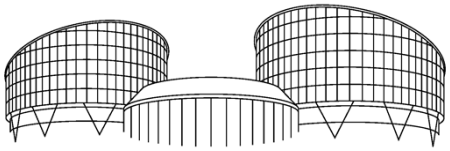

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF A AND B v. CROATIA

(Application no. 7144/15)

JUDGMENT

STRASBOURG

20 June 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A and B v. Croatia,

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

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 29 August 2017, 9 January 2018 and 30 April 2019,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 7144/15) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Croatian nationals, A (the first applicant) and B (the second applicant), on 3 February 2015. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The first applicant was initially represented by Ms I. Bojić and later on by Ms Tanja Vranjican Đerek, both lawyers practising in Zagreb.

3. Due to the nature of the relationship between the first applicant and the alleged perpetrator and a potential conflict of interest between the applicants, following a request by the Court, the Croatian Bar Association appointed Ms V. Drenški-Lasan, also a lawyer practising in Zagreb, to submit observations on behalf of the second applicant so that her rights and interests are duly presented and taken into account (see §§ 22, 78, 79, 83 and 76 below). The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

4. The applicants alleged that the national authorities had not properly responded to the allegations of sexual abuse of B by her father, and that there had been no effective remedy in that regard.

5. On 23 September 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant was born in 1984 and the second applicant in 2009.

A. Background to the case

7. A had a relationship with C and in 2009 their daughter, B, was born. The family lived together at the house of C's parents until January 2014 when A and B moved out. B continued to see C regularly and spend two to three nights a week at the house he shared with his parents.

8. According to A, on an unspecified date in June 2014 B, then four and a half years old, was playing with her genitals in front of A and told her that she had been playing like that with her father, C, every evening before going to bed.

9. On 11 June 2014 A called "the Brave Telephone", a children's helpline, which advised her to contact the Polyclinic for the Protection of Children in X (hereinafter "the Polyclinic"). On the same evening, A took B to C's house and left her there to spend the night with her father.

10. The following day A called the Polyclinic and scheduled an appointment for B for 20 June 2014. It is unknown which information A gave the Polyclinic at that time.

11. The next day, A and B travelled to another town to visit A's family. According to A, on 14 June 2014 when B was with her maternal aunt, she asked her to "touch [herself] down there" and told the aunt that "daddy has been playing with [her] so as to touch [her] on the genitals with his hands, which [she] told [her] paternal grandparents and [her] grandfather shouted at [her] father". B also told her aunt that C had been singing a song to her about a bunny. The aunt considered the lyrics of the song as having erotic content.

B. Criminal proceedings

12. On 16 June 2014 A went to the Y Police Station to report that C had been sexually abusing their child, B, at the time aged four and a half. A was interviewed by a police officer. According to the police report, A said that about two and half years previously she had found her daughter naked from the waist to the knees in a bed with her partner, C, who was asleep. C's face had been close to the child's genitals. A had woken him up and asked him why B was naked. C had replied that she had probably taken her clothes off while he had been asleep. Since there had been no other suspicious signs in B or C's behaviour at the time, A had not taken any action. However, in the

spring of 2014, when A, B, and A's sister had been out in public, B had suddenly grabbed a woman she did not know by her genitals. Around then C had been taking care of B most of the time. Also, on 14 June 2014 A had left B with her aunt, A's sister. When A had returned after about an hour, her sister had told her that B had said that C had been "touching [her] down there", and that she had heard B singing some songs about "a bunny entering a hole". B had said that she had told her paternal grandparents all this, and that her grandfather had "yelled at daddy not to do things like that anymore".

13. According to A, she did not receive any assistance from the police and was only told to contact the Polyclinic, which she had already done (see paragraph 10 above).

14. On the same day the police interviewed D and E, A's siblings. D confirmed A's allegations, and said that she had recorded some of B's behaviour and statements on her mobile telephone. E said that one day mid-June 2014 B had started to behave aggressively towards him, had wanted to kiss him on the mouth and had tried to touch his genitals. He had told D about it.

15. On the same day, C's father reported to the Y Welfare Centre that A had been "emotionally and physically abusing B", in that she was frequently shouting at B, hitting and insulting her.

16. On 17 June 2014 the police interviewed a paediatrician who had treated B. She said that A had approached her the previous day very upset and had wanted to discuss the possible sexual abuse of B by her father, C. The doctor said that C had been taking care of B most of the time, and that when she had needed medical assistance, he had been the one who had brought B to see her. The doctor described B as a communicative, bright and intelligent child and said that she had not noticed any signs of any kind of abuse.

17. On the same day the police interviewed two teachers in the kindergarten B had been attending. They both described B as a normal, communicative child. Neither of them had noticed any signs of abuse.

18. On the same day A reported the alleged sexual abuse of B by C to the Y Social Welfare Centre (hereinafter "the Centre"). She gave the Centre details on the alleged abuse and informed them that she had already made an appointment at the Polyclinic. A report was drawn up and on the same day forwarded to the Y Police. On 18 June 2014 the Centre contacted the Polyclinic inquiring about the exact date of their appointment with A and B.

19. On 20 June 2014 B was seen by a multidisciplinary team at the Polyclinic. According to A, when she arrived at the Polyclinic she found that C was also there. She was surprised since she had not been informed that he would be present. According to her, both she and C were constantly present during the interviews with B, except for maybe five minutes.

According to the Government, the first applicant and C were "processed" at the Polyclinic but were not present during the interviews with B.

20. According to the Government, on 23 June 2014 the Y Police Department requested the Polyclinic to urgently deliver to them its findings concerning B.

21. On 2 July 2014, as instructed by the Polyclinic, B was examined by a gynaecologist. Both her parents were there, but neither of them were present during the examination. No signs of sexual penetration or a fresh or older injury were observed.

22. On 4 July 2014 a multidisciplinary team from the Polyclinic issued a report on B. According to that report, during the assessment B was seen by a social worker, a paediatrician, a psychologist and a psychiatrist. The report does not state the dates she was seen by any of the specialists. The relevant parts of that report read as follows:

> "**Assessment and opinion of the social worker**
>
> The girl came to the [interview with] the social worker accompanied by her parents ... During the interview with the parents, the girl entered the [interview] room several times. She accepts to stay alone, but on several occasions she exits the room and asks that her mother join her. During the conversation... she says that "dad touched her [vagina]" and that mum "told her to say that", no other information can be obtained ...
>
> **Assessment and opinion of the paediatrician**
>
> ... sexual organ externally female, clean, no irritations or change of colour... Appointment arranged with ... gynaecologist ... for 30 June 2014.
>
> **Assessment and opinion of the psychologist**
>
> The girl comes accompanied by her parents ... At this point the girls is separated from her parents and remains alone with the interviewer but several times exits the room checking on her parents, which she also does when parents were in the room while she was outside in the hallway with a companion ... As her reason for coming she says that her mother had told her that her father "had done something bad, was touching her [vagina]", which is why "her mum is protecting her from her father, so that she does not go close to him". She provides no further details ...
>
> In conclusion ... [the girl] is growing up in a family with separating parents, she witnesses their broken down relationship, and is exposed to negative attributes of the other parent by the mother, which creates a pressure on the girl ... During the conversation she says that the reason for her coming was inadequate behaviour by the father, but she has difficulties providing details. No signs confirming such behaviour are observed through psychological assessment ...
>
> **Assessment and opinion of the psychiatrist**
>
> ... The girl states that she lives with her mother, that her father used to be very good, but now he is very bad and rude to her, she claims that he "touched her [vagina]". The girl talks about the father's alleged actions spontaneously, without any discomfort ... Later on, we get the information that her mother told her to say so ...
>
> Psychiatric profile: ... established verbal communication, says she had been sexually abused by the father, but without discomfort or adequate affections ...

Psychiatric assessment does not show signs clearly showing sexual abuse (affectionate inadequacy), but it is not possible to exclude inducement of the girl, which constitutes a risk of emotional abuse.

Opinion of the multidisciplinary team

The girl has been included into the multidisciplinary assessment as instructed by the relevant Centre and police, for suspicions of abuse by the father...

During the examination, the girl did not show clear signs of being sexually abused. The girl did not describe contextually characteristic situations and her affective response did not correspond to the verbally expressed content. There are elements which indicate pressure by the mother and the possibility of inducement cannot be excluded, which presents a risk of emotional abuse.

The assessment of the father's possible inappropriate behaviour is aggravated by the family climate of fighting, the relationship between the parents, the heteroamnestic information obtained, the different information given by the parents, as well as the mother being overwhelmed by her own experience and mistrust towards the girl's father.

...

It is recommended that the girl receives supportive supervision over her further development. [It is also recommended] that the parents take part in counselling and that assistance be provided to the family through supervision of parental care to ensure the girl grows up in a safe and stable environment."

23. On 15 July 2014 C instituted court proceedings against A seeking custody of B.

24. On 6 August 2014 the police sent a special report to the Z State Attorney's Office containing all the interviews are reports gathered by them up to that point.

25. On 11 August 2014 the Y police interviewed C. He denied any sexual abuse of B and alleged that A had been physically punishing her, about which he had lodged a criminal complaint.

26. On the same day, the police requested the Y Welfare Centre to urgently send the family anamnesis and all available information on A and C's family.

27. On 13 August 2014 the Y Municipal Court issued an interim measure allowing A to "exercise all parental rights" over B, owing to the allegations of sexual abuse against C.

28. On the same day, the Centre inquired with the Polyclinic whether B had been included in any supportive follow-up treatments further to her multidisciplinary assessment.

29. On 20 August 2014 the Y police interviewed C's parents, aunt and brother-in-law. The parents had not witnessed any incidents of C sexually abusing B, but both described incidents of A physically abusing B. The aunt and brother-in-law had heard from A about the alleged sexual abuse of B by C, but had not witnessed any incidents of that kind.

30. On 22 August 2014 the Y police confiscated a USB stick from C.

31. On 25 August 2014 A's mother approached the Y police and expressed her concerns about a meeting between B and C ordered by the Y Social Welfare Centre for 28 August 2014. She said that at the mention of the meeting with C, B had thrown herself to the ground and started crying and being aggressive towards her toys, pets and relatives. She also described B's overtly sexual behaviour.

32. On 27 August 2014 the Y Welfare Centre applied a "supervision of parental care" child-protection measure in respect of both A and C.

33. On 2 September 2014 the Y police provided the Z State Attorney's Office with another special report on the actions taken following A's criminal complaint.

34. On 5 September 2014 the Y Welfare Centre sent its report on A, B and C to the Y Municipal Court. It suggested that for the time being care of B be granted to A.

35. On 19 September 2014 the Y Municipal Court awarded custody of B to A and ordered that contact between C and B take place between 4 and 6 p.m. every Tuesday.

36. On 6 October 2014 the Y police interviewed B's babysitter, who described incidents of sexual behaviour by B. On the same day, the police provided the Z State Attorney's Office with another special report on the actions taken following A's criminal complaint.

37. On 10 October 2014 A requested the Z State Attorney's Office to hear further witnesses in the case.

38. On 30 October 2014 the State Attorney's Office ordered that B be seen by a defectologist and that, along with the relevant social welfare centre, the results of the child-protection measure be assessed (see paragraph 32 above) with a view to protecting B's best interest.

39. On 14 November 2014 the State Attorney's Office requested Polyclinic A.B.R., where B was being treated, to submit its assessment on whether B was being abused by either of her parents, with a view to her criminal protection.

40. On 17 November 2014 A submitted to the State Attorney's Office a report dated 10 November 2014 issued by a psychiatrist Z.K, employed with Clinic P, where A had taken B for another assessment. The relevant part of that report reads as follows:

> "... In the drawing of her family, the father is described as mean and doing things that he should not. She says that the father took her clothes off and pinched her behind and genitals on three occasions, that she told him not to do it, but he had always replied that he did not care. She also says that daddy used to kiss her on the mouth but has stopped doing it. She says that she has not had similar experiences with anyone else. The mother says that the girl behaves in an overtly sexual manner, tries to kiss other people on the mouth (her nannies, mother and uncle). The mother says that the girl wants to touch other people on the behind, inserts her fingers in her underwear and then into other people's mouths and that she had inserted her finger into her cat's rectum. The girl denies remembering any of this.

...

During examination the girl attempted to make inappropriate contact with the doctor writing the report. She stopped playing with toys and approached him from behind, tried to hold his upper arm and leant her head against it. This behaviour is regarded as inappropriate in the current situation.

Recommendations

It is advised that the girl continue psychotherapeutic counselling currently being performed at ... Polyclinic A.B.R. Given the overall context and ongoing court proceedings, I recommend issuance of regular documents, cooperation with both parents as seen fit by the psychotherapist in charge of the child. In order to determine the forensic issues, in light of the complicated status of the girl and the overall circumstances of the 'case', it would be necessary to obtain an expert opinion, which could sufficiently determine the psychiatric and psychological characteristics of both parents and their causal link with the behaviour of the child or possible manipulation of the child. There is no professional need for ... double psychotherapy by two psychotherapists ..."

41. On 17 November 2014 A's lawyer asked the Z State Attorney's Office to commission a forensic expert report on B.

42. In reply to the State Attorney's Office letter of 14 November 2014, on 3 December 2014 the A.B.R. Polyclinic submitted its psychological assessment and opinion dated 1 December 2014 and drawn up by psychologist Z.G. The relevant part of that report, reads as follows:

"1. The child expresses a lack of distance and erotic closeness with people she does not know. On the basis of her playing and drawings and the information given by both parents, it could be concluded that the child expresses a premature interest in sexuality which is repeated constantly, so it cannot be seen as behaviour appropriate for [the child's] age, but as behaviour which indicates [the existence of] trauma.

2. It is clear that the child is emotionally and socially neglected because of the severe conflict between the parents over a longer period. The neglect is so severe that both parents are responsible for it. It is difficult to tell to what extent and in what way such a parental approach has contributed to the observed behaviour of the child, that is to say her premature and intense interest in sexuality and her sexual behaviour.

3. I therefore consider that the child, apart from being educationally and emotionally neglected, has also been exposed to inappropriate content and/or conduct by an adult with sexual connotations.

4. At the time of examination the child was not testable, so the projective techniques which could better explain the parents' influence on the observed behaviour could not have been applied.

5. Before deciding which parent is better placed to have custody of the child, an assessment of [their] capability should be carried out.

6. The child should certainly [receive] intensive treatment so as to diminish or remove the obstacles from the emotional and social sphere."

43. On the same day a senior expert consultant of the Z State Attorney's Office issued a report on the applicants' case, the relevant part of which reads as follows:

"... on her mother's initiative, the girl has been examined at various psychological and psychiatric institutions, so one gets the impression that the mother visits various experts and institutions in order to support her accusations and when she does not obtain confirmation of her accusations, she goes to another institution. The girl has hence been treated by the Social Welfare Centre, the Polyclinic, Clinic P and is now treated in Polyclinic A.B.R.

It transpires from the examinations and opinions of all institutions that the girl behaves in an inappropriately sexualised manner, but they do not establish that such behaviour would be due to sexual abuse by the father. The Polyclinic established that there had been no signs clearly indicating a sexual trauma because the girl did not describe contextually characteristic situations and her affectionate [behaviour] is not in line with verbally described content. On the other hand, [the Polyclinic] did note elements indicating the mother's pressure due to which inducement of the girl could not be excluded, which is a form of emotional abuse.

...

Generally it can be concluded that the relationship between former spouses is very disturbed and that the child was left to nannies and has not bonded with either of the parents. Although the child shows erotic behaviour inappropriate for her age, her inducement by the mother is so obvious as well as her taking of the child to various institutions and psychiatrists, that no credibility can any longer be given to the child's statements. Through her behaviour, the mother is pushing the girl even more to regression and emotional trauma, and although she has been warned about this, she ignores the experts. One gets the impression that she contacts institutions until she receives confirmation for her accusations. When experts point out her failures, she becomes verbally aggressive. On the other hand, the father distances himself, he is anxious and depressed and actually participates in the education only passively, sets no boundaries for the girl who has no distance in respect of him and acts appropriately considering her age in a given situation.

To sum up, the behaviour of both parents and their severely disturbed relationship and conflicts which break down on the girl and continue through institutions, severely endanger the child's further emotional, cognitive and social development, and regression is observed already at this stage and is continuing negatively. I consider both parents responsible for such a state of the girl. I consider that both parents should be included in psychotherapy, which has already been suggested to them, but neither of them has thus far joined any expert treatment nor has asked for help; what is important is that the girl is being taken to various experts, from institution to institution so that she already feels at home there and adapts her behaviour, so no credible statement can any longer be obtained from her.

..."

44. On 31 December 2014 the Z State Attorney's Office informed A and her lawyer that the case had been closed. The relevant part of the letter sent to them reads:

"... after careful assessment of the ... documentation ..., even though it has been concluded with certainty that child B shows erotic behaviour inappropriate for her age, no facts or circumstances have been established which would clearly indicate that the cause of this behaviour is sexual abuse of child B by the suspect C.

Since in this case reasonable suspicion has not been established that C has sexually abused child B, or that his behaviour amounted to any other criminal act liable to

State-assisted prosecution, there is therefore no basis for the State Attorney's Office to process [the case] further."

45. On 30 January 2015 the Z State Attorney's Office issued a formal decision not to prosecute. The decision describes in detail all the evidence gathered. The relevant part of its conclusion reads:

"On the basis of the allegations contained in the criminal complaint, the documentation obtained during the enquiry and [that] submitted by the complainant ... it has been established that there were no signs of either old or fresh injuries on child B's body and genitals ... that child B shows a premature interest in sexuality and erotic behaviour inappropriate for her age, and that both parents should receive appropriate [psychotherapy]. The fact that child B shows a premature interest in sexuality and erotic behaviour inappropriate for her age has been established in interviews with complainant A, [the child's maternal grandmother, A's siblings] D and E, and by the opinions given by experts of various institutions ... However, even though the A.B.R. Polyclinic's report ... shows that the child was exposed to inappropriate content and/or conduct by an adult with sexual connotations, the fact is that none of the four institutions which had previously treated the child, including the A.B.R. Polyclinic, has established that the cause of this erotic behaviour ... is sexual abuse by her father C. The report by the Polyclinic's multidisciplinary team ... indicates that there are no clear signs of sexual abuse. On the other hand, elements showing pressure by the mother were present. This could not exclude the possibility of the girl's inducement ... which represents emotional abuse. Furthermore, elements of pressure by the mother on the child were observed by other experts ... It has been established that the conduct of the mother, who is well informed about the manner in which sexually abused children are treated and monitored, led the child to give statements which were often contradictory or untrue, which is why it is no longer possible to obtain a truthful statement from the child."

The decision then concludes that, taking into account all the facts and circumstances, it was not possible to conclude that C had committed any criminal offence liable to State-assisted prosecution. A was also informed that she could lodge a request for an investigation with a competent county court's investigating judge within eight days.

46. A complied with the instruction on 26 February 2015 by submitting a request to an investigating judge of the Z County Court seeking an investigation into the allegations of sexual abuse of B by her father.

47. A also lodged a constitutional complaint against the decision of the Z State Attorney's Office of 30 January 2015. It was declared inadmissible by the Constitutional Court on 28 April 2015 on the ground that the impugned decision did not amount to an act by which "a competent court has decided on the merits about a right or an obligation of the applicant or a criminal charge against her".

48. On 30 October 2015 an investigation judge of the Z County Court dismissed A's request for an investigation (see paragraph 46 above) on the grounds that the requirement of a reasonable suspicion against C had not been met. A's appeal against that decision was dismissed by a three-judge panel of the same court on 8 December 2015.

C. Further developments

49. On 27 August 2014 the Centre ordered three measures to protect the rights of B: supervision of parental care of both parents, supervision of personal contact between B and C and providing expert assistance and support with parental care.

50. The measure of supervision of parental care was implemented in respect of both parents for the period 30 August 2014 to 29 February 2016. A psychologist was assigned to observe the manner in which parental care was carried out and she gave expert advice to the parents on how to minimise the tension between them. Monthly reports were submitted to the Centre.

51. The measure of supervision of personal contact between B and C was implemented on 2 September 2016. The supervisor assigned submits monthly reports to the Centre.

52. The measure of expert assistance was implemented in respect of both parents on 30 September 2016. A pedagogical expert was appointed to assist A with her parental care of B.

53. The documents submitted by the parties show the following.

54. B continues to be seen by a psychiatrist.

55. On 28 August 2014 a meeting was held at the Centre with a psychologist to inform the parents about the measure of supervision of parental care. It was agreed that the psychologist would see the mother once every two weeks and that the father would also see B every second week in the presence of the psychologist. Reports of the psychologist show that these meetings have been held regularly.

56. The psychologist also made contact with and consulted the psychiatrist treating B, the relevant professionals from the kindergarten and school attended by B and the psychologist treating C.

57. On 13 August 2014 the Z Municipal Court ordered contact between B and C every Tuesday afternoon for two hours, under the supervision of a social worker. It appears that this order has been complied with.

58. A attended counselling for single parents on her own initiative.

59. Detailed reports were submitted to the Centre after every meeting with each of the parents, on contact between B and C and members of his family and on meetings with B. The reports show that B and C have a good relationship and that A insists on not communicating with C.

D. Other proceedings

60. Several sets of proceedings concerning the custody of B and contact rights of C were pending before the national authorities at the material time.

61. On 7 May 2018 a municipal court awarded C custody of B, finding it in the child's best interest to live with her father.

II. DOMESTIC LAW

A. Criminal Code

62. Sexual abuse of a child under fifteen years of age (Article 158), satisfaction of lust in front of a child (Article 160) and the introduction of children to pornography (Article 164) are all offences under the Criminal Code (*Kazneni zakon*, Official Gazette nos. 125/2011 and 144/2012).

B Code of Criminal Procedure

63. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette no. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013 and 145/2013) at the material time provided as follows:

Article 2

"(1) Criminal proceedings shall be instituted and conducted at the request of a qualified prosecutor only. ...

(2) In respect of criminal offences subject to public prosecution the qualified prosecutor shall be the State Attorney and in respect of criminal offences to be prosecuted privately the qualified prosecutor shall be a private prosecutor.

(3) Unless otherwise provided by law, the State Attorney shall undertake a criminal prosecution where there is a reasonable suspicion that an identified person has committed a criminal offence subject to public prosecution and where there are no legal impediments to the prosecution of that person.

(4) Where the State Attorney finds that there are no grounds to institute or conduct criminal proceedings, the injured party as a subsidiary prosecutor may take his place under the conditions prescribed by this Act."

Article 44

"(1) A child victim of a criminal offence ... has the right to:

1. a representative paid by the State; ...

2. be accompanied by a person of his or her trust when participating in measures [taken by the authorities];

3. confidentiality of personal data;

4. exclusion of the public [from proceedings]

..."

Article 205

"(1) [A criminal] report shall be filed with the relevant State Attorney in writing, orally or by other means.

...

(3) If the report was filed with the court, the police authority or a State Attorney lacking jurisdiction, they shall receive it and immediately forward it to the State Attorney having jurisdiction ..."

Article 207

"(2) The police shall notify the State Attorney about all inquiries into criminal offences immediately, and not later than 24 hours from the moment the action was conducted ...

...

(4) On the basis of conducted inquiries, the police shall ... compose a criminal complaint or a report about the conducted inquiries, stating all the evidence which it gathered ...

(5) Should the police subsequently learn about new facts [or] evidence ... it shall collect the necessary information and inform the State Attorney about it immediately ..."

Article 285

"(1) The following persons are not obliged to give evidence as witnesses:

...

4. a child who, owing to his or her age and emotional development, is unable to understand the meaning of the right not to give evidence as a witness cannot be heard as a witness, but the information obtained from him or her through experts, relatives or other persons who have been in contact with the child may serve as evidence.

..."

C. Act on Protection from Domestic Violence

64. Section 4 of the Act on Protection from Domestic Violence (*Zakon o zaštiti od nasilja u obitelji*, Official Gazette no. 116/2003), defines domestic violence as follows:

"... every use of physical force or psychological pressure against the integrity of a person; every other behaviour of a family member which can cause or potentially cause physical or psychological pain; causing feelings of fear or being personally endangered or feeling of offended dignity; physical attack regardless of whether or not it results in physical injury, verbal assaults, insults, cursing, name-calling and other forms of severe disturbance, sexual harassment; spying and all other forms of disturbing; illegal isolation or restriction of the freedom of movement or communication with third persons; damage or destruction of property or attempts to do so."

D. Family Act

65. The relevant provisions of the Family Act (*Obiteljski zakon*, Official Gazette no. 103/2015) provide:

Section 127

"(1) Parents have a duty and responsibility to protect the rights and welfare of their child.

(2) In the cases prescribed by this Act other family members also have the duty and responsibility referred to in paragraph 1 of this section.

(3) Measures to protect the rights and welfare of a child are applied in respect of the parents.

(4) Measures which may be taken by a social welfare centre to protect the rights and welfare of a child may also be applied in respect of persons who care for a child on a daily basis."

Section 128

"When determining the appropriate measure to protect the rights and welfare of a child, the body conducting the procedure shall ensure that a measure is applied which restricts as little as possible a parent's right to care for the child where it is possible to protect the rights and welfare of the child by such a measure."

Section 131

"Measures to protect the rights and welfare of a child shall be ordered on the basis of an expert assessment if it has been established that there has been an infringement of the child's rights or welfare or that the child's rights or welfare are at risk."

Section 134

"A social welfare centre may apply [the following measures] to protect the rights and welfare of a child:

1. An urgent measure placing the child outside his or her family;
2. A warning about the errors and failures in exercising parental care;
3. A measure of expert assistance and support with parental care;
4. A measure of intensive expert assistance and supervision of parental care."

E. National Strategy for the Rights of Children in the Republic of Croatia

66. The National Strategy for the Rights of Children in the Republic of Croatia for the period 2014 to 2020 (*Nacionalna strategija za prava djece u Republici Hrvatskoj*) was adopted in September 2014 by the Croatian Government. Four main aims were identified: ensuring that services in various areas were adapted to children (such as justice, health care, social welfare, education, sport and culture), eliminating all forms of violence against children, ensuring that the rights of children in vulnerable situations are respected and ensuring the active participation of children.

F. Protocol on Conduct in Domestic Violence Cases

67. The Protocol on Procedures in Domestic Violence Cases (*Protokol o postupanju u slučaju nasilja u obitelji* – hereinafter "Protocol 1") was issued in 2008 by the Ministry of Family, Homeland War Veterans and Intergenerational Solidarity. It relies on the definition of domestic violence, as stated in the Act on Protection against Domestic Violence Act (see paragraph 64 above).

68. As regards the duties of the police, Protocol 1 provides that when the police receive information in any way and from anyone about an instance of domestic violence, an officer must interview the victim in separate premises without the alleged perpetrator being present. If the victim or witness of domestic violence is a child, specially trained officers must carry out all tasks.

69. As regards the duties of social welfare centres, Protocol 1 provides that such centres are obliged to provide help to the victims of domestic violence in obtaining legal aid, encourage the victim to seek appropriate counselling, and assess whether the best interests of a child victim of domestic violence require that a special guardian be appointed so that his or her rights are completely protected in criminal or minor offences proceedings.

G. Protocol on Conduct in Cases of Sexual Violence

70. The Protocol on Conduct in Cases of Sexual Violence (*Protokol o postupanju u slučaju seksualnog nasilja* – hereinafter "Protocol 2") was adopted by the Croatian Government on 4 September 2014. It provides that all actions by the police, save for urgent measures, are to be carried out by officers specially trained in sexual violence cases and that the police must inform the victim of the possibility of obtaining expert help for the protection of his or her physical and psychological well-being. The police are obliged to immediately inform a State attorney's office of the information gathered.

71. As regards the duties of social welfare centres, Protocol 2 provides that centres are obliged to provide victims with help in obtaining legal aid, as well as counselling and psychosocial support.

H. Protocol on Conduct in Cases of Ill-treatment and Neglect of Children

72. The Protocol on Conduct in Cases of Ill-treatment and Neglect of Children (*Protokol o postupanju u slučaju zlostavljanja i zanemarivanja djece* – hereinafter "Protocol 3") was adopted by the Croatian Government in November 2014.

73. Protocol 3 provides that the best interests of a child have primary importance in all matters covered by it. The procedures followed should be efficient in order to ensure that the child is given prompt and co-ordinated protection from further ill-treatment, including sexual abuse, or neglect, as well as provided appropriate support. All procedures conducted by State bodies are to be carried out by experts in the relevant fields.

74. A social welfare centre should appoint a special guardian for the child if its experts assess that his or her interests are in conflict with those of the parent. It should also instruct the parent to seek counselling or involve the child in appropriate forms of psychosocial help, rehabilitation programmes and other forms or expert help and support. The social welfare centre is also obliged to provide information to the parent about any pending procedures, activities planned and their possible consequences and the rights of the child. It must also co-operate with other bodies and institutions involved and organise consultation meetings so as to ensure a coordinated approach in order to provide the child with appropriate help, support and treatment with the aim of protecting him or her from further trauma, and to prevent repeated interviews or examinations.

75. Medical institutions are obliged to ensure cooperation through a multi-disciplinary team approach in order to avoid repetition of the traumatic experience.

III. EUROPEAN UNION LAW

76. Directive of the European Parliament and of the Council (2012/29/EU) of 25 October 2012 establishes minimum standards on the rights, support and protection of victims of crime. The relevant part of the Directive, which was to be implemented into the national laws of the European Union Member States by 16 November 2015, provides as follows:

Article 1
Objectives

> "2. Member States shall ensure that in the application of this Directive, where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child."

Article 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

"4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article."

Article 24
Right to protection of child victims during criminal proceedings

"1. In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

(a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;

(b) in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;

(c) where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

The procedural rules for the audiovisual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law."

IV. INTERNATIONAL MATERIALS

A. United Nations

77. The relevant provisions of the Convention on the Rights of the Child, which came into force on 2 September 1990, read as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

...

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials."

B. Council of Europe

1. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

78. This Convention obliges its parties to take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to criminalise certain intentional conduct. It was adopted in Lanzarote on 25 October 2007 and entered into force on 1 July

2010. As regards Croatia, it was ratified on 21 September 2011 and came into force on 1 January 2012. The relevant parts read:

Article 4 – Principles

"Each Party shall take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children."

Article 14 – Assistance to victims

"1. Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psycho-social recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.

...

4. Each Party shall take the necessary legislative or other measures to ensure that the persons who are close to the victim may benefit, where appropriate, from therapeutic assistance, notably emergency psychological care."

Chapter VI – Substantive criminal law
Article 18 – Sexual abuse

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities;

..."

Chapter VII – Investigation, prosecution and procedural law
Article 30 – Principles

"1. Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.

3. Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay.

..."

Article 31 – General measures of protection

"1. Each Party 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 criminal proceedings, in particular by:

a. informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, 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 cases;

...

d. providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

...

g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.

...

4. Each Party shall provide for the possibility for the judicial authorities to appoint a special representative for the victim when, by internal law, he or she may have the status of a party to the criminal proceedings and where the holders of parental responsibility are precluded from representing the child in such proceedings as a result of a conflict of interest between them and the victim.

..."

Article 34 – Investigations

"1. Each Party shall adopt such measures as may be necessary to ensure that persons, units or services in charge of investigations are specialised in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose. Such units or services shall have adequate financial resources.

..."

Article 35 – Interviews with the child

"1. Each Party shall take the necessary legislative or other measures to ensure that:

a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c. interviews with the child are carried out by professionals trained for this purpose;

d. the same persons, if possible and where appropriate, conduct all interviews with the child;

e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

f. the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

2. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.

..."

79. The relevant part of the Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse reads as follows:

Article 31 – General measures of protection

"...

227. Paragraph 4 makes provision for the situation in cases of sexual abuse within the family, in which the holders of parental responsibility, while responsible for defending the child's interests, are involved in some way in the proceedings in which the child is a victim (where there is a "conflict of interest"). In such cases, this provision makes it possible for the child to be represented in judicial proceedings by a special representative appointed by the judicial authorities. This may be the case when, for example, the holders of parental responsibility are the perpetrators or joint perpetrators of the offence, or the nature of their relationship with the perpetrator is such that they cannot be expected to defend the interests of the child victim with impartiality.

..."

Article 35 – Interviews with the child

"236. This provision concerns interviews with the child both during investigations and during trial proceedings. ... The main purpose of the provision is the same as that described more generally in connection with Article 30: to safeguard the interests of the child and ensure that he or she is not further traumatised by the interviews. ...

237. In order to achieve these objectives, Article 35 lays down a set of rules designed to limit the number of successive interviews with children, which force them to relive the events they have suffered, and enable them to be interviewed by the same people, who have been trained for the purpose, in suitable premises and a setting that is reassuring...

238. Paragraph 2, provides that interviews with a child victim or, where appropriate, those with a child witness, may be videotaped for use as evidence during the criminal proceedings. The main objective of this provision is to protect children against the risk of being further traumatised. The videotaped interview can serve multiple purposes, including medical examination and therapeutic services, thus facilitating the aim of limiting the number of interviews as far as possible. It reflects practices successfully developed over the last few years in numerous countries.

..."

80. Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Committee) adopted a 1st implementation report on the protection of children on sexual abuse in the circle of trust on 4 December 2015. The relevant parts of that report read as follows:

"**III. BEST INTEREST OF THE CHILD AND CHILD FRIENDLY CRIMINAL PROCEEDINGS**

77. Child sexual abuse is typically a very intimate and secretive act... A child's ability and willingness to report their victimisation plays a crucial role in legal and

therapeutic intervention. It represents the most valuable source of information and it is on this that the whole case may rest.

78. In this respect it is crucial to avoid the negative consequences which result from inappropriate and repetitive interviewing techniques and adverse facilities where these interviews may take place. To guarantee the rights and best interests of child victims of sexual abuse, authorities need to recognize that they have to act collectively, not just as a government or a judicial system, but all together as a society. Acting collectively means implementing measures to protect children, which are not confined to individual actions... but which are truly child-focused and comprehensive with regard to prevention, intervention and rehabilitation. An interdisciplinary and multi-agency approach delivered by all the different entities in society whose responsibility is to carry out these tasks is therefore paramount.

...

III.5 Article 31 § 4: Appointment by the judicial authorities of a special representative for the victim to avoid a conflict of interest between the holders of parental responsibility and the victim

125. Considering that the level of family support is one of the most important predictors of the degree to which the child can adjust following his or her disclosure, family support can be heavily disrupted when the alleged perpetrator is part of the child's family environment. In Belgium and Croatia the non-offending parent will often be appointed as special representative if this is in the child's best interest. However, although this option can provide valuable emotional support for the child's future wellbeing, it may also create a conflict of interests with the child, especially if the non-offending parent is involved emotionally.

..."

2. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

81. The Convention was adopted in Istanbul on 11 May 2011 and entered into force on 1 August 2014. It was signed by Croatia on 22 January 2013, ratified on 12 June 2018 and came into force on 1 October 2018. The relevant part reads:

Chapter IV – Protection and support
Article 18 – General obligations

"1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.

2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Articles 20 and 22 of this Convention.

3. Parties shall ensure that measures taken pursuant to this chapter shall:

– be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;

– be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment;

– aim at avoiding secondary victimisation;

...

– allow, where appropriate, for a range of protection and support services to be located on the same premises;

– address the specific needs of vulnerable persons, including child victims, and be made available to them.

4. The provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator.

5. Parties shall take the appropriate measures to provide consular and other protection and support to their nationals and other victims entitled to such protection in accordance with their obligations under international law."

Article 19 – Information

"Parties shall take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand."

Chapter VI – Investigation, prosecution, procedural law and protective measures
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.

..."

Article 50 – Immediate response, prevention and protection

"1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.

..."

Article 56 – Measures of protection

"...

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."

3. Recommendation of the Committee of Ministers on assistance to crime victims

82. The relevant part of the Recommendation Rec (2006) 8 of the Committee of Ministers to member States on assistance to crime victims, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies, reads as follows:

1. Definitions

"1.3. Secondary victimisation means victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim."

2. Principles

"2.1. States should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims.

2.3. The granting of these services and measures should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the criminal act."

3. Assistance

"3.3. Victims should be protected as far as possible from secondary victimisation.

3.4. States should ensure that victims who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation."

10. Protection
Protection of physical and psychological integrity

"10.1. States should ensure, at all stages of the procedure, the protection of the victim's physical and psychological integrity. Particular protection may be necessary for victims who could be required to provide testimony.

10.2. Specific protection measures should be taken for victims at risk of intimidation, reprisals or repeat victimisation."

14. Co-ordination and co-operation

"14.1. Each state should develop and maintain co-ordinated strategies to promote and protect the rights and interests of victims.

14.2. To this end, each state should ensure, both nationally and locally, that:

– all agencies involved in criminal justice, social provision and health care, in the statutory, private and voluntary sectors, work together to ensure a co-ordinated response to victims;

..."

4. Child Friendly Justice

83. Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice were adopted by the Committee of Ministers on 17 November 2010. The relevant part reads:

"**B. Best interests of the child**

1. Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them.

2. In assessing the best interests of the involved or affected children:

a. their views and opinions should be given due weight;

b. all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;

c. a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.

3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.

4. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.

C. Dignity

1. Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. This treatment should be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions, and regardless of their legal status and capacity in any procedure or case.

2. Children shall not be subjected to torture or inhuman or degrading treatment or punishment.

...

2. Legal counsel and representation

37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

...

42. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child.

43. Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.

6. Evidence/statements by children

...

68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.

V. Promoting other child-friendly actions

Member states are encouraged to:

...

j. set up child-friendly, multi-agency and interdisciplinary centres for child victims and witnesses where children could be interviewed and medically examined for forensic purposes, comprehensively assessed and receive all relevant therapeutic services from appropriate professionals;

..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3 AND 8 OF THE CONVENTION AS REGARDS THE ALLEGATIONS OF SEXUAL ABUSE OF B

84. A complained on behalf of B that the domestic authorities had failed to provide a proper response to the allegations of sexual abuse of B by her father, and that they had had no effective remedy in that regard. They relied on Articles 3, 8 and 13 of the Convention.

85. The Court, being master of the characterisation to be given in law to the facts of the case, will examine this complaint under Articles 3 and 8 of the Convention. The relevant parts read:

Article 3

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

Article 8 § 1

"Everyone has the right to respect for his private and family life ..."

A. Admissibility

1. The parties' submissions

86. The Government argued that the complaints under Articles 3 and 8 were premature since two sets of civil proceedings at national level, both concerning the custody of B, were still pending at the material time.

87. The applicants objected, arguing that these proceedings had no bearing on the State's obligations under Articles 3 and 8 of the Convention.

2. The Court's assessment

(a) As regards A's victim status

88. Even though the Government did not raise objections concerning A's victim status, that issue is a matter which goes to the Court's jurisdiction, which the Court thus must examine of its own motion (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 60, ECHR 2016 (extracts)).

89. The Court reiterates that in order to be able to lodge a petition in pursuance of Article 34, a person, non-governmental organisation or group of individuals must be able to claim "to be the victim of a violation ... of the rights set forth in the Convention ...". In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure (see *Micallef v. Malta* [GC], no. 17056/06, § 44, ECHR 2009). This criterion is not to be applied in a rigid, mechanical and inflexible way (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX).

90. In the present case, the applicants alleged that the response of the national authorities to the allegations of sexual abuse of B by her father had not been in compliance with the State's obligations under Articles 3 and 8 of the Convention. This complaint concerns B only. A was only a representative of B in the proceedings before the national authorities. In the present case, the Court does not find any particular circumstances that would justify accepting the victim status of the mother as well.

91. Accordingly, this complaint, in so far as it concerns A, is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected, in accordance with Article 35 § 4.

(b) Whether the application is premature

92. The Court reiterates that the alleged breaches of Articles 3 and 8 of the Convention concern the inadequate response of the national authorities to the allegations of sexual abuse of a child. The Court has held that in such circumstances it falls upon the member States to ensure that efficient criminal-law provisions are in place (see, for example, *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII). The protection afforded by civil and custody proceedings is insufficient (see *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91). Therefore, the fact that the civil and custody proceedings referred to by the Government were pending at the material time (see paragraph 86 above) does not have as a consequence that the application is premature.

(c) Conclusion as to the admissibility

93. The Court notes that these complaints in so far as they concern B (hereinafter "the applicant") are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

94. The applicant contended that the criminal-law mechanisms existing in Croatia as regards allegations of sexual abuse of children were ineffective.

95. She considered that the national authorities should have carried out investigations into the following three issues – whether she had been sexually abused by her father; whether she had been sexually abused by someone else; and whether she had been emotionally abused by her mother.

96. As regards the investigation into the alleged sexual abuse of the applicant by her father, the authorities had not acted promptly. Thus, after A had reported the sexual abuse of the applicant to the police, the latter had not been taken to a gynaecologist within seventy-two hours. No forensic expert interview was ever done in order to clarify the facts of the case (see paragraph 41 above). The psychological and psychiatric assessment of the father, C, had not been carried out properly in a specialised facility.

97. Further to this, the authorities had not efficiently investigated whether the applicant had been emotionally abused and manipulated by her mother.

98. The authorities had not once investigated the possibility that the applicant had been sexually abused by someone else, even though such a possibility had been suggested by a psychologist (see paragraph 42 above).

99. The authorities in charge had not considered appointing a special guardian for the applicant during the proceedings at issue, even though it had been obvious that neither A nor C had been capable of protecting her best interests. In these circumstances only a special guardian could have ensured that her best interests were in reality protected.

100. Furthermore, at the time when the expert reports had indicated that A might have influenced and manipulated the applicant, the relevant social welfare centre failed to remove the applicant from her parents. The centre had not done anything to prevent A from constantly changing the doctors and psychologists treating the applicant, which had amounted to her secondary victimisation.

101. The Government, relying extensively on the details of the facts of the case, argued that the authorities had carried out all the necessary steps in

order to establish the circumstances of the alleged sexual abuse of the applicant by her father. As regards the alleged lack of promptness in the initial stages of the investigation, the Government pointed out that the requirement of a medical examination with a seventy-two hour period relied on by the applicant had started to run from the moment of the alleged sexual contact. Since A had informed the police and the social welfare centre about the alleged sexual abuse only several days after the applicant had last seen C, that 72-hour period had already elapsed.

102. As regards the examination of B carried out by the team of experts at the Polyclinic, which started only four days after the alleged sexual abuse had been reported, the Government maintained that that team had been comprised of experts specially trained for that type of interview. The applicant had been seen by four members of that team, including a paediatrician. A and C had also been seen by the members of the team but had not been present during the interviews with the applicant.

103. The Government stressed that all the procedures had been carried out by experienced professionals and experts in the relevant fields and that those procedures had been of a nature appropriate to the applicant's age. As regards a forensic interview, the Government submitted that, given the applicant's young age, such interviewing techniques could to a large extent not have been applied to her at the material time.

104. In parallel, starting the very next day after the alleged abuse had been brought to their attention, the competent authorities interviewed all persons who might have had any knowledge of the events. During the ensuing investigation all relevant evidence had been gathered and properly assessed. The fact that the authorities had decided not to prosecute could not be seen as arbitrary or a result of any failure on their part.

2. The Court's assessment

105. The Court is called upon to examine the adequacy of the legal framework governing the conduct of the authorities in investigating and processing cases of sexual abuse of children. It is also called upon to examine whether in the criminal proceedings concerning alleged sexual battery by the father against the applicant, who at the time was four and a half years old, the competent authorities had carried out a thorough, effective and prompt investigation as well as whether they had afforded sufficient protection to the applicant's right to respect for private life, and especially for her personal integrity in light of her vulnerability due to her young age and alleged sexual abuse and taking the best interests of the child as a primary consideration. Thus, in issue is not only the effectiveness of investigation, but the alleged lack or inadequacy of measures aimed at protecting in criminal proceedings the rights of a child, who had allegedly been the victim of sexual abuse (compare *Y. v. Slovenia*, no. 41107/10, § 101, ECHR 2015 (extracts)).

(a) General principles

106. Given the nature and substance of the applicant's complaints, they fall to be examined under Articles 3 and 8 of the Convention, both of which entail an obligation on the State to safeguard the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, cited above, §§ 22-23; *M. and C. v. Romania*, no. 29032/04, §§ 107-11, 27 September 2011; *M.P. and Others v. Bulgaria*, no. 22457/08, §§ 108-10, 15 November 2011; and *Okkalı v. Turkey*, no. 52067/99, § 54, ECHR 2006 XII (extracts)). Children and other vulnerable individuals, in particular, are entitled to effective protection (see *O'Keeffe v. Ireland* [GC], no. 35810/09, § 144, ECHR 2014 (extracts); *X and Y v. the Netherlands*, cited above, §§ 23-24 and 27, and *M.C. v. Bulgaria*, cited above, § 150).

107. Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *Söderman v. Sweden* [GC], no. 5786/08, § 80, ECHR 2013 with further references).

108. Positive obligations of the states under Article 3 and 8 of the Convention also include requirements related to the effectiveness of the investigation (see *M.C. v. Bulgaria*, cited above, §§ 150-152 and, as regards general principles, *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 233-238, 30 March 2016; *Bouyid v. Belgium* [GC], no. 23380/09, §§ 114-123 , ECHR 2015; and *Tadić v. Croatia*, no. 10633/15, § 66, 23 November 2017). The Court has held that an effective investigation 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 take the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. A requirement of promptness and reasonable expedition is an important factor. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case. 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 *Y. v. Slovenia*, cited above, § 96).

109. The Court has also accepted that positive obligations under Articles 3 and 8 include the protection of the rights of victims in criminal proceedings (see *Y. v. Slovenia*, cited above, §§ 97 and 101).

110. Thus regarding, more specifically, serious acts such as rape and other forms of sexual abuse of children, including sexual battery, where fundamental values and essential aspects of private life are at stake, it falls upon the member States to ensure that criminal-law provisions for the effective punishment of sexual abuse of children are in place and that they are applied in practice through effective investigation and prosecution (ibid., § 82, and *M.C. v. Bulgaria*, cited above, § 153). Yet, there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see *Söderman*, cited above, § 83 with further references).

111. The Court reiterates that in cases of sexual abuse children are particularly vulnerable (see *M.C. v. Bulgaria*, cited above, §§ 150 and 183; *M.G.C. v. Romania*, no. 61495/11, § 56, 15 March 2016). The Court also recalls that the right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012; see also paragraph 78 above). The Court recalls that the obligations incurred by the State under Articles 3 and 8 of the Convention in cases such as this, involving and affecting a child, allegedly victim of sexual abuse, require the effective implementation of children's right to have their best interests as a primary consideration (see paragraphs 77, 78, 81 and 83 above, see also in various contexts *Neulinger and Shuruk*, cited above, § 134; *Scozzari and Giunta*, cited above, § 169; and *Blokhin v. Russia* [GC], no. 47152/06, § 138, ECHR 2016) and to have the child's particular vulnerability and corresponding needs adequately addressed by the domestic authorities (see, *mutatis mutandis*, *O'Keeffe v. Ireland* [GC], cited above, § 146; and *M.G.C. v. Romania*, cited above, § 73).

112. In view of the above, the Court considers that States are required under Articles 3 and 8 to enact provisions criminalising the sexual abuse of children and to apply them in practice through effective investigation and prosecution (see paragraph 110 above; see also *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; *Söderman*, cited above, §§ 82-83; and *M.G.C.*, cited above, §§ 57-58), being thereby mindful of particular vulnerability of children, their dignity and their rights as children and as victims. These obligations also stem from other international instruments, such as, *inter alia*, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (see paragraphs 78 to 81 above, including the

relevant parts of the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, see paragraph 83 above).

113. Finally, the Court recalls that where a particularly important facet of an individual's existence or identity is at stake, or where the activities at issue involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed (see *Söderman*, cited above, §§ 78-79, with further references).

(b) Application of these principles in the present case

114. The Court notes at the outset that on 16 June 2014 A went to the police and a day later to the competent social welfare centre to report that her daughter B had been sexually abused by her father. Several witnesses confirmed the allegations of overtly sexualised behaviour of B (see paragraphs 11, 14 and 36 above), and A also said that B had told her and her sister that her father had played sexualised games with her (see paragraphs 8 and 11 above). These allegations were sufficient to engage the authorities' obligation to investigate the situation.

115. The Court notes that there are three aspects to the applicant's complaints. Firstly, whether there had been an appropriate legal and regulatory framework for the protection of her rights under Articles 3 and 8 of the Convention; secondly, whether in the application of that framework to her particular case the national authorities had complied with their procedural obligations to conduct an effective investigation; and, thirdly, whether in conducting their investigation the national authorities have sufficiently taken into consideration her rights as a child victim of sexual abuse.

116. The authorities have to be prepared for such difficult situations as allegations of sexual abuse of children by persons close to them, and be ready to face them properly by enacting efficient criminal-law provisions concerning sexual activity with children and by conducting an effective investigation into any such allegation (see paragraph 110 above; see also *Söderman*, cited above, §§ 82-83; and *C.A.S. and C.S.*, cited above, §§ 71-72). In this connection the Court notes that the Lanzarote Committee in its 1st implementation report on the protection of children on sexual abuse in the circle of trust pointed out that the authorities should also ensure the coordination and collaboration of the different players who intervene for and with the child victim (see paragraph 80 above).

117. As to the criminal-law mechanisms provided in the Croatian legal system in connection with the State's obligations under Articles 3 and 8 of the Convention, it is not disputed that the criminal law prohibited the sexual abuse alleged by the applicants as an aggravated offence when compared to the same acts against adult individuals and provided for the prosecution and effective punishment of those responsible (see paragraphs 62 and 63 above).

118. The Court further notes that the Code of Criminal Procedure contains a provision ensuring special rights of a child victim of a criminal offence (see paragraph 63 above).

119. The Court also observes that certain rules on the procedures to be followed by authorities such as the police, social welfare centres or medical institutions in Croatia in cases of domestic violence and/or sexual abuse of children are provided for in three Protocols adopted by the Croatian Government (see paragraphs 67-75 above). Those Protocols contain rules which require co-ordinated action by all the authorities involved in cases of sexual abuse of children. The procedures followed must be efficient and respectful of the physical and psychological integrity of the child, whose best interests are of primary importance. At the time when A made allegations of sexual battery of B, Protocol 1 had already been in force, whereas Protocols 2 and 3 were adopted while the allegations were being assessed by the national authorities. The Court notes that none of those Protocols envisaged a detailed flowchart which the domestic authorities had to follow in cases of alleged sexual abuse of a child.

120. However, the Court's responsibility being the pronouncing on whether a certain situation amounts a violation of the Convention and not identifying best practices, which would be particularly beneficial in cases such as the present one (see, *mutatis, mutandis*, *Muršić v. Croatia* [GC], no. 7334/13, § 113, ECHR 2016), it is satisfied that in Croatia there exists an adequate legal and regulatory framework relevant for the specific circumstances of the present case.

121. The Court will now examine whether the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's procedural obligations under Articles 3 and 8 of the Convention. In this connection, the Court considers that the criminal-law mechanisms should be implemented so as to address the particular vulnerability of the applicant as a child of a young age, who had allegedly been a victim of sexual abuse by her father, taking the child's best interests as a primary consideration and in this connection to afford protection to her victim's rights and avoid secondary victimisation (compare *Y. v. Slovenia*, cited above, §§ 101-104 and international materials as well as domestic law cited in paragraphs 62-75 above).

122. The Court notes that on 16 June 2014 A informed the police and the day after the relevant social welfare centre about the alleged sexual abuse of her daughter. Whereas certain criticism might be directed at the authorities for not organising an interview of B with the competent experts of their own motion, the Court notes that at that time A had already contacted the Polyclinic on the advice of "the Brave Telephone" and that an appointment in the Polyclinic, where the applicant was eventually

interviewed, had been scheduled for 20 June 2014, four days after the incident had been reported (see paragraph 10 above). Moreover, it cannot be said that the relevant social welfare centre or the police remained inactive in this sense, as they both contacted the Polyclinic urging it to deliver its findings (see paragraph 18 and 20 above).

123. At the Polyclinic, the applicant was seen by a team of experts, including a paediatrician (see paragraph 22 above). Further to this, on 2 July 2014, at the Polyclinic's instruction, B was seen by a gynaecologist, albeit with a considerable delay. No evidence of sexual abuse was found (see paragraph 21 above). The final expert report issued by the Polyclinic of 4 July 2014 established that B did not show any signs of being sexually abused and that there had been pressure and the possibility of inducement by the mother (see paragraph 22 above).

124. The Court further observes that subsequent psychological reports were all inconclusive. The expert report of 10 November 2014 stated that B described sexualised behaviour of C towards her and that the child needed to continue therapy (see paragraph 40 above). The expert report of 1 December 2014 established that B had been exposed to content and/or conduct of a sexualised nature by an adult, which had resulted in her behaving in an overtly sexualised manner (see paragraph 42 above).

125. As to the applicant's assertion that none of the interviews had been conducted in such a manner that they could have been accepted as evidence during subsequent court proceedings, the Court notes that none of the experts who had interviewed her could reach the conclusion that she had actually been sexually abused by her father. The State Attorney's Office concluded that there had been no grounds for prosecuting C and the Court, for its part, finds no reasons to call into question that conclusion.

126. The Court further observes that the police began interviewing witnesses the very next day, following A's report of the alleged sexual abuse (see paragraph 14 above). They interviewed A, two of her siblings, teachers from the kindergarten the applicant attended at the relevant time and her paediatrician. Later on, they also interviewed C and members of his family (see paragraphs 23 and 29 above).

127. The Court recognises that the Croatian authorities faced a difficult task, as they were confronted with a sensitive situation, conflicting versions of events and little direct evidence. The authorities had to deal with two irreconcilable versions of the facts and the results of three inconclusive expert opinions.

128. After all relevant evidence had been gathered, the prosecution authorities concluded that there had been insufficient evidence for the prosecution of C. The Court, for its part, does not consider itself to be in a position to draw a conclusion on the issue, and reiterates that it cannot substitute its own findings of fact for those of the national authorities, which are better placed to assess the evidence adduced before them and the

importance of witness testimony (see *M.P. and Others v. Bulgaria*, no. 22457/08, § 112, 15 November 2011).

129. In the light of the above considerations, the Court does not consider that the case at hand discloses any culpable disregard, discernible bad faith or lack of will on the part of the police or the prosecuting authorities as regards properly holding perpetrators of serious criminal offences to account under domestic law, and in particular as regards the establishment of the true facts in the case at hand and the punishment of those responsible (ibid., § 113). Moreover, the Court is satisfied that the domestic authorities did everything that could have reasonably been expected from them to protect the rights of the applicant, a child allegedly victim of sexual abuse, and to act in her best interest (see paragraphs 14, 16-21, 24-30 and 32-36 above).

130. Against the above background, the Court considers that there has been no violation of the procedural aspect of Articles 3 and 8 of the Convention in the particular circumstances of the present case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE SUPERVISION OF PARENTAL CARE

131. The documents submitted with the application show that an expert in psychology found that the applicant had been severely socially and emotionally neglected by both parents (see paragraph 42 above). The Court therefore communicated the issue under Article 8 of the Convention whether the State authorities had complied with their positive obligation to properly address the issue of the child's serious neglect by her parents. The relevant part of Article 8 is cited above (see paragraph 84 above).

132. The parties made no objections in that respect.

133. The Government argued that the above complaint was premature since two sets of civil proceedings at national level, both concerning the custody of B, were still pending and because the measures applied by the Centre were still ongoing.

134. The applicant contested those arguments.

135. The Court notes that the expert reports concerning the applicant concluded that she had been seriously neglected and had serious behavioural problems. Counselling was recommended for both parents and the child. The Court considers that in assessing the State's compliance with its positive obligations under Article 8 of the Convention, considerable importance should be attached to the efforts of social services and the child protection authorities to handle the situation and provide assistance and counselling to the applicant and her parents, A and C. It notes that the social services have been implementing various measures aimed at normalising the relationship between the applicant and her father. Psychological, psychiatric and pedagogical experts have been involved, as have social workers.

Meetings have taken place with A and professional assistance has been provided to her so that she can cope better with caring for B. Contact between the applicant and her father C and members of his family have been supervised and regular reports have been submitted. The social services also held consultations with the professionals from the kindergarten and later on the school B attended (see paragraphs 49-59 above).

136. In light of all the material in its possession, even assuming that the Court has jurisdiction to examine this issue (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 121-122, 20 March 2018), it finds that this complaint does not disclose any appearance of a violation of Article 8 of the Convention. Accordingly, it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under the procedural aspect of Articles 3 and 8 of the Convention in respect of B admissible and the remainder of the application inadmissible;

2. *Holds*, by for votes to three, that there has been no violation of Articles 3 and 8 of the Convention.

Done in English, and notified in writing on 20 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Linos-Alexandre Sicilianos
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Wojtyczek;
(b) concurring opinion of Judges Koskelo, Eicke and Ilievski;
(c) dissenting opinion of Judges Sicilianos, Turković and Pejchal.

L.-A.S.
R.D.

CONCURRING OPINION OF JUDGE WOJTYCZEK

"We see also that justice is that habit in respect of which the just man is said to be apt to do deliberately that which is just; that is to say, in dealings between himself and another (or between two other parties), to apportion things, not so that he shall get more or too much, and his neighbour less or too little, of what is desirable, and conversely with what is disadvantageous, but that each shall get his fair, that is, his proportionate share, and similarly in dealings between two other parties" (Artistotle, *Nicomachean Ethics*, V.5, translated by F.H. Peters, London, Kegan Paul 1893, p.159).

1. I share the concerns expressed by Judges Koskelo, Eicke and Ilievski in their concurring opinion and subscribe to the views expressed therein concerning the scope of the case. They complement and reinforce the *per curiam* opinion by additional explanations as to why the majority, to which I belong, found that Article 8 had not been violated in the instant case. I would like to present here a few remarks from a different perspective, as the case exemplifies a certain number of general problems arising in proceedings before the European Court of Human Rights and raises fundamental questions of procedural justice.

2. Very often a case brought before this Court encompasses numerous distinct cases at national level, brought before several domestic bodies in different proceedings. In other words, in such a situation a single case before this Court involving a single problem raised by an applicant under the Convention corresponds to a whole set of distinct cases brought at the domestic level (under the applicable rules of domestic law) in which different aspects of same main problem have been dealt with.

The proceedings before the European Court enable the judges to form a comprehensive picture of the factual and legal situation of the applicant. Issues which were often spread over different proceedings at domestic level are grouped together for the purpose of the assessment of compliance with the Convention. The added value of the proceedings before the Court is precisely the possibility of a comprehensive single assessment of all the relevant issues involving the applicant. Frequently, at the domestic level, given the unavoidable fragmentation of the proceedings and of the system of remedies, there is no opportunity at all for a single State organ to make such a comprehensive assessment.

3. At the same time the proceedings before the European Court are fragmented from another point view. The case or cases brought at the domestic level by the same applicant often involve other private legal subjects with their own fundamental rights and legitimate interests. Such cases involve a whole bundle of conflicting or diverging rights and interests of many persons. The same person may have several different rights and many legitimate interests at stake in the same case.

All these persons, if they do not join in as co-applicants, are not parties to the proceedings before the Court (see my separate opinion appended to the judgment in the case of *Bochan v. Ukraine (no. 2),* [GC], no. 22251/08, ECHR 2015). They cannot participate in the establishment of the facts. They can neither claim their rights before the Court nor assert their interests. Their absence is not compensated for by the Government, who are not able either to see all the relevant factual or legal elements or to articulate fully all their rights and interests. Moreover, the interests of the Government and the private parties not represented in the proceedings are not identical. Even if the private parties would probably have pleaded, like the Government, either for the inadmissibility of the application or for no violation, they might have pleaded differently, placing the emphasis on completely different points. As result no one speaks before the Court on behalf of all the persons who were involved in the domestic proceedings and whose interests either diverge from the applicant's or simply collide with them.

The problem becomes even more acute since the Court establishes the factual circumstances as well as the different interests colliding with the right asserted by the applicant on the basis of the submissions of the parties, usually refraining from making such findings of its own motion. The Court is confronted with the version of facts and the arguments presented by the applicant on the one hand and the Government on the other. The version of the facts and the arguments of other persons whose interests are at stake are absent from the proceedings. As result the Court may get only a fragmentary account of the relevant facts, and the judicial truth so established may be quite remote from the truth. Moreover, any legally protected goods and interests not asserted in the submissions of the parties are often completely absent from the "balancing" exercise carried out by the Court.

It has to be borne in mind here that the Court, when assessing the compatibility of an interference with Convention rights, engages in the "balancing" of the legally protected goods and interests at stake. This intellectual process makes sense only if all the relevant legally protected goods and interests, be they individual or public (in particular national, regional, local or pan-European goods and interests), are taken into account and weighed up. If some of them are not articulated by the parties, there is a high probability that they will not be taken into account by the Court of its own motion. Yet the absence of just one of them from the "balancing" process may easily tip the balance in the opposite direction. As result, the whole "balancing" exercise becomes flawed and cannot lead to the clarification and specification of general standards valid for 47 States, but results only in random, case-specific answers whose content depends on the aleatory quality of the pleadings. The Court's *dicta* formulated under such an approach cannot claim any *erga omnes* effect (see my dissenting opinion

appended to the judgment in the case of *Biržietis v. Lithuania,* no. 49304/09, 14 June 2016).

A multidimensional and multi-subject case at domestic level is reduced to a one-dimensional, binary applicant-State relationship before this Court. This relationship is divorced in a very artificial way from the broader context of a complex set of legal relations involving numerous legal subjects.

4. The third persons mentioned above are persons who were parties to the domestic proceedings. The decisions of the domestic bodies pertained to their subjective rights (as recognised in the national legal systems) and sometimes were determinative of their fundamental rights protected under the Convention.

None of these persons are parties to the proceedings before the Court, yet their rights may be affected by a judgment of this Court. Moreover, the practical effect of the Court's judgments for these persons is often underestimated by the advocates of the current shape of proceedings before the Court.

It is true that the Court does not directly adjudicate on the rights of these persons, does not issue decisions imposing any legal obligations on private parties and does not quash domestic decisions imposing obligations upon or granting rights to private parties. Nevertheless, a finding of a violation may be a strong argument either for the reopening of the domestic proceedings or for obtaining the quashing of the domestic administrative or judicial decisions through the available domestic remedies. A judgment of the Court may be relevant for accepting the admissibility of a domestic remedy in the event of doubt. Even if the quashing of past decisions is no longer possible, the mere *dicta* of the Court may be an important argument if – for whatever reason – new proceedings are initiated before some domestic bodies in respect of a certain aspect of the case. Given the authority of the Court and the weight attributed to its *dicta*, the views expressed by the Court may be a determinative argument in subsequent domestic proceedings. They may prejudge the outcome of future domestic and international cases. Also, the views expressed in separate opinions may help one party or another in their pleadings and may be taken into account, resulting in greater weight being given to certain interests in the process of "balancing" rights and interests. A favourable *dictum*, let alone a favourable judgment, may be a valuable asset in future legal battles against the same litigants. In any event, even if subsequent proceedings end in a way which is favourable for the third parties concerned, their position in these proceedings might be considerably weakened and their task made much more complicated. Furthermore, the mere fact that proceedings before this Court have been initiated by an applicant may create a state of prolonged and acute uncertainty in juridical relations between private parties which is detrimental to the interests of all of them.

An applicant before this Court often gains an unfair procedural advantage over the opposing side in litigation. Moreover, the whole system, as it operates, may give a premium to the most "combative" litigant, to the detriment of private parties more inclined to find a compromise.

I note here *en passant* a fundamental difference between the situation described here and the one in the case of *Sine Tsaggarakis A.E.E. v. Greece* (no. 17257/13, 23 May 2019). In that case the applicant did not have any subjective civil right recognised in the domestic system and therefore the guarantees of access to court were not applicable (see my dissenting opinion appended to that judgment). In the situations described above in the present opinion, the persons concerned have clearly recognised subjective rights which were at stake in the domestic proceedings and which may be affected as a result of a judgment of this Court. Procedural fairness requires granting these persons the right to be heard in the proceedings before the Court.

Unfortunately, as mentioned above, in practice private persons involved in litigation against an applicant are not heard by this Court. This too often leaves them with a wholly comprehensible feeling of grievance and injustice, especially when the application before the Court is brought with the strategic objective of reinforcing the position of the applicant *vis-à-vis* other private litigants. This feeling is made even more acute if the Court finds a violation of the rights of an applicant involved in a dispute with other private litigants, because such a judgment is typically felt by these other litigants as acknowledging to their detriment that their opponent is right from a legal point of view, at least on some questions.

5. The applicant before this Court is a minor. In normal situations minors are represented by their parents before the domestic and international authorities. Either one parent or both parents acting jointly can lodge an application with the Court on behalf of their child. The relevant rules of domestic law concerning the representation of minors by their parents apply.

The instant application was brought by one of the parents (the mother) in the context of an acute conflict with the other parent. If there is a conflict between the two parents, there is a strong risk that the rights of the child will be invoked in an instrumental way with the purpose of detrimentally affecting the interests of the other parent. The parents engaged in the conflict may no longer be able to identify and pursue the best interests of the child. In this context the question arises as to who should represent a minor if there is a conflict between the parents. This matter is not regulated either in the Convention or in the Rules of Court. There is a lacuna here which can be detrimental to the interests of the minors concerned.

In the instant case the composition which examined the case had to a find a solution in order to overcome at least certain difficulties connected with the representation of the child. The Court contacted the Croatian Bar Association, requesting it to appoint a representative for the applicant

minor. The Croatian Bar appointed a lawyer who presented observations on behalf of the minor. It is important to note that these observations contained important information and arguments which were not presented either by the mother of the child or by the respondent Government.

The Croatian Government in their submissions strongly criticised the steps taken by the Court, complaining that the competent State authorities tasked with protecting children had been circumvented. These authorities had been deprived of the possibility to themselves appoint a person who would have represented the minor before the Court. I agree with the respondent Government that there is a need to amend the Rules of Court on this question. However, the Court was examining an urgent case and could not have waited until such an amendment was adopted.

In my view, in very exceptional situations in which one parent lodges an application in a case involving the rights of a child and there is an acute conflict between the parents, there may be a need to appoint a curator *ad litem* to protect the interests of the child. At the same time it is absolutely necessary to grant both the mother and the father the right to present their own observations before the Court, in parallel to those of the curator. The Rules of Court should also address the more general situation of every conflict of interests between a person representing a party (including a legal person) and that specific party.

The curator *ad litem* should be appointed by the competent domestic court, which is usually much more familiar with the situation of the persons concerned and the potential curators. The curator should not be appointed by the Court itself. The Rules of Court should be amended to this effect.

It is also necessary to bear in mind that the appointment of a curator *ad litem* does not guarantee automatically that the rights of the child will be effectively protected and his best interests pleaded. There are cases in which this Court found a violation of the Convention despite the fact that a curator *ad litem* had participated in the decision-making process at the domestic level (see, for instance, the judgment in the case of *Haase v. Germany* (no. 11057/02, ECHR 2004-III (extracts)), in which the curator *ad litem* pleaded in favour of a judicial decision which led to a finding of a violation of the Convention). Analogous problems may occur in the proceedings before the Court. The submissions of the curator would therefore require particularly thorough and critical scrutiny.

6. In situations in which one parent lodges an application on behalf of the minor and there is a conflict between the parents, it is also necessary to hear the other parent even if he or she is in a situation of conflict of interests with the child.

During the proceedings before the Court, the mother (who had lodged the application) was deprived of her parental rights. The father became the only legal representative of the child under domestic law. In my view, he should have been informed by the Court about the proceedings to which the child

placed under his exclusive parental authority was a party. He should have also been invited – on the basis of Article 36 § 2 of the Convention – to present his observations in the case, as the father and as the legal representative of the applicant. This would have enabled him to express his views on the best interests of the child. Yet he was not even informed about the proceedings before this Court.

In the instant case the proceedings initiated by the mother also had an impact on the subjective rights of the father himself. This was another reason to invite the father – on the basis of Article 36 § 2 of the Convention – to present his observations, this time as a party whose own rights and interests might have been affected by the outcome of the proceedings. He should have been able to defend his own rights and interests. The fact that the father was not invited to submit observations in this case constitutes a violation of the rules of procedural fairness.

7. Any conflict between parents has detrimental effects on their child. These effects are particularly acute if the conflict ends in the separation of the parents. Such a situation causes extreme suffering to the child and badly affects his or her development. The intensity of the child's suffering surpasses the level of suffering caused by treatment found to be contrary to Article 3 in many cases brought before the European Court of Human Rights.

The best interests of the child usually call for speedy action to de-escalate the conflict between the two parents and to find at least a *modus vivendi* that provides more security and emotional stability for the child. The Committee of Ministers of the Council of Europe has recognised the growing number of family disputes, particularly those resulting from separation or divorce, and noted the detrimental consequences of conflict for families and the high social and economic cost to States. The Committee recommended to the governments of member States that they introduce or promote family mediation or, where necessary, strengthen existing family mediation (see Recommendation No. R (98) 1 of the Council of Europe's Committee of Ministers to member States on family mediation, adopted on 21 January 1998). The Court has endorsed this approach in its case-law (see, in particular, *Cengiz Kılıç v. Turkey*, no. 16192/06, § 132 *in fine*, 6 December 2011, and *M.K. v. Greece*, no. 51312/16, § 78, 1 February 2018).

In this context it should be highlighted that multiplying legal proceedings by exercising new remedies does not always serve the best interests of the child. In particular, an application to this Court lodged without sufficient prospect of success may bring more harm than benefits to the minor. Even if the child is kept unaware of the ongoing proceedings the very fact of their existence may exacerbate the conflict between the parents and thus indirectly cause additional suffering to the child.

The role of a curator *ad litem* would consist in assessing the actual and legal situation of the child and evaluating, in particular, whether new legal remedies and especially an application to this Court would serve the best interests of the child in the concrete situation. I am not sure that the best interests of the minor were best served by the decision to lodge and maintain the instant application with the Court without providing more solid evidence for the factual basis of the grievances. It appears likely that the proceedings before the Court in the instant case rendered the de-escalation of the conflict between the parents more difficult.

8. The procedural obligations developed by the Court in its case-law ensure greater protection of certain rights, and especially the rights of the most vulnerable persons, but on the other hand generate certain social costs. Judgments which stress the obligation to investigate encourage more and more persons to lodge complaints about the alleged violation of their rights. There is a risk that the right to complain may be abused for the purpose of harassment. The temptation to lodge abusive complaints is particularly great in the context of conflicts between private parties and in particular in the context of marital conflicts.

The lower the threshold of plausibility triggering the obligation to investigate, the greater such a risk. Submitting an innocent person to criminal investigation causes sufferings and long-lasting stress and the ultimate discontinuation of the proceedings may not always suffice to clear the person concerned in the eyes of the public. The damage done may sometimes be irreversible.

The Court too often forgets this aspect of human rights protection. In particular, when clarifying States' procedural obligations, it is absolutely necessary to stress simultaneously the obligation to put in place effective safeguards against legal harassment and abusive complaints aimed at causing harm to an innocent person. The lack of such protection may entail a violation of Article 8 of the Convention.

9. *Iustitia est constans et perpetua voluntas ius suum* ***cuique*** *tribuendi (Digesta Iustiniani* 1.1.10, *in principio*, emphasis added). Human rights adjudication is an exercise of the utmost complexity which requires taking into account all the rights and all the legitimate interests of all the persons involved in a case and ensuring a just balance between them. Each right and each legitimate interest at stake has to be duly taken into account and weighed with the utmost precision. The fundamental flaw of the proceedings before the Court as they are currently shaped is that they are not suited to tackling cases involving at least two private parties in dispute and that they do not ensure sufficient protection of the substantive and procedural rights of the private parties involved other than the applicant. The multidimensional and multi-subject cases coming from the domestic legal systems do not fit the pattern of the one-dimensional binary procedural relationship between the applicant and the respondent State. In such cases a

judgment or decision of the Court in respect of one litigant is usually – in reality – a decision or judgment in respect of all the litigants. It is simply not possible, in practice, to extract the case of an applicant against the State from the bundle of relations between private parties with their own rights and interests and to decide the case of the former without affecting in any manner the situation of the latter.

Procedural law is primarily a tool for implementing substantive law in a just manner and should always be appropriate to the substantive law. The procedure before the European Court of Human Rights was originally designed for public-law disputes between an individual and the State, disputes not involving other private parties. The case-law developed and extended the "horizontal" effect of the Convention (*Drittwirkung*), leading to more and more cases stemming from disputes between private parties, yet these developments in the substantive law have not been accompanied by the necessary adjustments of the procedural law. The instant case once again shows that the original paradigm of Convention procedural law is no longer appropriate to the substantive rules in force and needs to be revisited.

The structural flaw identified above is at the origin of many fluctuations and inconsistencies in the Court's case-law, which in some judgments emphasises certain rights while in others it emphasises the conflicting rights, depending on the right claimed by the applicant (and also the quality of the pleadings – see paragraph 3 above), thus losing sight of a comprehensive vision of the whole set of human rights as a coherent system. The boat tacks constantly instead of steering a straight and steady course towards justice.

CONCURRING OPINION OF JUDGES KOSKELO, EICKE AND ILIEVSKI

1. We agree with the conclusion reached by the majority in this case that there has been no violation of Articles 3 and 8 of the Convention in relation to the narrow complaint that was before it, i.e. the alleged failure of the authorities to respond properly to the allegations of sexual abuse of B by her father.

2. In light of the unfortunate circumstances of this case and the sharp division within the Chamber we feel that it is necessary and might be helpful if we explain the relatively narrow basis of our conclusion. Furthermore, we consider that this case provides a particularly stark example of a problem this Court is not infrequently confronted with when considering applications brought jointly by one parent on their own behalf as well as for and on behalf of a child: how does the Court ascertain what is or would have been in the best interest of the child and how, procedurally, can it ensure that the child's best interest was and remains a primary consideration throughout the domestic procedures as well as before this Court.

3. In order to explain the narrow basis for our decision and the scope of the case before the Court it is necessary to set out some of the procedural history of this case which is not necessarily apparent from the judgment.

4. This is so because, as this Court made clear in *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 101-127, 20 March 2018, the international system of protection established by the Convention functions on the basis of applications, be they governmental or individual, alleging violations of the Convention, and therefore does not enable the Court to either take up a matter irrespective of the manner in which it came to its knowledge or even, in the context of pending proceedings, to seize on facts that have not been adduced by the applicant – be it a State or an individual – and to examine those facts for compatibility with the Convention.

5. Consequently, the scope of a case before the Court remains circumscribed by the facts as presented by the applicant. If the Court were to base its decision on facts not covered by the complaint, it would rule beyond the scope of the case and exceed its jurisdiction by deciding matters which were not "referred to" it, within the meaning of Article 32. In such situations the question of respect for the principle of equality of arms might also arise.

6. Conversely, the Court would not be deciding outside the scope of a case if it were, by applying the *jura novit curia* principle, to recharacterise in law the facts being complained of by basing its decision on an Article or provision of the Convention not relied on by the applicants. However, the Court cannot, by resorting to the *jura novit curia* principle, adopt a

judgment which would go beyond (*ultra petita*) or outside (*extra petita*) what has been referred to it.

7. It therefore seems to us to be essential that the complaint submitted by the applicant contains the factual parameters necessary for the Court to define the issue which it is requested to examine. This is of fundamental importance, as the role of the Court cannot be to act of its own motion, and also because it is necessary to ensure the adversarial nature of the proceedings before the Court. The latter is required by Article 38 of the Convention, pursuant to which the Court must examine the case "together with" the representatives of the parties, and by the Rules of Court (see Rule 54 § 2 (b) in particular). The respondent Government must be in a position to know, on the basis of the complaint submitted by the applicant, what are the issues that may come to be examined by the Court.

8. Having, unusually, had the benefit of reading the Dissenting Opinion of our colleagues Judges Sicilianos, Turković and Pejchal, we note that the lack of agreement between us and the minority in the present case appears largely to stem from a difference of approach regarding the extent to which the Court has the power to examine aspects of the impugned investigation regardless of whether they have been raised by the applicant in the complaint originally addressed to the Court. In our view, the fact that a complaint concerns an alleged failure by the respondent State to comply with procedural obligations arising under Articles 3 and 8 in a specific context (such as the present one) cannot entail that the Court may, of its own motion, examine and adjudicate on aspects of the investigation going (well) beyond the factual elements relied on by the applicant in his or her original complaint. It should be borne in mind that any such approach would not only, as indicated above, risk undermining the indispensable adversarial nature of the proceedings before the Court (see in respect of the requirements applicable at the domestic level: *Čepek v. the Czech Republic*, no. 9815/10, §§ 45-48, 5 September 2013 and *Rivera Vazquez and Calleja Delsordo v. Switzerland*, no. 65048/13, § 40, 22 January 2019) but also, and perhaps even more fundamentally, entails real difficulties for the members of the Court's judicial composition given the fact that most of them are often not in a position, for linguistic reasons, to study the domestic case file and thus to conduct the independent assessment or verification of its contents in any way approaching that required of us in the exercise of our judicial role. Furthermore, an examination by the Court of matters going beyond the factual scope of the applicant's complaint would also risk contradicting the limitations deriving from the admissibility requirements laid down in Article 35 § 1 of the Convention, according to which the Court may only deal with the matter after all domestic remedies have been exhausted and within a period of six months from the date on which the final decision was taken.

9. The procedural background of this case can be summarised as follows.

10. By an application of 3 February 2015, the applicant A ("the mother") brought an application on behalf of herself and B ("her daughter") narrowly focused, as §§ 4 and 84 record, "that the domestic authorities had failed to provide a proper response to the allegations [made by the mother] of sexual abuse of B by her father". It was this serious but narrow complaint which was communicated to the respondent Government on 23 September 2015 and to which the Government responded in its lengthy and detailed observations of February 2016.

11. The observations in reply, dated 11 April 2016, submitted on behalf of both applicants again only addressed and made further submission on this (narrow) complaint. At this stage, perhaps not surprisingly in light of the common representations of the two applicants (with the mother purporting to act in the best interest of the child), there had been no suggestion in any of the observations on behalf of the applicants suggesting, as now recorded in § 95 of the judgment, that "the authorities should have carried out investigations" also into "whether she had been emotionally abused by her mother".

12. In fact it was not until the second deliberation of the Court on 9 January 2018 that the Court, of its own motion and in light of some of the evidence before it (especially that now summarised in §§ 22, 43 and 44), identified the issue of "a potential conflict of interest between the applicants" (§ 3) and sought to identify an appropriate procedural means by which it could ensure that it received independent submissions on behalf of the child as to its best interests.

13. It was in this context that it was decided that (a) a direction should be given based on Rule 36 § 4(b) that the lawyer who had, to date, represented both applicants should no longer represent or assist the child in these proceedings and (b) a request be made directly to the Croatian Bar Association to appoint a legal representative on behalf of the daughter, B.

14. As a consequence, on 17 January 2018, the Croatian Bar Association appointed Ms V. Drenški-Lasan, a lawyer practising in Zagreb, to represent the daughter in these proceedings before the Court. On 12 April 2018, she submitted observations on behalf of the daughter in which, for the first time, it was asserted that:

> "B is of the opinion that, within the domestic legal system, no effective investigation has been carried out into the suspicion that:
>
> 1. ...
> 2. she has been subjected to sexual abuse by some other individual (...);
> 3. she has been subjected to emotional abuse by applicant A (...)"

> "The public authorities failed to carry out such an investigation and establish whether B's inappropriate behaviour and premature sexualisation was the result of A's conscious and deliberate manipulation of B."

15. The Government responded to these observations on 15 May 2018 and the mother, through her lawyer, also responded by further observations of 14 May 2018. In these latter observations, the mother expressly asserted that "the emotional abuse of B by A is not a subject of an investigation which was the reason for addressing the I. and the II. Applicant to the European Court, and that in this regard the legal representative of the II. Applicant has stepped out of the subject matter of this case as well as the questions presented by the European Court and the observations of the Government to which the legal representative of the II. Applicant had been invited to submit her response".

16. In light of this procedural history, and the fact that the allegations first made in the observations on behalf of the daughter in April 2018 had been made well outside the period of six months from the final decision in criminal proceedings (§ 48; see *mutatis mutandis,* the judgment in *Radomilja and Others*, cited above, at § 138), it appeared to us that these new allegations were plainly outside the scope of the case and, by considering these new allegations, the Court would impermissibly be acting *ultra petita* or even *extra petita*.

17. As a consequence, our vote for §§ 1 and 2 of the operative part of the judgment relates only to the allegation originally made, namely in relation to the compliance of the investigation into allegations of sexual abuse by the father with the requirements of the Convention.

18. As indicated above, this case provides a stark example of the difficulties this Court frequently finds itself in cases, usually involving the break-up of a family, in which the interests of one parent and the child are being represented together, by the same lawyer, no doubt on the instructions from the adult applicant. Where, as the Court has rightly held, in any proceedings involving children their best interest should be a primary consideration, the absence of separate representation of the child (and its best interest) makes it extremely difficult if not impossible for this Court to ascertain in any meaningful way what the best interests of the child, in fact, are or were. In highly stressful situations such as e.g. a family break-up it would certainly not be right for this Court to assume that the parent(s) can or should always be the final arbiter of what is in the child's best interest; a conflict of interest will frequently arise (see, in a different context, *Charles Gard and Others v. United Kingdom* (dec), no. 39793/17, § 67, 27 June 2017).

19. In this context we should also acknowledge the – it seems to us now with the benefit of hindsight – justified criticism of the procedure adopted by the Court in seeking to ensure separate representations of the child in this case. In their observations of 15 May 2018, the Government complains that

the procedure adopted "circumvented" its representative as the channel for communication with the respondent Government and, by directly approaching the Croatian Bar Association, sought appointment of such representation by a body which might, as a matter of domestic law, not, in fact, be the appropriate body to do so:

> "In this case, it could be argued that the competent State authorities tasked with protecting children's rights were circumvented, which could also potentially raise issues under the principle of subsidiarity, especially given that these proceedings before the Court are likely to directly affect the pending domestic proceedings, given the State's obligations under Article 46 of the Convention.
>
> In conclusion, having in mind the nature and complexity of the situation, the State deems it would have been useful to ensure that an independent and impartial representative was appointed in the proper domestic procedure, by a competent domestic body, to ensure a complete protection of the child's interest. ...
>
> ... the State calls upon the Court to consider and establish clear criteria and procedural rules related to the necessity of appointment, as well as the appointment itself, of legal representatives to applicants who are members of vulnerable groups."

20. We agree that the experience of this case shows – as the Government suggests - that the Court and the Court's Rules of Procedure are currently not particularly well adapted to these difficulties. That said, while this problem is certainly something we would encourage the Court's Rules Committee to consider further, it also seems to us to be clear that, in fact, the very nature of the proceedings before this Court means that any mechanism that would leave it to the Court to direct or request the appointment of a legal guardian/separate representative for a child applicant in cases of established or suspected conflict of interest – as envisaged in the context of domestic proceedings e.g. in Article 31 of the Lanzarote Convention – would in the vast majority of cases be far too late and, therefore, ineffective to protect the best interests of the child.

21. That, however, then raises the wider question whether it would not be appropriate for the other stakeholders in the European system for the protection of human rights, and in particular the Member States, to consider, possibly together with the Court, whether it may not be more useful to identify or establish domestic mechanisms for the appointment of a legal guardian/separate representation for a child in proceedings before this Court (or to continue the mandate of those appointed in domestic proceedings where that has occurred), at least in cases that have been communicated to the respondent Government and where there is an established or suspected conflict of interest between the two applicants. The Court has certainly consistently shown itself flexible enough for cases advanced by representatives of those who are vulnerable by reason of their age, sex or disability, which rendered them unable to lodge a complaint on their own behalf with the Court to be entertained: see *S.P., D.P. and A.T. v. the United Kingdom*, no. 23715/94, Commission decision of 20 May 1996, unreported

and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 103, ECHR 2014.

JOINT DISSENTING OPINION OF JUDGES SICILIANOS, TURKOVIĆ AND PEJCHAL

1. To our regret, we have been unable to follow the majority in finding that there has been no violation of Articles 3 and 8 of the Convention in the present case, especially in view of the very young age of the applicant (B) and the allegation that she was a victim of sexual abuse by her father (C), and thus of her particular vulnerability and the need to take the best interests of the child as a primary consideration in protecting her rights as a victim and in conducting an effective investigation. While we agree with the majority that in Croatia there is an adequate legal and regulatory framework relevant to the specific circumstances of the present case (see paragraph 120 of the judgment), unlike the majority (see paragraph 129 of the judgment) we find that the domestic authorities have not carried out an effective investigation, nor have they afforded sufficient protection to the applicant's rights as a victim for the reasons explained below. Actually, in our view these two issues are closely connected in the present case and failures to protect the applicant's rights as a victim directly contributed to the ineffectiveness of the investigation.

2. We consider that the case raises more general issues concerning, on the one hand, a positive obligation of the States to protect, during a criminal investigation, the "victim rights" of a child allegedly sexually abused and, on the other, the specific standards that should be applied in conducting an effective investigation into such crimes, while of course ensuring an adequate and effective exercise of the rights of the defence. Furthermore, as far as we are aware, this is the first case before the ECtHR in which the Court has asked for a special legal representative to be appointed for an applicant, a child, separately from a representative who originally brought the complaint before the Court, in the name of both a mother and her child. The Court did so to address the potential conflict of interest between the two (see paragraph 3 of the judgment). However, the procedure of appointment and the role and powers of a special representative in the present case and in general before the Court have remained unclear. The arguments put forward by the special representative raise, to a certain extent, specific issues in relation to the scope of the case.

3. We will now address each of these issues separately in more depth. At the outset, we will elaborate briefly on the scope of the case.

1. Scope of the Case

4. In the light of *Radomilja and Others*, to determine the proper scope of the present case it is necessary to distinguish the complaint put forward by A in her name and in the name of B from the submissions lodged later on by the special representative of B. It is established case-law that the Court

cannot base its decisions on facts that are not covered by the complaint. However, this does not prevent an applicant from clarifying or elaborating upon his or her initial submissions during the Convention proceedings (see *Radomilja and Others* [GC], nos. 37685/10 and 22768/12, §§ 121-22 and 126, 20 March 2018). With this in mind, two types of comments that were put forward by the special representative in her submissions can be distinguished. On the one hand, those in which she repeated the very same arguments that were put forward by A in the initial complaint[1], together with those in which she merely further elaborated upon the initial submissions of A related to the investigation into the alleged sexual abuse of B and the protection of the rights of a child during that investigation on the basis of the facts alleged in the initial complaint as subsequently clarified and elaborated upon in observations by the Government and the applicant[2]; and, on the other hand, those comments that were not directly based on such facts[3].

5. Since A, as well as the Government, was invited and given the opportunity to comment upon all of these arguments, there is no problem from the perspective of adversariality in the present case. However, only the first type of comments raised by the special representative would satisfy the requirements of *Radomilja*. Regarding the second type of arguments (those listed in footnote 3), an issue arises as to whether they could fall at all within the scope of the case and thus whether they could be addressed by the Court, or whether they are inadmissible under the six-month rule or because they would be considered to be *ultra petita*, or possibly for non-exhaustion of domestic remedies. This is a novel issue in our case-law, which deserves special attention. In this connection, we agree with the concurring opinions of our colleagues Judges Koskelo, Eicke and Ilievski as well as with the concurring opinion of Judge Wojtyczek. We will further elaborate upon that issue below, when addressing the role of the special representative, taking into consideration the principle of the best interests of the child, which the Court itself is obliged to apply. It is regrettable that the present judgment did not attempt to distinguish between these two types of arguments by the special representative and to take a position in this respect

---

[1] The arguments, for example, that B was not immediately taken to a gynaecologist for examination or that C was not subjected to a psychological or psychiatric forensic evaluation in a specialised institution in accordance with professional standards.

[2] Such as emphasising that by frequent interviews the child was exposed to secondary victimisation, that no court-financed authorised agent was assigned to the child, independent of A and C, neither of whom because of the conflicts of interest was in position to act in the best interests of the child during the investigation, and that the authorities did not carry out an effective investigation into an unknown perpetrator. All of these arguments are in our view clearly within the scope of the case according to the *Radomilja and Others* criteria (see paragraph 4 above).

[3] It could be argued that such was the complaint that no effective investigation had been conducted into the suspicion that B had been subjected to emotional abuse by A.

on the scope of the case. This criticism is equally as pertinent for the majority as for the minority.

6. Our disagreement with the majority is, in the present case, actually based on the arguments raised by the applicant, either through A in submissions she lodged in her name and in the name of B[4] or through the special representative acting on behalf of B, to the extent that the latter arguments clearly fall within the facts covered by the complaint[5]. The Court noted in the present judgment that there were three aspects to the applicant's complaint: adequacy of the legal framework, effectiveness of the investigation and sufficient protection of victims' rights during an investigation related to the alleged sexual abuse of B (see paragraphs 105 and 115 of the judgment). We agree with such assessment. Accordingly, our criticism of the majority position is actually based on the arguments cited under the parties' submissions in the judgment (paragraphs 94-96 and 98-100 of the judgment) except for the one related to the lack of an effective investigation into the alleged emotional abuse of the child (paragraph 97 of the judgment) upon which we reflect separately under the role of the special representative.

7. However, we would like to emphasise that in reviewing the effectiveness of the investigation, according to our well established case-law[6], once the complaint is arguable, the Court should apply criteria related to that effectiveness as established in its case-law of its own motion, regardless of whether a certain, particular deficiency was pointed out by the applicant or not. This is so because very often applicants do not have an accurate

---

[4] In the complaint lodged in her name and in the name of B, A in particular alleged that there was no clear legal framework governing the conduct of the authorities and provided a number of examples for her claim. Furthermore, she pointed out that B was an especially vulnerable victim and that as such she was entitled to the effective protection of her rights. In particular, she observed that the child had not been promptly examined after she had reported the incident, that the alleged perpetrator had been present in the Polyclinic during the first examination of the child by a multidisciplinary team, that he had been present at a gynaecological examination of the child, and that she was not given any information or instruction on how she should behave and secure the rights of her child. Later in her observations she emphasised that the Social Welfare Centre had not taken any measures for the protection of the child. Finally, she complained that the investigation was ineffective in that it was neither prompt nor thorough, the multidisciplinary interview with the child was only conducted 8 days after she reported the incident to the Polyclinic and 4 days after she reported the incident to the police, no forensic interview with the child was ever conducted, no expert opinion on the psychiatric and psychological characteristics of the alleged perpetrator was ever requested or obtained although it was indicated as necessary by experts examining the child, it took a long time to interview the perpetrator, no search of his home, computer or mobile phone was ever made, and the police did not inform the office of the prosecutor about the case in a timely manner.

[5] Facts identified in footnote 1 and 2 above.

[6] See, for example, the number of Turkish or Russian cases related to effective investigation, or for example Croatian cases related to the effective investigation of war crimes.

overview of the prosecution file and thus cannot be aware of all possible deficiencies in an investigation. Thus, it is sufficient for them to make an arguable claim that an investigation was ineffective and then the burden of proof is on the Government to demonstrate that the investigation was carried out in accordance with the requirements of the Court's case-law related to an effective investigation, otherwise the Court might draw adverse consequences on the basis of the facts as presented by the applicant and clarified by the Government in their observations. However, in the present case the submissions by the applicant are rather exhaustive and our criticism of the majority position actually, in our view, fully reflects the applicant's arguments related to the positive obligation of the State to protect her rights as a victim during the investigation and to the effectiveness of an investigation into the alleged sexual abuse of a child. As emphasised before, all of these arguments have been submitted for comment to the Government. They are cited in summary form in paragraphs 94-96 and 98-100 of the judgment.

2. Positive obligation of the State to protect the applicant's rights as a child and victim, allegedly of sexual abuse, during the investigation

8. In the present case the Court explicitly acknowledged that under Articles 3 and 8 of the Convention the State had a positive obligation to protect the rights of victims in criminal proceedings (see paragraph 109 of the judgment), which in our opinion should extend to specific rights of child victims of sexual abuse during a criminal investigation. The applicant alleged a failure to protect her "victim rights" during the investigation as an issue to be examined by the Court (see paragraphs 105 and 115 of the judgment). We note that 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 (see Article 19 of the EU Directive on the minimum standards on the rights, support and protection of victims of crime, paragraph 76 of the judgment). In our view the judgment should have examined the complaint related to the protection of victims' rights from the perspective of the child alleged to be a victim of sexual abuse. For this it is not sufficient to meticulously cite, in the judgment under the headings European Union Law and International Materials, criteria related to the protection of victims' rights during a criminal investigation in general and the rights of children who are (alleged) victims of sexual abuse in particular, as developed in international documents (see paragraphs 76, 78, 79 and 81-83, compare also *Y. v. Slovenia*, § 104), but in reviewing the circumstances of the case these criteria should have been taken into account.

9. In particular, when the first expert report established that there had been pressure and the possibility of inducement of the applicant by her

mother (see paragraph 22 of the judgment), the relevant domestic authorities did not consider appointing a special guardian and/or legal representative for the applicant in order to avoid any potential conflict of interest between her and her mother and to protect the interests of the child with impartiality (as provided for in Protocol 1, cited at paragraph 67 of the judgment, and Article 31 (4) of the Lanzarote Convention, cited at paragraph 77 of the judgment). The majority have not addressed this omission on the part of the domestic authorities, although it was specifically emphasised by the special representative as one of the omissions in the protection of the rights of the child during the investigations (see paragraph 99 of the judgment) and even though the Court itself, for the very same reasons, has required the appointment of a special representative for a child. We further note that at the same time C alleged that A had been physically punishing B, about which he had lodged a criminal complaint (see paragraphs 15 and 25 of the judgment) and that he had instituted court proceedings against A seeking custody of B (see paragraphs 23, 27 and 35 of the judgment). The authorities were aware of this highly antagonistic relationship between the parents.

10. Furthermore, already during the preliminary investigation, the applicant was interviewed by various experts on at least three different occasions, which appears contrary to the requirement of protecting victims of alleged sexual violence, and in particular children, from secondary victimisation by, *inter alia*, being asked to repeatedly retell the traumatic experience to different experts (see the parties' submissions in paragraph 100 of the judgment; see in this connection Protocol 3 cited at paragraph 72 of the judgment and Article 35 § 1 (d) and (e) of the Lanzarote Convention, cited at paragraph 77 of the judgment). As confirmed by the special counsellor to the State Attorney's Office in her report dated 3 December 2014, the domestic authorities had been well aware of the fact that A had exposed B to additional psychological assessments (see paragraph 43 of the judgment), but they did nothing to prevent and/or avoid such secondary victimisation of the child (see, in this sense, the relevant international material, in particular Articles 30 (2) and 35 of the Lanzarote Convention, cited at paragraph 77 of the judgment, and the explanatory report thereto, cited in paragraph 78 of the judgment, and paragraphs 77 and 78 of the report of the Lanzarote Committee cited in paragraph 80 of the judgment). In fact, the authorities themselves ordered the last psychological assessment, with a view to the child's "criminal protection" (see paragraph 39 of the judgment). In *G.U. v. Turkey* (no. 16143/10, §§ 72-73, 18 October 2016) the Court emphasised that the States had to adopt procedural rules guaranteeing and safeguarding children's testimony. This refers equally to trial and to pre-trial investigation. In *Y. v. Slovenia* (no. 41107/10, §§ 104, 108, 109, 112 and 114, 28 May 2015) the Court emphasised that the States had a positive obligation to protect victims'

rights, and among the criteria for such protection it singled out the duty to protect victims from intimidation and repeat victimisation, and to keep medical examinations to a minimum.

11. In this connection we observe that none of the interviews with the applicant were videotaped or conducted in such a manner that they could be accepted as evidence during any future court proceedings or could be used for other purposes (compare *Vronchenko v. Estonia*, no. 59632/09, § 61, 18 July 2013; *Rosin v. Estonia*, no. 26540/08, § 62, 19 December 2013; and *Kovač v. Croatia*, no. 503/05, § 30, 12 July 2007). The function of videotaping is not only to secure the rights of the defence, as it seems to be understood and interpreted by the majority (see paragraph 125 of the judgment), but the main or at least equally important objective of videotaping interviews with a child victim of sexual abuse is to protect children against the risk of being further traumatised by repeated unnecessary interviews. Its aim is to limit the number of interviews as far as possible. The videotaped interview can serve multiple purposes, including for medical examination and therapeutic services. Such a practice has been successfully developed in numerous countries (see Article 35 (1) (e) of the Lanzarote Convention with the explanatory report thereto, cited in paragraphs 78 and 79 of the judgment, together with the relevant part of paragraphs 77 and 78 of the first report by the Lanzarote Committee cited in paragraph 80 of the judgment). In our view, the repeated interviews organised by the mother with the knowledge of the authorities or organised by the authorities themselves could indeed be seen as a source of secondary victimisation of the applicant in the present case.

12. Furthermore, whereas it is disputed between the parties as to who had actually been present during the first set of interviews with B on 20 June 2014, it is undisputed that C, the alleged perpetrator, was on the premises of the Polyclinic, and that B saw him there (see paragraph 19 of the judgment and footnote 4), which would appear contrary to both domestic and international rules recommending that any such contact be avoided (see Protocol 1, cited at paragraphs 68 of the judgment and Article 31 (1) (g) of the Lanzarote Convention, cited at paragraph 77 of the judgment).

13. In addition, there is nothing to show that the authorities gave A clear information about B's rights as a victim, such as the right to free legal assistance or counselling and psychological support, or that they assisted her in obtaining them as required by the Protocols (see paragraphs 69 to 71 of the judgment).

14. We would like to stress that appropriate support should be available to the alleged victim from the moment the competent authorities become aware of the victim's existence and throughout the criminal proceedings (see the various international instruments cited at paragraphs 77-83 of the judgment). This obligation is all the more stringent when the victim of the

alleged crime is a child (see Article 22 and 24 of the EU Directive cited at paragraph 83 of the judgment). To be sure, Protocol 2, under the duties of social welfare centres, provides that they are obliged to provide victims with help in obtaining legal aid and counselling and psychological support (see paragraph 71 of the judgment; and see in this connection *C.A.S. and C.S. v. Romania*, no. 26692/05, §§ 65 and 78, 20 March 2012). In our view, it is problematic that it took the Social Welfare Centre two months to enquire with the Polyclinic whether the applicant had been included in any supportive follow-up treatments further to her multidisciplinary assessment (see paragraph 28 of the judgment). This, at the same time, demonstrates poor coordination and collaboration on the part of the different actors who were supposed to intervene for and with the alleged child victim at the outset of the proceedings (see paragraphs 80 and 116 of the judgment).

15. In our opinion, all these failures, even if each by itself might not reach the threshold under Articles 3 and 8 of the Convention, cumulatively represent a violation of the positive obligation of the State to protect victims' rights during a criminal investigation, in the present case the victims' rights of a child who was allegedly sexually abused by her father (right to a special legal representative and/or guardian, right to protection from secondary victimisation, right to psychological and other support, right to be treated by different actors who act in coordination and collaboration, right to information as defined by international instruments and internal legislation, all cited in the judgment, see paragraphs 76-83).

3. Effectiveness of the investigation

16. We observe at the outset that the results of the three expert opinions in the case relating to the alleged sexual abuse of B had been inconclusive. The first expert report of 4 July 2014 established that the applicant did not show clear signs of sexual abuse and that there had been elements showing pressure and the possibility of inducement by the mother (see paragraph 22 of the judgment). The expert report of 10 November 2014 stated that B described sexualised behaviour of C towards her and that the applicant during the interview demonstrated inappropriate behaviour in the current situation (see paragraph 40 of the judgment). The third expert report of 1 December 2014 established that B had been exposed to content and/or conduct of a sexualised nature by an adult, which had resulted in her behaving in an overtly sexualised manner and that her behaviour indicated the existence of trauma. The same report also emphasised that the applicant was taken to various experts, from institution to institution so that she already felt at home there and adapted her behaviour, so no credible statement could any longer be obtained from her (see paragraph 42 of the judgment).

17. Even though it had been concluded with certainty that child B showed erotic behaviour inappropriate for her age, the prosecution authorities after assessment of the documentation and in view of the conclusion of the experts that it was no longer possible to obtain a truthful statement from the child, concluded that there was insufficient evidence for the prosecution of C and issued a formal decision not to prosecute (see paragraphs 43-45 of the judgment). We do not in any way call into question the conclusion reached by the prosecution authorities, nor do we believe that the Court should assess in any respect the responsibility of C. However, we find that the steps taken before reaching that conclusion did not comply with the State's procedural obligations under Articles 3 and 8 of the Convention (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Sandra Janković v. Croatia*, no. 38478/05, § 46, 5 March 2009).

18. In view of the weight that the majority have attached to the fact that the State Attorney's Office concluded that there had been no grounds for prosecuting C (see paragraphs 123-25 of the judgment), we find it important to emphasise that, once there are sufficient allegations to engage the authorities' obligation to investigate the situation (see paragraph 114 of the judgment), the fact that the investigation ultimately did not confirm the responsibility of C has no bearing on the need to carefully scrutinise whether the investigation into alleged sexual abuse satisfied the minimum threshold of effectiveness. This is so since the obligation to investigate is specifically intended to refute or confirm the responsibility of the alleged perpetrator (compare *Mustafa Tunç and Facire Tunç v. Turkey* [GC], no. 24014/05, §§ 132-34, 14 April 2015, concerning Article 2; and *Alpar v. Turkey*, no. 22643/07, § 42, 26 January 2016, concerning Article 3). In actual fact, as was emphasised in the judgment itself, where arguable allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny regardless of how the investigation in the concrete case has ended (see paragraph 108 of the judgment). In our view, in doing so, the Court should in particular take into consideration special standards that should guide domestic authorities in conducting an effective investigation into alleged sexual abuse of a child (see Article 30 (5) of the Lanzarote Convention).

19. In view of the special vulnerability of children when they are exposed to criminal proceedings and especially when such proceedings are related to their alleged sexual abuse, particular attention should be given to protecting the "victim rights" of children in criminal proceedings, which at the same time serve to secure an effective investigation (a significant part of the Lanzarote Convention covers that subject, see in particular Articles 10-14, 30-36, some of them cited in paragraph 78 of the judgment; see the Explanatory Report to the Lanzarote Convention, paragraph 209; see also the EU Directive, in particular Articles 1, 20 and 24, all cited in

paragraph 76 of the judgment). Among others, special standards have been established for interviewing children in criminal proceedings, including during investigations (Article 35 of the Lanzarote Convention, cited in paragraph 78 of the judgment). The function of these rules is, on the one hand, to protect children from secondary victimisation, and on the other hand, to secure reliable evidence and thus also effective investigation. In *G.U. v. Turkey* (cited above, §§ 72-73) the Court emphasised that the States had to adopt procedural rules guaranteeing and safeguarding children's testimony. The majority disregarded this specific aspect of the effectiveness of the investigation related to alleged sexual abuse of children.

20. In particular, when on 16 June 2014 A informed the police, and the next day the relevant Social Welfare Centre, of the alleged sexual abuse of her daughter, the police interviewed A, two of her siblings, teachers from the kindergarten that the applicant was attending at the relevant time and her regular paediatrician. However, the alleged victim was neither promptly interviewed nor examined, in order to avoid any risk of undue pressure on the child (see paragraph 90 of the judgment; in this respect see Article 30 (3) and 35 (1) (a) of the Lanzarote Convention, cited at paragraph 77 of the judgment). Moreover, there is no indication that the authorities themselves organised the necessary initial interviews and examinations of the applicant by experts in the field, but rather they left that to A herself. The Court further observes that the applicant was interviewed for the first time by a multidisciplinary team of experts on 20 June 2014, that is to say four days after A had informed the police about the alleged sexual abuse. No justification for such delay was provided (see Article 35 (a) of the Lanzarote Convention, cited in paragraph 78 of the judgment). On that occasion the father, the alleged perpetrator, was on the premises of the Polyclinic and interacted with the applicant contrary to the established international and domestic standards (see paragraph 7 above). Moreover, this interview did not have the nature of a forensic interview. Actually, no forensic interview with the child for the purposes of deciding A's criminal complaint had ever been conducted, although her complaint was arguable and although at a certain point such an interview had been specifically requested by the applicant's lawyer (see paragraph 41 of the judgment).

21. In this connection, we cannot but observe that in cases such as the present one forensic interviews conducted without delay would appear to offer the most reliable source of information. They could also be used in all further investigations or proceedings, prevent repeated traumatisation and most of all prevent any outside influence and/or pressure on the child, affecting his or her credibility, and thus are essential for securing the effectiveness of the investigation (see, in this sense, Article 35 of the Lanzarote Convention cited at paragraph 77, the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

cited at paragraph 83 of the judgment, and Article 24 of the Directive 2012/29/EU of the European Parliament and the Council cited at paragraph 76 of the judgment). The interview in the Polyclinic could have been organised in this way, but it was not in the present case.

22. Subsequent to the first interview by the multidisciplinary team, A arranged one additional interview with the psychiatrist. Another interview with the psychiatrist was arranged by the State Attorney's Office (see paragraph 39 of the judgment). The child also apparently started having psychological treatment, although no forensic interview with the child had yet been conducted (see paragraph 39 of the judgment). All these led to the conclusion in the expert report from November 2014 that since the applicant was taken to various experts, from institution to institution, she already felt at home there and adapted her behaviour, so no credible statement could any longer be obtained from her. These failures in organising an adequate forensic interview of a child, alleged victim of sexual abuse, significantly contributed to the decision of prosecution authorities to stop the investigation for lack of sufficient evidence (see paragraph 42 of the judgment).

23. There is no evidence to show that the authorities gave A clear instructions about the rights of her child (see footnote 4 above), or instructed A as to how she had to behave in order not to obstruct the investigation (ibid.), nor that the authorities organised the investigation in such a way as to obtain and secure the child's account of the alleged events that could be used for the purposes of a criminal investigation.

24. Furthermore, there were other failures in the investigation, unrelated to the omissions in the protection of victims' rights. For example, the alleged perpetrator had not been interviewed by the police before 11 August 2014, that is to say almost two months after the police had been informed that he had allegedly sexually abused his daughter (see paragraph 25 of the judgment, see also *C.A.S. and C.S. v. Romania*, § 74, cited above, in which it also took the authorities two months to interview a suspect). Moreover, the police confiscated a USB stick from the alleged perpetrator only on 22 August 2014, more than two months after the complaint was lodged, although A reported that she saw pornographic material on his computer (see paragraph 30 of the judgment, see also footnote 4 above). The authorities have not given any explanation for such a delay and we do not see any reason for it. We note that in cases of applicants in a vulnerable position the Court requires authorities to show particular vigilance (see, for example, *I.C. v. Romania*, no. 36934/08, § 51, 24 May 2016; and *C.A.S. and C.S.*, cited above). Finally, although it was indicated in the second report that "in order to determine the forensic issues, in light of the complicated status of the child and the overall circumstances of the 'case', it would be necessary to obtain an expert opinion, which could sufficiently determine the psychiatric and psychological characteristics of both parents

and their causal link with the behaviour of the child or possible manipulation of the child ...” (see paragraphs 40 and 96 of the judgment), this was never done during the criminal investigations. We note that the authorities must take the reasonable steps available to them to secure evidence concerning the incident, including, *inter alia*, forensic evidence (see *C.A.S. and C.S.*, cited above, § 70).

25. It would further appear that the relevant police department did not inform the State Attorney’s Office of A’s criminal complaint or the enquiries undertaken by the police before 6 August 2014 (see paragraph 24 of the judgment), although under domestic law, as in force at the material time, they had been under an obligation to do so much sooner. Thereafter the police submitted reports with updates on the investigation on a monthly basis although they were obliged to do so immediately after any enquiries undertaken and not later than 24 hours thereafter (see paragraph 63 of the judgment, see also footnote 4 above). Even after being informed of the case and the activities of the police, the Attorney’s Office remained rather passive in the proceedings. There is no indication that they gave any instructions to the police or undertook any activities by themselves except for ordering two expert reports, one by a defectologist and another one by a Polyclinic in which B was being treated at that time (see paragraph 38 and 39 of the judgment). It appears that neither the police nor the Attorney’s Office have ever seen B or were in any way involved in her interviews by the multidisciplinary team or subsequent experts. There is no indication that police officers and the members of the Attorney’s Office had any special training in conducting cases of sexual abuse of children (as required by Protocol 1, see paragraph 68 of the judgment; see also Article 34 (1) of the Lanzarote Convention, cited in paragraph 78 of the judgment).

26. The majority emphasised that procedural obligations under Articles 3 and 8 required the criminal-law mechanism to be implemented so as to address the particular vulnerability of the applicant and to ensure that the investigation was carried out in the best interests of a child and respecting the rights of a child (see paragraph 121 of the judgment, see also Article 30 (1) of the Lanzarote Convention). But ultimately, the judgment failed to analyse the complaint raised by the applicant in the light of the standards identified in international documents (see paragraphs 76-83 of the judgment, in particular Chapter VII of the Lanzarote Convention), some of which, as demonstrated above, have already been acknowledged by the Court as prerequisites for the effectiveness of an investigation in cases of sexual abuse of children (see, for example, *C.A.S. and C.S. v. Romania*, cited above; *M.G.C. v. Romania*, no. 61495/11, 15 June 2016; *G.U. v. Turkey,* cited above; *S.N. v. Sweden*, no. 34209/96, §§ 47-53, 1 November 2002; see also *mutatis mutandis .Y v. Slovenia*, cited above, and *I.C. v. Romania,* cited above).

4. Appointment and role of a special representative

27. In the present case a special legal representative was appointed for a child, as an applicant before the Court, owing to the nature of the relationship between the first applicant, the mother, and the alleged perpetrator, the father, and a potential conflict of interest between the applicants, the mother and the child. The Court for the first time, in such circumstances, relying on international documents (see §§ 76, 78, 79 and 83 of the judgment) and Rule 36(4) of the Rules of Court, requested the Croatian Bar Association to name a lawyer to submit observations on behalf of the second applicant, a child, so that her interests and views would be duly presented and taken into account (see paragraph 3 of the judgment).

28. In their observations of 15 May 2018, the Government welcomed the second applicant being appointed a legal representative, but disagreed with the procedure and manner in which the representative was appointed. The Government remarked that a legal representative had been appointed without consulting the State beforehand, and circumventing the competent State authorities, namely the Social Welfare Centre and domestic courts, which under domestic law are authorised to appoint a special representative for a child in domestic court proceedings or the Centre for Guardianship, whose employees are specialised for representing interests of children. We agree with the Government that the Court should, with time, establish in its Rules of Court more detailed criteria and a procedure for the appointment of special representatives for children. However, in so doing the Court should avoid situations in which the very same authority implicated as responsible for the alleged violation of the Convention might be called upon to appoint a special guardian for the child. Further, the Court should take into consideration that the interests of the Government and of a child do not necessarily coincide.

29. Furthermore, it is important for the Court to clarify the powers of a special representative taking into consideration his or her role of securing access to the Court for a child and enabling the voice of a child to be heard before the Court. One of the important issues to resolve is the extent to which a special representative could in his or her submissions raise issues which, strictly speaking, are not within the facts covered by an initial complaint, but are related to the protection of the best interests of the child in connection with the facts as presented in an original complaint and further clarified in observations by the Government and applicant(s). In other words, should the "six-month rule", the rule on exhaustion of domestic remedies and the "*ultra petita* rule" be adapted to ensure the protection of the best interests of a child before the Court in such cases? This is of particular importance in cases of alleged sexual abuse or sexual exploitation of a child/children, in view of their extreme vulnerability and in many cases their *de facto* inability, especially if they are of a very young

age, to bring such cases, both before domestic courts and before the Court, without adult assistance. The applicant in this case at the time of the alleged event was only four and half years old and at the time the case reached the Court was six years old, and as we have explained above, the Court identified a possible conflict of interest between the applicants, the mother and the child (see paragraphs 1, 3 and 8 of the judgment).

30. We note that, to compensate for children's vulnerability in cases of sexual abuse and sexual exploitation and the inability of many children to report cases perpetrated against them before reaching the age of majority, the Lanzarote Convention took a measured flexible approach to the statute of limitations in criminal proceedings, taking at the same time into consideration the requirements of proportionality that apply to criminal proceedings, namely ensuring that the limitation period continues to run for a sufficient period of time to allow prosecution to be effectively initiated after the child has reached the age of majority (see Article 33 of the Lanzarote Convention and paragraphs 231 and 232 of the Explanatory Report to that Convention). In our view, this approach of the Lanzarote Convention, that has introduced certain flexibility to domestic criminal proceedings, could be instructive for the Court in devising its own proceedings related to the protection of human rights of children before the Court in a more flexible manner.

31. In the present case, in our view, one of the arguments put forward by the special representative on behalf of B is potentially of such a character. It could be argued that such was the complaint that no effective investigation had been conducted into the suspicion that B had been subjected to emotional abuse by A. However, the special representative indicated that she was basing this complaint on the report of the multidisciplinary team of the Polyclinic, which was extensively cited and used in the submissions and observations both by A and by the Government. Thus, before any final conclusion on the scope of the case, this proposition should have been carefully analysed.

5. Conclusion

32. At the level of the Council of Europe, the EU and their member States over the past twelve years, there has been extensive development of various standards and measures focused on the preventive, protective and criminal law aspects of the fight against all forms of sexual abuse and sexual exploitation of children. In our view, the Court should carefully take into consideration those standards, while reviewing the rights of children and obligations of States under the Convention in these types of cases in particular since the Lanzarote Convention, which is the main international instrument in this area, has been signed by all Council of Europe member States and ratified by all but three. The Court's case-law may need to be

further reflected upon so as to ensure that investigation and criminal proceedings are carried out in the best interests of the child and respecting the rights of the child, and that a protective and child-friendly approach towards children who are victims of alleged sexual abuse is adopted, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child or cause the trauma, and that the criminal justice response is followed by assistance, where appropriate. Of course, the Court should ensure that any such measures are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial guaranteed by Article 6 of the Convention.

33. Furthermore, in our opinion, the Court should, in reviewing the effectiveness of an investigation into alleged sexual abuse of a child, rely on the specific standards developed in the Lanzarote Convention in this connection, which, as we have already pointed out, has been signed by all member States of the Council of Europe and ratified by all except three.

34. Finally, the Court should take a stance on the extent to which arguments submitted by a special representative of a child, appointed upon the request of the Court in situations such as that in the present case, are admissible. Should the Court strictly follow the "*Radomilja*" approach or should it take a more flexible approach to a child's right of access to the Court? In making this decision the Court should be guided by the principle of the best interests of the child, in all of its three aspects, as a substantive right, as an interpretative principle and as a rule of procedure[7].

[7] According to General Comment No. 14, first of all the best interests of the child must be seen as a self-executing substantive right, which will be relied on as a primary consideration before the courts whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Secondly, it should be understood as an interpretative principle. In other words, if a legal provision is open to more than one interpretation, that which most effectively serves the child's best interests should be chosen. Finally, it must be seen as a rule of procedure. In other words, whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned and must be accompanied by certain procedural safeguards. In particular, States must explain how the right has been respected in their decision, that is, what was considered to be in the child's best interests, what criteria it was based on and how the child's interests have been weighed up against other considerations. The best interests of the child must be assessed individually. See General Comment No. 14, adopted by the UN Committee on the Rights of the Child at its 62nd session, 14 January - 1 February 2013.