed from the courtroom while she was questioned. Besides, as also noted by the majority, some of X's questions were prohibited by the presiding judge where the latter considered them to be irrelevant to the case. What more could have been done by the judge in order to protect the applicant's rights while still having an opportunity to assess the victim's credibility?

The majority considers that "most of X's questions were of a distinctly personal nature" (see paragraph 107 of the judgment). I absolutely agree with that finding, and I can hardly imagine any question of a non-personal nature that an accused who considers himself innocent could put to a victim defaming him, as he believes. Some of X's remarks were in reality aimed at presenting the negative aspects of the applicant's character, yet the majority defines them as "offensive insinuations" exceeding "the limits of what could be tolerated for the purpose of enabling him to mount an effective defence". It is obvious that the aim of those remarks was to challenge the applicant's credibility and to enable the judge to observe her demeanour under this provocative questioning – which is, again, the crux of any confrontation in the courtroom.

Certainly, the manner in which X built his line of defence brought additional stress to the applicant, who had already been deeply traumatised. Still, the present situation is significantly different from the case of *Brandstetter v. Austria*[1] referred to by the majority, since in that case the applicant, in the course of proceedings against him for adulterating wine (an offence for which he could only be fined, and which, in principle, is incomparable with a rape accusation), deliberately and falsely accused an official of an offence in order to manipulate evidence, thus exposing the latter to the risk of disciplinary sanctions. In the present case, "offensive insinuations" such as the comments that "the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him or that she had confided in him her desire to dominate men" are mostly value judgments and cannot be compared to a false, as X believed, accusation of sexual abuse. The degree of interference in one's private life represented by those quoted remarks and by the accusation of having committed a grave crime is incommensurable. Thus, I cannot agree that X's questions overstepped the admissible limits of defence, given that what was at stake for him was his honour and liberty.

In addition to criticising the way in which the confrontation between the applicant and X was conducted, the majority reproaches the domestic

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[1]. Judgment of 28 August 1991, Series A no. 211.

judicial authorities for not disqualifying X's counsel M., who allegedly had some prior informal consultations with the applicant. This was not proved; however, "assuming that the applicant's allegation was true" the majority has decided that the applicant would have felt better psychologically being cross-examined by another lawyer. Once more, had that been the case, then the applicant's greater comfort would have been at the expense of X's right to defend himself through legal assistance of his own choosing. The majority also stated, quite *in abstracto*, "that any information that M. might have received from the applicant in his capacity as a lawyer ... should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter". There is no evidence in the case file to the contrary.

Lastly, the majority criticises the questioning of the applicant by the gynaecologist B., namely the fact that the latter "confronted the applicant with the findings of the police and orthopaedics reports and questioned her on why she had not defended herself more vigorously", thus "addressing issues that were indeed not related to the question he was requested to examine" (see paragraph 113 of the judgment). It is to be noted, however, that B. was entrusted with the task of "establish[ing] the probability of the applicant having engaged in sexual intercourse" (see paragraph 22), and thus he had to assess whether her testimony was reliable from a medical standpoint. Given that the applicant's hymen was intact and that X could not have used his left arm to crush the applicant's resistance, it cannot be said that B.'s questions were completely irrelevant to the report he had to present.

In view of the above considerations, and bearing in mind that, in cases such as the present one, the absence of a complete picture of the trial calls for self-restraint on the part of the international judge, I have voted for the finding that there was no violation of Article 8.