Juhnke v. Turkey **-** 52515/99 **(**French**) (**Arabic**)**
Judgment 13.5.2008 [Section IV]

Article 8

Article 8-1

Respect for private life

Gynaecological examination imposed on a detainee without her free and informed consent: *violation*

Facts: In 1997 the applicant, a German national, was arrested by Turkish soldiers on suspicion of membership of an illegal armed organisation, the PKK (Workers' Party of Kurdistan) and handed over to local gendarmes. In 1998 she was convicted as charged and sentenced to imprisonment. In the meantime she lodged a petition with a public prosecutor's office, stating that she had been subjected to a gynaecological examination without her consent. She further claimed that she had been stripped naked and sexually harassed by several gendarmes present during the examination. The applicant had requested the prosecution of both the gendarmes and the doctor. In 2002 the criminal investigation against the gendarmes was suspended by the Supreme Administrative Court. In 2004 the applicant was released and deported to Germany.

Law: Article 8 – The applicant had resisted the gynaecological examination until persuaded to agree to it. Given the vulnerability of a detainee at the hands of the authorities, she could not have been expected to have resisted the examination indefinitely. She had been detained *incommunicado* for at least nine days prior to the intervention. At the time of the examination, she had apparently been in a particularly vulnerable mental state. It was not suggested that there had been any medical reason for such an examination or that it had been carried out in response to a complaint of sexual assault lodged by her. It remained, moreover, unclear whether she had been adequately informed of the nature of and the reasons for the measure. In the light of the doctor's statement, she might have been misled into believing that the examination had been compulsory. It could not be concluded with certainty that any consent given by the applicant had been free and informed. The imposition of a gynaecological examination on her, in such circumstances, had given rise to an interference with her right to respect for her private life, and in particular her right to physical integrity. Further, it had not been shown that that interference had been "in accordance with the law", as the Government had not presented any arguments to the effect that the interference was based on and was in compliance with any statutory or other legal rule. The impugned examination had not been part of the standard medical examination applied to persons arrested or detained. Rather it appeared to have been a discretionary decision – not subject to any procedural requirements – taken by the authorities in order to safeguard the members of the security forces, who had arrested and detained the applicant, against a potential false accusation by the applicant of sexual assault. Even if this could, in principle, have constituted a legitimate aim, the examination had not been proportionate to such an aim. The applicant had not complained of having been sexually assaulted and no reason had been advanced suggesting that she would be likely to do so. Therefore, that

aim was not such as to justify overriding the refusal of a detainee to undergo such an intrusive and serious interference with her physical integrity or seeking to persuade her to give up her express objection. The gynaecological examination which had been imposed on the applicant without her free and informed consent had not been shown to have been "in accordance with the law" or "necessary in a democratic society".

Conclusion: violation (five votes to two).

The Court found no violation of Article 3 and a violation of Article 6.

Article 41 – EUR 4,000 in respect of non-pecuniary damage.

(See also *Y.F. v. Turkey*, no. 24209/94, Information Note no. 55)

***Maslova and Nalbandov v. Russia* - 839/02 (French) (Arabic)**
Judgment 24.1.2008 [Section I]

Article 3

Degrading treatment

Inhuman treatment

Torture

Ill-treatment of persons held for questioning and failure to follow correct procedures when prosecuting those responsible: *violations*

Article 38

Article 38-1-a

Obligation to furnish all necessary facilities

Government's refusal to disclose documents from investigation into allegations of ill treatment by State agents: *failure to comply with Article 38*

Facts: The first applicant complained of serious assault – including beatings, rape, suffocation and electric shocks – at the hands of police and prosecution interrogators after she was called to a police station for questioning as a witness in a murder case in November 1999. She denied all involvement in the murder but says that she was forced to make a written confession. She was eventually released after almost 24 hours in custody. Her mother and the second applicant were likewise detained for questioning and the second applicant alleged that prosecution officials punched, kicked and tried to suffocate him before evicting him from the building. The following day the first applicant filed a complaint with the prosecutor's office alleging rape and torture. An investigation was immediately opened. Witnesses were interviewed, the police station searched and evidence was sent for forensic examination. In April 2000 four police officers and members of the prosecution service were formally charged. However, the trial court ruled all the prosecution evidence inadmissible owing to a failure to follow a special procedure that applied to proceedings against prosecution officers. The case was remitted for fresh investigation but later discontinued for want of evidence of an offence.

During the course of the proceedings before the Court, the Court requested the Government to submit a copy of the investigation file into the events at the police station. However, without any explanation, the Government refused to produce any documents other than copies of procedural decisions.

Law: Article 3 – (a) *Substantive limb*:

(i) First applicant: There was an impressive and unambiguous body of evidence in support of the first applicant's version of events. Indeed, by bringing charges, referring the case for trial and then resuming and discontinuing the proceedings on numerous occasions, the authorities had conceded that her allegations were credible. That evidence had been dismissed solely because of procedural defects. The Government had not provided any satisfactory or convincing explanation to

disprove her allegations. The Court therefore accepted the first applicant's claims as to what had happened. The rape of a detainee by a State official had to be considered an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. Consequently, the physical violence, especially the cruel acts of repeated rape, to which the first applicant had been subjected, amounted to torture.

Conclusion: violation (unanimously).

(ii) Second applicant: Throughout the domestic proceedings the second applicant had presented a coherent and convincing account of the events which was further corroborated by the evidence in the investigation file. Inferences could also be drawn from the Government's failure to comply with the Court's request for a copy of the entire investigation file, which was seen as crucial to establishing the facts in the case. The Government had only produced copies of procedural decisions and had refused to submit any other documents. The Court therefore accepted the second applicant's version of events and concluded that the duration of his ill-treatment and its physical and mental effects, taken as a whole, amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(b) *Procedural limb*: The authorities appeared to have reacted diligently and promptly in order to identify and punish those responsible for the first applicant's ill-treatment. However, procedural errors had led to a stalemate in the criminal proceedings. In the absence of any plausible explanation, the only possible explanation was the prosecution authorities' obvious incompetence in conducting the investigation during the relevant period. Accordingly, there had been no effective investigation into the first applicant's allegations of ill-treatment. That reasoning also held true in the second applicant's case.

Conclusion: violations (unanimously).

Article 38 § 1 (a) – Referring to the importance of a government's cooperation in Convention proceedings and mindful of the difficulties associated with the establishment of the facts in cases such as the present one, the Court found that, by failing to submit the requested documents, the Government had failed to meet their obligations under Article 38 § 1 (a).

Conclusion: failure to comply (unanimously).

Article 41 – EUR 70,000 to the first applicant and EUR 10,000 to the second applicant in respect of non-pecuniary damage.

***Yazgül Yılmaz v. Turkey* - 36369/06 (French) (Arabic)**
Judgment 1.2.2011 [Section II]

Article 3

Degrading treatment

Gynaecological examination of minor in custody without consent: *violation*

Facts – In 2002 the applicant, a sixteen-year-old girl, was taken into custody on suspicion of assisting an illegal organisation. A medical and gynaecological examination was requested by the police superintendant responsible for juveniles in order to establish whether there was evidence of assault committed during the police custody and if her hymen was broken. The examination request was not signed by the applicant. The next day she was remanded in custody and criminal proceedings were brought against her; then in October 2002 she was acquitted and released. Shortly afterwards, the applicant, suffering from psychological problems, underwent various medical examinations. Two medical reports concluded that she was suffering from post-traumatic stress and depression. In December 2004 she filed a complaint for abuse of authority against the doctors who had examined her in police custody. No disciplinary proceedings were opened and in March 2005 the public prosecutor's office discontinued the proceedings. A challenge by the applicant was dismissed by the assize court.

Law – Article 3

(a) *Substantive aspect* – There was nothing to suggest that the authorities had tried to obtain the applicant's consent or that of her legal representative for the gynaecological examination. In addition, she could not have been expected to oppose such an examination, having regard to her vulnerability in the hands of the authorities, who had total control over her while she was in police custody. At the time there had been a gap in the law as regards such examinations of female detainees, which were carried out without any safeguards against arbitrariness. Unlike other medical examinations, a gynaecological examination could be traumatising, especially for a minor, who had to be afforded additional guarantees and precautions (for example, by ensuring that consent was given at all stages by her and her representative, and by allowing her to be accompanied and to choose between a male or female doctor). A general practice of automatic gynaecological examinations for female detainees, for the purpose of avoiding false sexual assault accusations against police officers, did not take account of the interests of detained women and did not meet any medical need. The Court noted with interest that the new Code of Criminal Procedure regulated, for the first time, internal bodily examinations, including those of a gynaecological nature, although there was no specific provision for minors. In addition, one of the two reports, drawn up by a panel of doctors in October 2004, had indicated that the medical certificates were not compliant with the medical assessment criteria provided for in the circulars adopted by the Ministry of Health or in the Istanbul Protocol, since they failed to show whether the applicant had sustained any physical or psychological violence. The report had also concluded that to conduct a gynaecological examination without the person's consent could be regarded as sexually traumatic and that the applicant's allegations of assault in police custody were largely corroborated by the subsequent medical examinations. Put together, the above-mentioned evidence created a strong presumption as to the superficial nature of the medical and gynaecological

examinations in question. Accordingly, the authorities, who had deprived the applicant of her liberty, had not taken any positive measure to protect her during her police custody and had thus caused her considerable distress. In deciding to subject the girl to a gynaecological examination, they could not have been unaware of its psychological consequences. Having regard to the fact that this examination must have caused her extreme anxiety, given her age and the fact that she was not accompanied, it attained the requisite threshold to be characterised as degrading treatment.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – As regards the effectiveness of the investigation, the Court noted that, following the applicant's complaint, it was the Deputy Director for Health who was entrusted with the case as inspector, whereas he reported to the same hierarchy as the doctors whose actions he was investigating. Following his conclusion that, two years after the events, disciplinary proceedings for misconduct were time-barred, the District Governor's office had decided not to authorise the opening of a criminal investigation against the doctors concerned. That decision had been upheld by the administrative court and the public prosecutor had then decided to discontinue the proceedings. No criminal investigation had therefore been conducted. Moreover, the inspector's report of July 2005, which had found the doctors liable, had not been notified to the applicant. The doctors had thus benefited from the statute of limitations without any judicial finding as to their possible liability for the acts complained of. The Court had already expressed serious doubts about the capacity of the administrative bodies concerned to conduct an independent investigation. In the present case, the shortcomings in the investigation, which had had the result of granting virtual impunity to the presumed perpetrators of the offending acts, had rendered ineffective the criminal action and also any civil action by which the applicant could have obtained compensation for the alleged violations.

Conclusion: violation (six votes to one).

Article 41: EUR 23,500 in respect of non-pecuniary damage.

B.S. v. Spain - 47159/08 (French) (Arabic)
Judgment 24.7.2012 [Section III]

Article 14

Discrimination

Ineffective investigation into possible racist motivation for ill-treatment allegedly suffered by Nigerian prostitute: *violation*

Facts – The applicant is a woman of Nigerian origin who worked as a prostitute at the material time. In July 2005 she was stopped for questioning on three occasions; she alleged that she was beaten and racially abused on each occasion. Following the third such incident, she lodged a criminal complaint and attended a hospital. After being stopped for questioning a fourth time, she lodged a further complaint in which she alleged, among other things, that women with a "European phenotype" were not stopped by the police. She again went to hospital for an examination.

Law – Article 3

(a) *Procedural aspect* – The investigation had been inadequate in many respects: in particular, the only report examined had been submitted by the official superior of the police officers accused in the case, the authorities had refused to organise an identity parade using a two-way mirror and the medical reports had not been taken into consideration. Accordingly, the investigation had not been sufficiently thorough and effective to satisfy the requirements of Article 3.

Conclusion: violation (unanimously).

(b) *Substantive aspect* – The medical reports were inconclusive as to how the injuries observed on the applicant might have been sustained, and their cause could not be established beyond all reasonable doubt from the evidence submitted.

Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 3 (*procedural aspect*): The Court reiterated that the authorities' duty to investigate whether there was any link between racist attitudes and an act of violence was an aspect of their procedural obligations under Article 3, but could also be seen as implicit in their responsibilities under Article 14 to secure without discrimination the observance of the fundamental value enshrined in Article 3. Owing to the interplay of these two Articles, issues such as those in the present case could fall to be examined under one of the two Articles only, with no separate issue arising under the other, or could require examination under both Articles. In her complaints the applicant had mentioned possible racist motives. Her arguments had not been examined by the domestic courts, which had also not taken into account her special vulnerability inherent in her situation as an African woman working as a prostitute. The authorities had thus failed to satisfy their obligation to take all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage.

İzci v. Turkey - 42606/05 (French) (Arabic)
Judgment 23.7.2013 [Section II]

Article 46

Article 46-2

Execution of judgment

Measures of a general character

Respondent State required to take measures to ensure respect by law-enforcement officials of right to peaceful assembly

Facts – On 6 March 2006 the applicant took part in a demonstration in Istanbul to celebrate Women's Day which ended in clashes between police and protesters. Video footage of the events showed police officers hitting a large number of demonstrators with truncheons and spraying them with tear gas. Women who had taken refuge in shops were dragged out by the police and beaten up. According to the report of an expert appointed by the Turkish authorities to examine the video footage, police officers had not issued any warnings to disperse demonstrators before attacking them. The demonstrators, for their part, had not tried to respond to the attack but had only tried to flee. The applicant sustained bruising all over her body and lodged an official complaint against the police officers she considered responsible for her ill-treatment. Of a total of 54 police officers accused of causing injuries by the use of excessive force at the demonstration, 48 were acquitted for lack of evidence. The six remaining officers were sentenced to terms of imprisonment ranging from five to twenty-one months, but the proceedings against them were discontinued under the statute of limitations.

Law – The Court unanimously found violations of the substantive and procedural aspects of Article 3 of the Convention through the use of disproportionate force and lack of an effective investigation, and a violation of Article 11 on account of the failure to respect her right to freedom of assembly.

Article 46 – The Court had already found in over 40 judgments against Turkey that the heavy-handed intervention of law-enforcement officials in demonstrations had amounted to a violation of Article 3 and/or Article 11 of the Convention. The common feature of those cases was the failure of the police forces to show a certain degree of tolerance towards peaceful gatherings and, in some instances, the precipitate use of force, including tear gas, by the police. In over 20 of the judgments, the Court had already observed the failure of the Turkish investigating authorities to carry out effective investigations into allegations of ill-treatment by law-enforcement personnel during demonstrations. It further stressed that 130 applications against Turkey concerning the right to freedom of assembly and/or use of force by law-enforcement officials during demonstrations were currently pending.

Having classified these problems as "systemic", the Court requested the Turkish authorities to adopt general measures in order to prevent further similar violations in the future. In particular, it asked the Turkish authorities to take steps to ensure that the police act in accordance with Articles 3 and 11 of the Convention, that the judicial authorities conduct effective investigations into

allegations of ill-treatment in conformity with the obligation under Article 3 and in such a way as to ensure the accountability of senior police officers also. Finally, the Court highlighted the need for a clearer set of rules to be adopted as regards the use of violence and weapons such as tear gas during demonstrations*, especially against demonstrators who do not put up violent resistance.

Article 41: EUR 20,000 in respect of non-pecuniary damage.

* See in this respect the judgment in the case of *Abdullah Yaşa and Others v. Turkey*, no. 44827/08, 16 July 2013, Information Note 165.

***P. and S. v. Poland* - 57375/08 (French)** (Arabic)
Judgment 30.10.2012 [Section IV]

Article 8

Article 8-1

Respect for private life

Disclosure of information by public hospital about a pregnant minor who was seeking an abortion after being raped: *violation*

Article 3

Degrading treatment

Inhuman treatment

Harassment of minor by anti-abortion activists as a result of authorities' actions after she had sought an abortion following rape: *violation*

Article 5

Article 5-1

Lawful arrest or detention

Placement of pregnant minor in juvenile shelter to prevent her from seeking abortion following rape: *violation*

Article 8

Positive obligations

Article 8-1

Respect for private life

Medical authorities' failure to provide timely and unhindered access to lawful abortion to a minor who had become pregnant as a result of rape: *violation*

Facts – The applicants were a daughter and her mother. In 2008, at the age of fourteen, the first applicant, P., became pregnant after being raped. In order to have an abortion in accordance with the 1993 Law on Family Planning, she obtained a certificate from the public prosecutor that her pregnancy had resulted from unlawful sexual intercourse. However, on contacting public hospitals in Lublin, the applicants received contradictory information as to the procedure to be followed. Without asking whether she wished to see him one of the doctors took P. to see a Catholic priest who tried to convince her to carry the pregnancy to term and got her to give him her mobile phone number. The second applicant

was asked to sign a consent form warning that the abortion could lead to her daughter's death. Ultimately, following an argument with the second applicant, the head of gynaecology in the Lublin hospital refused to allow an abortion, citing her personal views, and the hospital issued a press release confirming. Articles were published in local and national newspapers and the case was the subject of discussions on the internet.

P. was subsequently admitted to a hospital in Warsaw, where she was informed that the hospital was facing pressure not to perform the abortion and had received numerous e-mails criticising the applicants for their decision. P. also received unsolicited text messages from the priest and others trying to convince her to change her mind. Feeling manipulated and helpless, the applicants left the hospital two days later. They were harassed by anti-abortion activists and eventually taken to a police station, where they were questioned for several hours. On the same day, the police were informed that the Lublin Family Court had ordered P.'s placement in a juvenile shelter as an interim measure in proceedings issued to divest her mother of her parental rights on the grounds that she was pressurising P. into having the abortion. In making that order the court had regard to text messages P. had sent to her friend saying she did not know what to do. Later that day, the police drove P. to Lublin, where she was placed in a juvenile shelter. Suffering from pain, she was taken to hospital the following day, where she stayed for a week. A number of journalists came to see her and tried to talk to her. After complaining to the Ministry of Health, the applicants were eventually taken in secret to Gdańsk, some 500 kilometres from their home, where the abortion was carried out.

The family court proceedings were discontinued eight months later after P. testified that she had not been forced by her mother to have an abortion. Criminal proceedings that had been brought against P. for suspected sexual intercourse with a minor were also discontinued as was the criminal investigation against the alleged perpetrator of the rape.

Law – Article 8

(a) *Access to lawful abortion*: As to the right of doctors to refuse certain services on grounds of conscience, Polish law had acknowledged the need to ensure that doctors were not obliged to carry out services to which they objected, and put in place a mechanism by which such a refusal could be expressed. This mechanism also included elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for refusals to be in writing and included in the patient's medical records and, above all, by imposing an obligation on the doctor to refer the patient to another doctor competent to carry out the same service. However, it had not been shown that these procedural requirements and the applicable laws had been complied with in the instant case. The events surrounding the determination of P.'s access to legal abortion had been marred by procrastination and confusion. The applicants had been given misleading and contradictory information and had not received appropriate and objective medical counselling that had due regard to their views and wishes. No set procedure had been available by which they could have their views heard and properly taken into consideration with a modicum of procedural fairness. The difference in the situation of a pregnant minor and that of her parents did not obviate the need for a procedure for the determination of access to lawful abortion whereby both parties could be heard and their views fully and objectively considered and for a mechanism for counselling and for reconciling conflicting views in the minor's best interests. It had not been shown that the legal setting in Poland had allowed for the second applicant's concerns to be properly addressed in a way that would respect her views and attitudes and

balance them in a fair and respectful manner against the interests of her pregnant daughter in the determination of such access.

In this connection, civil litigation did not constitute an effective and accessible procedure since such a remedy was solely of a retroactive and compensatory character. No examples had been given of cases in which the civil courts had acknowledged and afforded redress for damage caused to a pregnant woman by the anguish, anxiety and suffering entailed by her efforts to obtain access to abortion.

Effective access to reliable information on the conditions for having a lawful abortion and the procedures to be followed was directly relevant to the exercise of personal autonomy. The notion of private life within the meaning of Article 8 applied both to decisions to become and not to become a parent. The nature of the issues involved in a woman's decision whether or not to terminate a pregnancy was such that the time factor was of critical importance. The procedures should therefore ensure that such decisions were taken in good time. The uncertainty which had arisen in the instant case had resulted in a striking discordance between the theoretical right to a lawful abortion and the reality of its practical implementation. The authorities had thus failed to comply with their positive obligation to secure to the applicants effective respect for their private life.

Conclusion: violation (six votes to one).

(b) *Disclosure of personal and medical data*: The information made available to the public had been detailed enough for third parties to establish the applicants' whereabouts and contact them, either by mobile phone or personally. P.'s text messages to a friend could reasonably be regarded as a call for assistance, addressed to that friend and possibly also to her close environment, by a vulnerable and distraught teenager in a difficult life situation. By no means could it be equated with an intention to disclose information about her pregnancy, her own or her family's views and feelings to the general public and press. The fact that legal abortion in Poland was a subject of heated debate did not confer on the State a margin of appreciation so wide as to absolve medical staff from their uncontested professional obligations regarding medical secrecy. It had not been argued, let alone shown, that in the present case there were any exceptional circumstances of such a character as to justify a public interest in P.'s health. Accordingly, the disclosure of information about her unwanted pregnancy and the hospital's refusal to carry out an abortion had not pursued a legitimate aim. Furthermore, no provision of domestic law had been cited on the basis of which information about individual patients' health issues, even non-nominate information, could be disclosed to the general public in a press release. P. had been entitled to respect for her privacy regarding her sexual life, whatever concerns or interest her predicament had generated in the local community. The national law expressly recognised the rights of patients to have their medical data protected, and imposed on health professionals an obligation to abstain from disclosing information about their patients' conditions. Likewise, the second applicant had been entitled to the protection of information concerning her family life. Yet, despite that obligation, the Lublin hospital had made information concerning the present case available to the press. The disclosure of information about the applicants' case had therefore been neither lawful nor served a legitimate interest.

Conclusion: violation (unanimously).

Article 5 § 1: The essential purpose of the decision to place P. in the juvenile shelter had been to separate her from her parents, in particular her mother, and to prevent the abortion. By no stretch of the imagination could the detention be considered to have been ordered for educational supervision within the meaning of Article 5 § 1 (d), as the Government had contended. It had been legitimate to try to establish with certainty whether P. had had an opportunity to reach a free and well-informed decision about having recourse to abortion. However, if the authorities had been concerned that an abortion would be carried out against her will, less drastic measures than locking up a fourteen-year old girl in a situation of considerable vulnerability should have at least been considered. Her detention between 4 and 14 June 2008 had thus not been compatible with Article 5 § 1.

Conclusion: violation (unanimously).

Article 3: It was of a cardinal importance that P. was at the material time only fourteen years old. However, despite her great vulnerability, a prosecutor's certificate confirming that her pregnancy had resulted from unlawful intercourse and medical evidence that she had been subjected to physical force, both she and her mother had been put under considerable pressure on her admission to the Lublin hospital. One of the doctors had made the mother sign a declaration acknowledging that an abortion could lead to her daughter's death. No cogent medical reasons had been put forward to justify the strong terms of that declaration. P. had witnessed the argument between the doctor and the second applicant, whom the doctor had accused of being a bad mother. Information about the case had been relayed by the press, in part as a result of the press release issued by the hospital. P. had received numerous unwanted and intrusive text messages from people she did not know. In the hospital in Warsaw the authorities had failed to protect her from contact from people trying to exert pressure on her. Further, when she requested police protection after being accosted by anti-abortion activists, she was instead arrested and placed in a juvenile shelter. The Court was particularly struck by the fact that the authorities had decided to institute a criminal investigation on charges of unlawful intercourse against P., who should have been considered a victim of sexual abuse. That approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse. Although the investigation against the applicant had ultimately been discontinued, the mere fact that it had been instituted showed a profound lack of understanding of her predicament. No proper regard had been given to her vulnerability and young age and to her views and feelings. The approach of the authorities had been marred by procrastination, confusion and a lack of proper and objective counselling and information. Likewise, the fact that P. had been separated from her mother and deprived of her liberty in breach of Article 5 § 1 had to be taken into consideration. In sum, P. had been treated by the authorities in a deplorable manner and her suffering had reached the minimum threshold of severity under Article 3.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 to the first applicant and EUR 15,000 to the second applicant in respect of non-pecuniary damage.

O'Keeffe v. Ireland [GC] - 35810/09 (French) (Arabic)
Judgment 28.1.2014 [GC]

Article 3

Positive obligations

Failure by State to put appropriate mechanisms in place to protect National School pupil from sexual abuse by teacher: *violation*

Facts – The applicant alleged that she was subjected to sexual abuse by a teacher (LH) in 1973 when she was a pupil in a state-funded National School owned and managed by the Catholic Church. National Schools were established in Ireland in the early nineteenth century as a form of primary school directly financed by the State, but administered jointly by the State, a patron, and local representatives. Under this system the State provides most of the funding and lays down regulations on such matters as the curriculum and teachers' training and qualifications, but most of the schools are owned by clerics (the patron) who appoint a school manager (invariably a cleric). The patron and manager select, employ and dismiss the teachers.

LH resigned from his post in September 1973 following complaints by other pupils of abuse. However, at that stage the Department of Education and Science was not informed about the complaints and no complaint was made to the police. LH moved to another National School, where he continued to teach until his retirement in 1995. The applicant suppressed the abuse to which she had been subjected and it was not until the late 1990s, after receiving counselling following a police investigation into a complaint by another former pupil, that she realised the connection between psychological problems she was experiencing and the abuse she had suffered. She made a statement to the police in 1997. LH was ultimately charged with 386 criminal offences of sexual abuse involving some 21 former pupils of the National School the applicant had attended. In 1998 he pleaded guilty to 21 sample charges and was sentenced to a term of imprisonment.

The applicant was subsequently awarded compensation by the Criminal Injuries Compensation Tribunal and damages in an action against LH. She also brought a civil action in damages alleging negligence, vicarious liability and constitutional responsibility on the part of various State authorities (for technical reasons, she did not sue the Church). However, the High Court rejected those claims in a judgment that was upheld by the Supreme Court on 19 December 2008, essentially on the grounds that the Irish Constitution specifically envisaged a ceding of the actual running of National Schools to interests represented by the patron and the manager, that the manager was the more appropriate defendant to the claim in negligence and that the manager had acted as agent of the Church, not of the State.

In her complaint to the European Court, the applicant complained, *inter alia*, that the State had failed to structure the primary education system so as to protect her from abuse (Article 3 of the Convention) and that she had not been able to obtain recognition of, and compensation for, the State's failure to protect her (Article 13).

Law – Article 3

(a) *Substantive aspect* – It was an inherent obligation of government to ensure the protection of children from ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards. In this connection, the nature of child sexual abuse was such, particularly when the abuser was in a position of authority over the child, that the existence of useful detection and reporting mechanisms were fundamental to the effective implementation of the criminal law designed to deter such abuse. A State could not absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals. Nor, if the child had selected one of the State-approved education options (whether a National School, a fee-paying school or home schooling), could it be released from its positive obligation to protect simply because of the child's choice of school.

The Court therefore had to decide whether the State's framework of laws, and notably its mechanisms of detection and reporting, had provided effective protection for children attending a National School against any risk of sexual abuse of which the authorities had, or ought to have had, knowledge at the material time. Since the relevant facts had taken place in 1973, any State responsibility in the applicant's case had to be assessed from the point of view of facts and standards existing at that time, disregarding the awareness society had since acquired of the risk of sexual abuse of minors in an educational context.

It was not disputed that the applicant had been sexually abused by LH or that her ill-treatment fell within the scope of Article 3. There was also little disagreement between the parties as to the structure of the Irish primary school system, which as a product of Ireland's historical experience was unique in Europe with the State providing for education (setting the curriculum, licencing teachers and funding schools) while the National Schools provided the day-to-day management. Where the parties disagreed was on the resulting liability of the State under domestic law and the Convention.

In determining the State's responsibility, the Court had to examine whether the State should have been aware of a risk of sexual abuse of minors such as the applicant in National Schools at the relevant time and whether it had adequately protected children, through its legal system, from such ill-treatment.

The Court found that the State had to have been aware of the level of sexual crime against minors through its prosecution of such crimes at a significant rate prior to the 1970s. A number of reports from the 1930s to the 1970s gave detailed statistical evidence on the prosecution rates in Ireland for sexual offences against children. The Ryan Report of May 2009 also evidenced complaints made to the authorities prior to and during the 1970s about the sexual abuse of children by adults. Although that report focused on reformatory and industrial schools, complaints about abuse in National Schools were also recorded.

Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should have adopted commensurate measures and safeguards to protect the children from the potential risks to their safety through, at minimum, effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body.

However, the mechanisms that had been put in place and on which the Government relied were not effective. The 1965 Rules for National Schools and the 1970 Guidance Note outlining the practice to be followed for complaints against teachers did not refer to any obligation on a State authority to monitor a teacher's treatment of children or provide a procedure for prompting children or

parents to complain about ill-treatment directly to a State authority. Indeed, the Guidance Note expressly channelled complaints about teachers directly to non-State managers, generally the local priest, as in the applicant's case. Thus, although complaints about LH were in fact made in 1971 and 1973 to the manager of the applicant's school, he did not bring them to the notice of any State authority. Likewise, the system of school inspectors, on which the Government also relied, did not specifically refer to any obligation on the inspectors to inquire into or monitor a teacher's treatment of children, their task principally being to supervise and report on the quality of teaching and academic performance. While the inspector assigned to the applicant's school had made six visits from 1969 to 1973, no complaint had ever been made to him about LH. Indeed, no complaint about LH's activities was made to a State authority until 1995, after his retirement. The Court considered that any system of detection and reporting which allowed over 400 incidents of abuse by a teacher to occur over such a long period had to be considered ineffective.

Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the applicant being abused two years later by the same teacher in the same school. Instead, the lack of any mechanism of effective State control against the known risks of sexual abuse occurring had resulted in the failure by the non-State manager to act on prior complaints of sexual abuse, the applicant's later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in the same National School. The State had thus failed to fulfil its positive obligation to protect the applicant from sexual abuse.

Conclusion: violation (eleven votes to six).

(b) *Procedural aspect* – As soon as a complaint of sexual abuse by LH of a child from the National School was made to the police in 1995, an investigation was opened during which the applicant was given the opportunity to make a statement. The investigation resulted in LH being charged on numerous counts of sexual abuse, convicted and imprisoned. The applicant had not taken issue with the fact that LH was allowed to plead guilty to representative charges or with his sentence.

Conclusion: no violation (unanimously).

Article 13 in conjunction with Article 3: The applicant had been entitled to a remedy establishing any liability of the State. Accordingly, the proposed civil remedies against other individuals and non-State actors on which the Government had relied must be regarded as ineffective in the present case, regardless of their chances of success. Equally, while central to the procedural guarantees of Article 3, LH's conviction was not an effective remedy for the applicant within the meaning of Article 13.

As to the alleged remedies against the State, it had not been shown that any of the national remedies (the State's vicarious liability, a claim against the State in direct negligence or a constitutional tort claim) was effective as regards the applicant's complaint concerning the State's failure to protect her from abuse.

Conclusion: violation (eleven votes to six).

Article 41: Global award of EUR 30,000 in respect of both pecuniary and non-pecuniary damage, having regard to the financial compensation the applicant had already received and the uncertainties about any future payments by LH.

S.Z. v. Bulgaria - 29263/12 (French) (Arabic)
Judgment 3.3.2015 [Section IV]

Article 3

Effective investigation

Undue delays in criminal proceedings and failure properly to investigate rape and assault allegations: *violation*

Article 46

Article 46-2

Execution of judgment

Measures of a general character

Respondent State required to identify and take general measures to improve effectiveness of criminal investigations into allegations of rape and assault

- *Facts* – In September 1999 the applicant was taken to a flat where she was held against her will, beaten and repeatedly raped by a number of men before managing to escape.

- A criminal investigation was launched by the prosecution. The applicant identified some of her assailants and two police officers they had allegedly met prior to holding her against her will.

- The investigation was closed four times and the case file sent back for further investigation on the grounds that the necessary investigative measures had not been carried out or that procedural irregularities had been committed.

- In 2007 seven defendants were committed for trial in the District Court on charges of false imprisonment, rape, incitement to prostitution or abduction for the purposes of coercing into prostitution. Twenty-two hearings were held, about ten of which were adjourned mainly on grounds of irregularities in summoning the accused or witnesses. In a judgment of March 2012, five of the accused were convicted and given prison sentences and fines, one was acquitted and the proceedings against the seventh defendant were discontinued on the grounds that they had become time-barred. The five accused who were convicted and the applicant appealed. Seven hearings before the Regional Court were adjourned on account of the absence of one of the accused or their lawyers. In a final judgment of February 2014, the court set aside one of the convictions and discontinued the proceedings on the grounds that they were time-barred. The prison sentences of some of the other accused were reduced.

- *Law* – Article 3 (*procedural aspect*): The acts of rape and assault inflicted on the applicant fell within the scope of Article 3 of the Convention.

- The total length of the criminal proceedings brought following the applicant's complaint came to more than fourteen years for the preliminary investigation and two levels of jurisdiction.

- That extremely long period did not appear to be justified on grounds of the complexity of the case. The delays incurred had been due to a lack of diligence on

the part of the authorities and, among other things, the investigating authorities had failed to investigate certain aspects of the case, particularly the involvement of individuals whom the applicant had identified as having taken part in the assault.

- The excessive length of the proceedings had undeniably had negative repercussions on the applicant, who had clearly been in a very vulnerable psychological condition following the assault. She had been left in a state of uncertainty regarding the possibility of securing the trial and punishment of her assailants, had had to return to the court repeatedly and been obliged to relive the events during the many examinations by the court.

- Accordingly, the proceedings could not be regarded as having satisfied the requirements of Article 3 of the Convention. Consequently, the Court rejected the Government's preliminary objection that the application was premature.

- *Conclusion*: violation (unanimous).

- Article 46: In more than 45 judgments the Court had already found violations of the obligation to carry out an effective investigation in applications concerning Bulgaria. Moreover, several applications concerning rape cases had recently been struck out of the list following a friendly settlement between the parties or a unilateral declaration by the Government acknowledging a violation of Article 3.

- In the majority of those cases the Court had found that there had been substantial delays at the preliminary investigation stage and that no thorough and objective investigation had been carried out. In some situations the delays had resulted in the termination of the proceedings on the grounds that they had become time-barred where the suspects, despite having been identified, had not been formally charged or where, despite the presumed perpetrators being committed for trial and the trial being held, the so-called "absolute" limitation period had expired. Furthermore, in some cases the authorities had not taken account of certain evidence or sought to clarify certain factual circumstances or the involvement of particular individuals in the criminal offence, or the prosecutor had persistently refused to comply with the court's instructions regarding the preliminary investigation.

- Accordingly, there was a systemic problem of ineffectiveness of investigations in Bulgaria. However, the complexity of the structural problem found to exist made it difficult to identify the exact causes of the defects found or to pinpoint specific measures that should be implemented in order to improve the quality of investigations. In those circumstances, the Court did not consider itself to be in a position to indicate which individual and general measures should be implemented for the purposes of executing the present judgment. The national authorities, in cooperation with the Committee of Ministers, were the best placed to identify the various causes of the problem and to decide which general measures were required – in practical terms – as a deterrent to similar future violations, with a view to combating impunity and upholding the rule of law and the trust of the public and victims in the justice system.

- Article 41: EUR 15,000 in respect of non-pecuniary damage.

Y. v. Slovenia - 41107/10 (French) (Arabic)
Judgment 28.5.2015 [Section V]

Article 8

Positive obligations

Article 8-1

Respect for private life

Failure to protect complainant's personal integrity in criminal proceedings concerning sexual abuse: *violation*

- *Facts* – In 2001, at the age of 14, the applicant was allegedly victim of repeated sexual assaults by a family friend, X. Following a criminal complaint by the applicant's mother, investigations started in 2003 and criminal proceedings were brought against X in 2007. In 2009, after having held 12 hearings in total, the domestic courts acquitted X of all charges on the ground that some of the applicant's allegations concerning X's physical conditions had been disproved by an expert, thus making it impossible, in the domestic courts' view, to prove X's guilt beyond reasonable doubt. The State Prosecutor's appeal against that judgment was rejected in 2010, as was the applicant's request to the Supreme State Prosecutor for the protection of legality a few months later.

- *Law* – Article 8: The Court had to examine whether the respondent State had afforded sufficient protection of the applicant's right to respect for her private life, and especially for her personal integrity, with respect to the manner in which she had been questioned during the criminal proceedings against her alleged sexual abuser. In so doing, it had to strike a fair balance between the rights of the applicant as a victim called upon to testify in criminal proceedings, protected by Article 8, and those of the defence, namely the right of the accused to call and cross-examine witnesses set out in Article 6 § 3 (d). Unlike the position in other similar cases previously examined by the Court, which had all been brought by the accused persons, in the present case the Court had to examine this issue from the perspective of the alleged victim.

- In the instant case, the interests of securing a fair trial required X to be provided an opportunity to cross-examine the applicant, especially as the applicant's testimony at the trial provided the only direct evidence in the case and the other evidence presented was conflicting.

- However, given that criminal proceedings concerning sexual offences were perceived as a very unpleasant and prolonged experience by the victims, and that a direct confrontation between those charged with sexual abuse and their alleged victims involved a risk of further traumatisation for the victims, personal cross-examination by the defendant had to be subject to the most careful assessment by the national courts. Indeed, several international instruments, including European Union law, provided that certain rights should be granted to victims of, *inter alia*, sexual abuse, including the duty of the State to protect them from intimidation and repeat victimisation when providing testimony of the abuse.

- In this respect, the Court noted that the applicant's questioning had stretched over four trial hearings held over seven months, a lengthy period which in itself raised concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings X

had personally cross-examined the applicant, continuously contesting the veracity of her answers and addressing her with questions of a personal nature. In the Court's view, those questions were aimed at attacking the applicant's credibility as well as at degrading her character. However, despite the duty incumbent on the judicial authorities to oversee the form and content of X's questions and comments and, if necessary, to intervene, the presiding judge's intervention had been insufficient to mitigate what had clearly been a distressing experience for the applicant.

- As to the applicant's claim that X's counsel should have been disqualified from the proceedings as he had been consulted by her on the sexual assaults shortly after the alleged events took place, the Court found that the applicable domestic law, or the manner in which it had been applied in the present case, had not taken sufficient account of the applicant's interests. This was so because the negative psychological effect of being cross-examined by X's counsel had considerably exceeded the apprehension the applicant would have experienced if she had been questioned by another lawyer. Moreover, any information he might have received from her in his capacity as a lawyer should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter.

- The Court also noted the inappropriateness of the questions put to the applicant by the gynaecologist appointed by the district court to establish whether she had engaged in sexual intercourse at the material time. In this regard, the authorities were required to ensure that all participants in the proceedings called upon to assist them in the investigation or the decision-making process treated victims and other witnesses with dignity and did not cause them unnecessary inconvenience. However, the appointed gynaecologist not only lacked proper training in conducting interviews with victims of sexual abuse, but had also addressed the applicant with accusatory questions and remarks exceeding the scope of his task and of his medical expertise. As a consequence, the applicant had been put in a defensive position unnecessarily adding to the stress of the criminal proceedings.

- Even though the domestic authorities had taken a number of measures to prevent further traumatisation of the applicant, such measures had ultimately proved insufficient to afford her the protection necessary to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention.

- *Conclusion*: violation (six votes to one).

- The Court also found unanimously a violation of Article 3 on account of the failure of the authorities of the respondent State to ensure a prompt investigation and prosecution of the applicant's complaint of sexual abuse.

- Article 41: EUR 9,500 in respect of non-pecuniary damage.

- (See also *S.N. v. Sweden*, 34209/96, 2 July 2002, Information Note 44; *Aigner v. Austria*, 28328/03, 10 May 2012; and the Factsheet on Violence against women)

E. Collins and A. Akaziebie v. Sweden (dec.) - 23944/05 (French) (Arabic)

Decision 8.3.2007 [Section III]

Article 3

Expulsion

Alleged risk of being subjected to female genital mutilation in case of extradition to Nigeria: inadmissible

The applicants are Nigerian nationals. In 2002, the first applicant entered Sweden and applied for asylum or a residence permit. She alleged that according to Nigerian tradition, women were forced to undergo female genital mutilation ("FGM") when they gave birth. As she was pregnant, she was afraid of this inhuman practice. Neither her parents nor her husband, who had supported her, could prevent this since it was such a deep-rooted tradition. She claimed that if she had travelled to another part of Nigeria to give birth to her child, she and her child would have been killed in a religious ceremony. Having decided to flee the country, she paid a smuggler, who took her to Sweden. Some months later, she gave birth to her daughter, the second applicant. The Migration Board rejected the applications for asylum, refugee status or a residence permit, stating, *inter alia*, that FGM was prohibited by law in Nigeria and that this prohibition was observed in at least six Nigerian states. Thus, if the applicants returned to one of those states it would be unlikely that they would be forced to undergo FGM. The applicants appealed unsuccessfully, maintaining that the practice of FGM persisted despite the law against it and had never been prosecuted or punished.

Inadmissible: It was not in dispute that subjecting a woman to female genital mutilation amounted to ill-treatment contrary to Article 3. Nor was it in dispute that women in Nigeria had traditionally been subjected to FGM and to some extent still were. However, several states in Nigeria had prohibited FGM by law, including the state where the applicants came from. Although there was as yet no federal law against the practice of FGM, the federal government publicly opposed FGM and campaigns had been conducted at state and community level through the Ministry of Health and NGOs and by media warnings against the practice. Although there were indications that the FGM rate was higher in the south, including the applicants' home state, according to the official sources, the FGM rate for the whole country in 2005 amounted to approximately 19%, a figure that had declined steadily in the past 15 years. Furthermore, while pregnant, the first applicant had not chosen to go to another state within Nigeria or to a neighbouring country, in which she could still have received help and support from her own family. Instead she had managed to obtain the necessary practical and financial means to travel to Sweden, having thus shown a considerable amount of strength and independence. Viewed in this light, it was difficult to see why she could not protect her daughter from being subjected to FGM, if not in her home state, then at least in one of the other states in Nigeria where FGM was prohibited by law and/or less widespread**.** The fact that the applicants' circumstances in Nigeria would be less favourable than in Sweden could not be regarded as decisive from the point of view of Article 3. Moreover, the first applicant had failed to reply to the Court's specific request to substantiate some of her allegations and to provide a satisfactory explanation for the discrepancies in her submissions. In sum, the applicants had failed to substantiate that they would face a real and concrete risk of being subjected to female genital mutilation upon returning to Nigeria: *manifestly ill-founded*.

***Omeredo v. Austria (dec.)* - 8969/10 (French) (Arabic)**
Decision 20.9.2011 [Section I]

Article 3

Degrading treatment

Inhuman treatment

Expulsion

Alleged risk of female genital mutilation if applicant returned to Nigeria: inadmissible

Facts – The applicant fled Nigeria in May 2003 and applied for asylum in Austria on the grounds that she was at risk of female genital mutilation (FGM) in her own country. The Federal Asylum Office rejected her request after finding that, even though her statements were credible, she had the alternative of living in another province of Nigeria where FGM was prohibited by law. The applicant lodged a complaint against that decision with the asylum court, but it was ultimately rejected. The Constitutional Court declined to examine the question after finding that it did not raise any issue of constitutional law. In her application to the European Court, the applicant complained under Article 3 of the Convention that she ran the risk of being subjected to FGM if expelled to Nigeria and that relying on an internal flight alternative and moving to another part of Nigeria as a single woman without her family to help her would also violate her rights under that provision.

Law – Article 3: It was not in dispute that subjecting any person, child or adult, to FGM would amount to ill-treatment contrary to Article 3 (see also *Izevbekhai and Others v. Ireland* (dec.), no. 43408/08, 17 May 2011). The Court noted, however, that while the domestic authorities had found that the applicant's fear of being forced to undergo FGM in Nigeria was well-founded they considered that she disposed of an internal flight alternative within the country. The Court therefore had to assess the applicant's personal situation in Nigeria. The applicant, who was thirty-seven years old, had obtained school education for at least thirteen years and had worked as a seamstress for eight years. While it might be difficult for her to live in Nigeria as an unmarried woman without the support of her family, the fact that her circumstances there would be less favourable than those she enjoyed in Austria could not be regarded as decisive. Owing to her education and work experience as a seamstress, there was reason to believe that she would be able to build up her life in Nigeria without having to rely on the support of family members.

Conclusion: inadmissible (manifestly ill-founded).

N. v. Sweden - 23505/09 (French) (Arabic)
Judgment 20.7.2010 [Section III]

Article 3

Expulsion

Risk of ill-treatment in case of deportation to Afghanistan of a woman separated from her husband: *deportation would constitute a violation*

Facts – The applicant and her husband are Afghan nationals who arrived in Sweden in 2004. Their requests for asylum were refused several times. In 2005 the applicant separated from her husband. In 2008 her request for a divorce was refused by the Swedish courts as they had no authority to dissolve the marriage as long as the applicant did not reside legally in the country. Her husband informed the court that he opposed a divorce. In the meantime, the applicant unsuccessfully requested the Migration Board to re-evaluate her case and stop her deportation, claiming that she risked the death penalty in Afghanistan as she had committed adultery by starting a relationship with a Swedish man and that her family had rejected her.

Law – Article 3: The Court had to establish whether the applicant's personal situation was such that her return to Afghanistan would contravene Article 3. Women were at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. The United Nations High Commissioner for Refugees had observed that Afghan women, who had adopted a less conservative lifestyle, such as those returning from exile in Iran or Europe, continued to be perceived as transgressing entrenched social and religious norms and might, as a result, be subjected to domestic violence and other forms of punishment ranging from isolation and stigmatisation to honour crimes for those accused of bringing shame on their families, communities or tribes. As the applicant had resided in Sweden since 2004, she might be perceived as not conforming to the gender roles ascribed to her by Afghan society. Moreover, she had attempted to divorce her husband and had demonstrated a real and genuine intention of not living with him. However, if the spouses were deported to Afghanistan, separately or together, the applicant's husband might decide to resume their married life together against her wish. The new Shiite Personal Status Law required, *inter alia*, women to comply with their husbands' sexual requests and to obtain permission to leave the home, except in emergencies. According to various human-rights reports on Afghanistan, up to 80% of Afghan women were affected by domestic violence, the authorities did not prosecute in such cases and the vast majority of women would not even seek help. To approach the police or a court, a woman had to overcome the public opprobrium affecting women who left their houses without a male guardian. The Court could not ignore the general risk indicated by statistics and international reports. As regards the applicant's extramarital relationship, she had failed to submit any relevant and detailed information to the Swedish authorities. Nevertheless, should her husband perceive the applicant's filing for divorce or other actions as an indication of an extramarital relationship, adultery was a crime under the Afghan Penal Code. Should the applicant succeed in living separated from her husband in Afghanistan, women without male support and protection faced limitations on conducting a normal social life, including the limitations on their freedom of movement, and lacked the means of survival, which prompted many to return to abusive family situations. The results of such "reconciliation" were generally not

monitored and abuse or honour crimes upon return were often committed with impunity. There were no strong reasons to question the veracity of the applicant's statement that she had had no contact with her family for almost five years and therefore no longer had a social network or adequate protection in Afghanistan. In the special circumstances of the present case, there were substantial grounds for believing that if deported to Afghanistan, the applicant would face various cumulative risks of reprisals from her husband, his family, her own family and from the Afghan society which fell under Article 3.

Conclusion: deportation would constitute a violation (unanimously).

R.H. v. Sweden - 4601/14 (French) (Arabic)
Judgment 10.9.2015 [Section V]

Article 3

Expulsion

Proposed deportation of young Somali woman to Mogadishu (Somalia):
deportation would not constitute a violation

Facts – In 2011 the applicant, a young Somali woman from Mogadishu, sought asylum in Sweden having stayed there illegally for four years after arriving from Italy via the Netherlands. At an interview in January 2013 the applicant stated, for the first time, that she had fled Somalia with her boyfriend after being forcibly married to an older man and subsequently beaten and thrown off a truck by her uncles when the relationship with her boyfriend was discovered. Her boyfriend and parents had since died and she claimed that if she was returned to Somalia she would have to go back to the man she had been forced to marry and risked being killed by her uncles. Since she lacked a male support network in Somalia she was also at risk of sexual assault and of becoming a social outcast. The Migration Board rejected her asylum application in June 2013 and ordered her deportation to Somalia after finding that her statements lacked credibility. It noted that she had stayed in Sweden illegally for four years before contacting the immigration authorities and had previously lodged asylum applications in Italy and the Netherlands. In addition, she had initially claimed she had left Somalia because of the war before changing her story to allege that she had fled to escape a forced marriage and risked ill-treatment by her family on her return. The applicant subsequently submitted a petition to have the enforcement of her deportation order stopped, claiming that her uncles had joined the jihadist terrorist group al-Shabaab, forcing her brother to also join the group and killing her sister. The Migration Board rejected her petition in September 2013.

- *Law* – Article 3: In the Court's view, it was clear that, if deported from Sweden, the applicant would be sent to Mogadishu and there was no risk that she would have to transit through or end up in other parts of Somalia. The Court had concluded in *K.A.B. v. Sweden* that the general situation in Mogadishu at that time (September 2013) was not such that returns to that city would breach Article 3. While it was clear that the general security situation there remained serious and fragile, the available sources did not indicate a deterioration since September 2013.

- However, unlike the applicant in *K.A.B. v. Sweden* (a male born in 1960), the applicant in the instant case was a young woman who had been living abroad for almost ten years after leaving Somalia at the age of 17. Various reports attested to the difficult situation of women in Somalia, including in Mogadishu. Women and girls had been identified as a particular risk group and there were several concordant reports of serious and widespread sexual and gender-based violence in the country. From these materials it could be concluded that a single woman returning to Mogadishu without access to protection from a male network would face a real risk of living in conditions constituting inhuman or degrading treatment under Article 3.

- However, while not overlooking the difficult situation of women in Somalia, including Mogadishu, the Court could not find on the particular facts of the applicant's case that she would face a real risk of treatment contrary to Article 3 if returned to that city. There had been significant inconsistencies in her

submissions and the claims concerning her personal experiences and the dangers she faced upon a return had not been plausible. There was no basis for finding that she would return to Mogadishu as a lone woman with the risks that such a situation entailed. Instead, she had to be considered to have access to both family support and a male protection network. Nor had it been shown that she would have to resort to living in a camp for refugees and displaced persons. Accordingly, her deportation to Mogadishu would not involve a violation of Article 3.

- *Conclusion*: deportation would not constitute a violation (five votes to two).

- (See *K.A.B. v. Sweden* [GC], 886/11, 5 September 2013, Information Note 166)

***Sandra Janković v. Croatia* - 38478/05 (French) (Arabic)**
Judgment 5.3.2009 [Section I]

Article 8

Positive obligations

Flawed implementation of domestic criminal-law mechanisms in respect of applicant's allegations of physical violence by private individuals: *violation*

Facts: The applicant was renting a room in a flat she shared with other tenants. In August 1999 she found that the lock of the flat had been changed and her belongings removed. She instituted proceedings before the civil court, which ruled in her favour in May 2002, ordering that she be allowed to reoccupy her room. The court decision was enforced about ten months later. The following day, on arriving at the flat, the applicant was assaulted by two women and a man, who kicked her, pulled her by the hair and pushed her down the stairs, while shouting obscenities. The applicant immediately informed the police, who came to the scene and interviewed her. They subsequently lodged a complaint with the minor-offences court, which initially found the attackers guilty of insulting the applicant and fined them. However, those proceedings were ultimately discontinued as being time-barred. In October 2003 the applicant filed a criminal complaint against seven individuals, alleging that she had been physically attacked and abused by them and threatened with death. The authorities decided not to open an official investigation as they found that the acts complained of constituted an offence for which prosecution had to be brought privately by the victim. The applicant lodged a private complaint, which was at first ignored and ultimately declared inadmissible as being incomplete. Her appeals against that decision were dismissed and her constitutional complaint was still pending when the European Court delivered its judgment. The applicant further complained, to the Constitutional Court in 2002 and to the ordinary court in 2007, about the length of civil and enforcement proceedings for the repossession of her room. While the Constitutional Court dismissed her complaint, in March 2008 the ordinary court ruled in her favour awarding her compensation in respect of non-pecuniary damage. Meanwhile, the applicant asked the civil court to resume the enforcement proceedings in order to regain access to her room but her request was declared inadmissible in January 2008.

Law: Recalling the States' positive obligations under Article 8, the Court observed that acts of violence such as those alleged by the applicant required States to adopt adequate positive measures in the sphere of criminal-law protection. Under Croatian law, certain criminal offences were to be prosecuted by the State Attorney's Office, either of its own motion or upon a private application, and those of a lesser nature were to be prosecuted by means of private prosecution. Further, a criminal complaint lodged in due time in respect of a criminal offence subject to private prosecution was to be treated as a private prosecution act. The applicant had brought a criminal complaint submitting a detailed description of the impugned events, alleging that they amounted to the criminal offence of violent behaviour and making serious threats. In the Court's view, her decision to request an investigation into those charges rather than to bring a private prosecution on lesser charges complied with the relevant rules of criminal procedure and might not have been regarded as unfounded. Furthermore, even though the applicant's request for an investigation had not strictly followed the usual form required for such requests, the Court attached importance to the fact that she was not represented by a lawyer and did not qualify for legal aid under

domestic law. She had nonetheless made it clear that she sought a criminal investigation into acts of violence against her, which she had described in detail and in respect of which a police report had been drawn up. The information provided was therefore sufficient to enable the competent authorities to act upon the applicant's request. Moreover, once the competent authority decided not to open an official investigation because in their view the act in question had to be prosecuted privately by the victim, pursuant to domestic law her criminal complaint should have been treated as a private prosecution. Finally, it could not be concluded that the applicant was given protection in the minor-offences proceedings, since they had been time-barred and had thus ended without a final decision on the attackers' guilt. In such circumstances, the Court concluded that the manner in which the domestic authorities had implemented the existing criminal-law mechanisms in the applicant's case was defective, contrary to the State's positive obligations under Article 8.

Conclusion: violation (unanimously).

Article 41 – EUR 3,000 in respect of non-pecuniary damage.

***Irina Smirnova v. Ukraine* - 1870/05 (French) (Arabic)**
Judgment 13.10.2016 [Section V]

Article 8

Positive obligations

Article 8-1

Respect for home

Lack of appropriate legal framework to protect occupant of flat from harassment by co-owners: *violation*

Facts – The applicant, an elderly woman, lived in a one-bedroomed flat that had been her home for many years and which she had recently acquired in equal shares with her adult son under a privatisation scheme. Her son gave his share in the flat to a third party, V.S., who in company with another man, A.N., began to insult, harass and physically assault the applicant and damage her belongings in an attempt to force her to sell her share in the property. Fearing for her safety, the applicant eventually moved out. Her attempts to recover full possession of the flat through the civil courts were unsuccessful as under Ukrainian law her son had not been required to obtain her consent before entering into the deed of gift in favour of V.S. and a co-owner could not be dispossessed on the grounds on which the applicant relied (unlawful conduct, unsuitability of the flat for joint use and refusal to share in the costs of maintenance). The applicant also made a number of complaints to the police. V.S. and A.N. were convicted of extortion and given prison terms some ten years after her first complaint.

Law

Article 3: The repeated and premeditated nature of the verbal attacks to which the applicant was subjected coupled with the incidents of physical violence by a group of men against a single senior woman reached the threshold of severity required to come within the ambit of Article 3 and engaged the State's positive duty to set in motion the protective legislative and administrative framework. Although the principal offenders were prosecuted and sentenced to significant prison terms, it nonetheless took the State authorities over twelve years to resolve the matter. In view of the extreme delays in instituting and conducting the criminal proceedings, the State had failed to discharge its positive obligation under Article 3.

Conclusion: violation (unanimously).

Article 8: Under this provision the applicant complained that she had been obliged to tolerate the presence inside her home of persons foreign to her household and their disagreeable, but essentially non-criminal conduct, including discourteous use of the flat and the applicant's belongings, spoliation of the amenities, and noise and other nuisance.

The Court found that the criminal proceedings in which V.S. and A.N. were ordered to pay compensation and were divested of their share in the flat eventually redressed these aspects of the applicant's complaint. However, because of the extreme delays in the proceedings the applicant's rights under Article 8 had been set at naught for a very considerable period.

As to whether the respondent State had an adequate non-criminal legal framework in place providing the applicant with an acceptable level of protection against the intrusions on her privacy and enjoyment of her home, the Court observed that sharing one's home with uninvited strangers, regardless of how sensibly they behave, creates very important implications for a person's privacy and other interests protected by Article 8. Accordingly, where a member State adopts a legal framework obliging private individuals to share their home with persons foreign to their household, it must put in place thorough regulations and necessary procedural safeguards to enable all the parties concerned to protect their Convention interests.

In the instant case, however, Ukrainian law had not afforded the applicant any meaningful forum in which to (i) object against cohabitation with A.N., V.S. and their acquaintances on the ground that such cohabitation created disproportionate consequences for her rights guaranteed by Article 8 of the Convention and (ii) obtain appropriate and expeditious protection against unwanted intrusions into her personal space and home, including, if necessary, by way of an injunction.

While the Court was prepared to accept that civil remedies such as an action for damages, a demand to cease and desist from interfering with enjoyment of another's possessions, or an action for establishing the rules of use of an object of shared property could be helpful in a situation where lawful cohabitants need to settle specific disagreements concerning the use of a common flat, the situation in the present case was much less trivial. The applicant's complaint was that her flat was not suitable for use by more than one family and that V.S. and A.N., had entered it by breaking in and taking possession of it against her will. The Government had not shown how the aforementioned remedies could address and redress the core of the above complaint.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also, *mutatis mutandis*, *McCann v. the United Kingdom*, 19009/04, 13 May 2008, Information Note 108; *Ćosić v. Croatia*, 28261/06, 15 January 2009, Information Note 115; and *B. v. the Republic of Moldova*, 61382/09, 16 July 2013)
