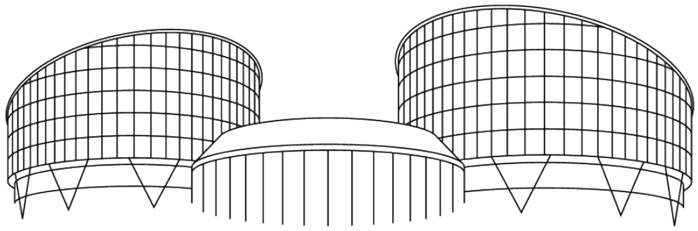

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF O'KEEFFE v. IRELAND

(Application no. 35810/09)

JUDGMENT

STRASBOURG

28 January 2014

In the case of O'Keeffe v. Ireland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. de Gaetano,
Angelika Nußberger,
André Potocki,
Krzysztof Wojtyczek
Valeriu Griţco, *judges*,
Peter Charleton, *ad hoc judge*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 6 March and on 20 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 35810/09) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Ms Louise O'Keeffe ("the applicant"), on 16 June 2009.

2. The applicant was represented by Mr E. Cantillon, a lawyer practising in Cork. The Irish Government ("the Government") were represented by their Agent, Mr P. White, of the Department of Foreign Affairs.

3. The applicant mainly complained under Article 3 of the Convention that the system of primary education had failed to protect her from sexual abuse by a teacher in 1973 and, under Article 13, that she did not have an effective domestic remedy in that respect. She also relied on Article 8 and Article 2 of Protocol No. 1, both alone and in conjunction with Article 14. She also complained of the length of her civil proceedings and of the absence of an effective domestic remedy in that respect, relying on Article 6 alone and in conjunction with Article 13.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). Ann Power-Forde, the judge elected in respect of Ireland, withdrew from sitting in the case (Rule 28). On 13 June 2012 the President of the Chamber decided to appoint Mr Justice Charleton to sit as an *ad hoc* judge (Article 26 § 4 of the Convention, and Rule 29 § 1).

5. On 26 June 2012 a Chamber of that Section (composed of Dean Spielmann, President, Mark Villiger, Karel Jungwiert, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, judges, Peter Charleton, *ad hoc* judge, and Claudia Westerdiek, Section Registrar) examined the case. The Chamber, unanimously, struck out the complaints regarding the length of the domestic proceedings and the lack of an effective domestic remedy in that regard, given the friendly settlement reached between the parties on those issues. It also, unanimously, declared admissible the remaining complaints.

6. On 20 September 2012 that Chamber (Angelika Nußberger, substitute judge, replaced Ganna Yudkivska who was unable to take part in the further consideration of the case (Rule 24 § 3)) relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24, with Mr Justice Charleton continuing to act as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

8. The applicant and the Government each filed further observations (Rule 59 § 1) on the merits. In addition, the Irish Human Rights Commission and the European Centre for Law and Justice had been given leave by the President of the Chamber (Article 36 § 2 of the Convention and Rule 44 § 3) to intervene in the written procedure and their submissions to the Chamber were admitted to the Grand Chamber file.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 March 2013 (Rule 59 § 3).

10. There appeared before the Court:

(a) *for the Government*

Mr P. WHITE, *Agent*,
Mr F. MCDONAGH, Senior Counsel,
Mr C. POWER, Barrister, *Counsel*,
Ms S. FARRELL, Office of the Attorney General,
Ms M. MCGARRY, Department of Education and Skills, *Advisers*;

(b) *for the applicant*
Mr D. HOLLAND, Senior Counsel,
Mr A. KEATING, Senior Counsel, *Counsel,*
Mr E. CANTILLON, Solicitor,
Mrs M. SCRIVEN, Solicitor, *Representatives*.

The applicant also attended.

11. The Court heard addresses by Mr Holland and Mr McDonagh.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1964 and lives in Cork, Ireland.

A. Background

13. The following facts were not contested by the parties.

14. The applicant attended Dunderrow National School from 1968. The school was owned, through trustees, by the Catholic Bishop of the Diocese of Cork and Ross who was recognised by the Department of Education and Science ("the Department") as the school's patron. The manager (S.), acting on behalf of the bishop, was the local parish priest. The latter being elderly and infirm, a local priest (Ó.) was the *de facto* manager who acted on behalf of, and in the interests of, S. The term "manager" used below refers both to Ó. and to the management function he performed. Dunderrow National School had two teachers, one of whom (L.H.) was the school's principal, a married man. Dunderrow was one of four national schools in the applicant's parish.

15. In 1971 a parent of a child complained to the manager that L.H. had sexually abused her child. That complaint was not reported to the police, to the Department or to any other State authority and was not acted upon by the manager.

16. During the first six months of 1973 the applicant was subjected to approximately twenty sexual assaults by L.H. during music lessons in his classroom. During the time she attended those lessons, the applicant and her parents were unaware of the allegation made in 1971 about L.H.

17. In September 1973 other parents brought to the applicant's parents' attention similar allegations concerning L.H. Following a meeting of parents chaired by the manager about this, L.H. went on sick leave. In September 1973 he resigned from his post. Those allegations were not reported at that time to the police, to the Department or to any other State authority. In a brief conversation, the applicant's mother asked her whether L.H. had touched her. The applicant responded to the effect that something of a sexual nature had happened but she did not recall the conversation going any further. In January 1974 the manager notified the Department that L.H. had resigned and named his replacement. Soon thereafter L.H. took up a position in another national school where he taught until his retirement in 1995.

18. Between 1969 and 1973, the inspector assigned to the region visited Dunderrow National School on six occasions which was, as he later stated in evidence, an above average number of visits. He met with L.H. and S. He attended parent meetings on the question of Dunderrow's amalgamation with other schools. No complaint about L.H. was made to him. He observed the teaching work of L.H. and considered it satisfactory.

19. The applicant suppressed the sexual abuse. While she had significant psychological difficulties, she did not associate those with the abuse. In 1996 she was contacted by the police who were investigating a complaint made in 1995 by a former pupil of Dunderrow National School against L.H. The applicant made a statement to the police in January 1997 and was referred for counselling. During the investigation a number of other pupils made statements. L.H. was charged with 386 criminal offences of sexual abuse involving some twenty-one former pupils of the school during a period of about ten years. In 1998 he pleaded guilty to twenty-one sample charges and was sentenced to imprisonment. His licence to teach was withdrawn by the Minister for Education ("the Minister") under Rule 108 of the National School Rules 1965 ("the 1965 Rules").

20. In or around June 1998, and as a consequence of the evidence of other victims during the criminal trial and subsequent medical treatment, the applicant realised the connection between her psychological problems and the abuse by L.H. and understood the extent of those problems.

B. Criminal Injuries Compensation Tribunal ("the CICT")

21. In October 1998 the applicant applied to the CICT for compensation. An initial award (44,814.14 euros (EUR)) was made by a single judge. The applicant appealed to a CICT panel. She claimed that the CICT gave her the option of continuing her appeal (at the risk of finding that her CICT application would be rejected as out of time) or of accepting the initial offer of the CICT with some additional expenses (EUR 53,962.24, the non-pecuniary aspect being EUR 27,000). The applicant accepted the offer by

letter of 5 November 2002 and gave the standard undertaking to repay the CICT award from any other award she may receive, from whatever source, in relation to the same injury. The award was made on an *ex gratia* basis. Since the State is never a party to CICT proceedings, it became aware of this award later before the High Court (see directly below).

C. Civil action for damages (No. 1998/10555P)

1. High Court

22. On 29 September 1998 the applicant instituted a civil action against L.H. and the Minister, as well as against Ireland and the Attorney General, claiming damages for personal injuries suffered as a result of assault and battery including sexual abuse by L.H. Her claim against the latter three defendants ("the State Defendants") was threefold: (a) negligence by the State arising out of the failure of the State Defendants in relation to the recognition, examination and supervision of the school and in failing to put in place appropriate measures and procedures to protect against, and put a stop to, the systematic abuse by L.H. since 1962; (b) vicarious liability of the State Defendants for the acts of L.H. since, *inter alia*, the true relationship between him and the State was one of employment; and (c) liability given the applicant's constitutional right to bodily integrity, the responsibility of the State Defendants to provide primary education under Article 42 of the Constitution and the measures put in place to discharge that responsibility.

23. Since L.H. did not file a defence, on 8 November 1999 the applicant obtained judgment in default against him. On 24 October 2006 the High Court assessed and awarded damages payable by L.H. in the sum of EUR 305,104, comprising EUR 200,000 in general damages, EUR 50,000 in aggravated damages, EUR 50,000 in exemplary damages, and EUR 5,104 in special damages. The applicant took enforcement proceedings. L.H. claimed he had insufficient means and she obtained an instalment order of EUR 400 per month. The first payment was received in November 2007 so that she has been paid in the region of EUR 31,000 to date. She registered a judgment mortgage against that part of the family home owned by L.H.

24. As regards her case against the State Defendants, she requested a Professor Ferguson to advise her on the question of the adequacy of child-protection mechanisms in Ireland in the 1970s. He responded by letter of 14 April 2003. Professor Ferguson agreed that, if the child-protection protocols existing in 2003 had been in place in 1973, it was very likely that the applicant's abuse would have been acted upon in a manner which would have ensured the promotion of her welfare. He feared that pleading the case on the basis of what the State should have known at the time would be

unsuccessful because it would not be possible to project onto the past the knowledge and systems of accountability that existed in the present day.

25. The High Court hearing against the State Defendants began on 2 March 2004. On 5 March 2004, while the applicant was presenting her evidence, the High Court judge, in response to the applicant's complaint regarding the absence of a State system for adverting to and addressing sexual abuse in national schools, asked Counsel for the applicant as follows:

> "What evidence do I have, or what should I have deduce[d] from the evidence that has been given that either the system in operation was a bad system, and I will come back to that, or that there was an alternative system that should have been applied, and what that alternative system might have been."

26. When the applicant's case concluded, the State Defendants applied for a direction to strike out the case on the basis that no prima facie case had been made out by the applicant as regards all three grounds, submitting, *inter alia*, that there was no evidence of negligence. On 9 March 2004 the High Court accepted the State Defendants' application, the court being "satisfied that the plaintiff had not established a case in negligence against the [State Defendants]" (the "non-suit" order). The court did not and was not called upon to distinguish between the two bases of the negligence claim. However, a prima facie case had been made out on the questions of vicarious and constitutional liability and evidence would be called from the defendants on those matters. The trial finished on 12 March 2004.

27. On 20 January 2006 the High Court delivered judgment. It found that the action was not statute barred. It also concluded that the State was not vicariously liable for the sexual assaults perpetrated by L.H. given the relationship between the State and the denominational management of national schools. Although counsel for the applicant had orally suggested that the State should be vicariously liable for the inaction of the manager, the High Court judgment did not address this point. Finally, the High Court found that no action lay for a breach of a constitutional right where existing laws (in this case, tort) protected that right. The costs of the proceedings against the State Defendants were awarded against the applicant.

*2. Supreme Court (*O'Keeffe v. Hickey*, [2008] IESC 72)*

28. In May 2006 the applicant appealed to the Supreme Court. Her Notice of Appeal challenged the finding on vicarious liability and referred to two matters: the absence of reasons for the interim ruling of 9 March 2004 and the High Court judgment's failure to rule on the vicarious liability for the inaction of the manager. Mr Justice Hardiman described the appeal as limited to the State's vicarious liability for the acts of L.H. and the manager, although he commented in his judgment on the other two initial claims of the applicant (direct negligence and the constitutional claim). Mr Justice Fennelly also considered that the appeal concerned only vicarious

liability for the acts of L.H., although he refused to accept that the State was vicariously liable for the manager.

29. The appeal was heard from 11 to 13 June 2006. By a majority judgment of 19 December 2008 (Hardiman J and Fennelly J, with whom Chief Justice Murray and Mr Justice Denham concurred and Mr Justice Geoghegan dissented), the Supreme Court dismissed the appeal.

30. Hardiman J described in detail the legal status of national schools. While the arrangements for national-school education might "seem rather odd today", they had to be understood in the context of Irish history in the early nineteenth century. Following denominational conflict and the later concession of Catholic emancipation in 1829, the dissenting churches and the Catholic Church wished to ensure that children of their denominations be educated in schools controlled by the denomination and not by the State or the established (Anglican) Church. Those churches were "remarkably successful" in achieving this aim: from the very beginning of the Irish system of national education (encapsulated in the "Stanley letter" of 1831), State authorities paid for the system of national education "but did not manage it or administer it at the point of delivery". The latter function was left to the local denominational manager. While State funding was accorded on a proportionate basis to all denominational schools, the population was at the time overwhelmingly Catholic so that the majority of national schools had Catholic patrons and managers.

31. Hardiman J went on to describe as "remarkable" the fact that, whilst in nineteenth-century Europe firmer distinctions were being drawn between Church and State and Church influence in the provision of public services (including education) was ebbing, in Ireland the position of the Church became stronger and more entrenched. He adopted the evidence of one expert witness (in the history of education in Ireland) who described the position after the inception of the Irish Free State in 1922 and noted that the Catholic managers in this "managerial" system

> "were very clearly articulate and very absolutely ... precise in how they interpreted what the situation was for national schools in the new Ireland ... It had to be Catholic schools under Catholic management, Catholic teachers, Catholic children".

32. That expert witness went on to describe the answer of the Catholic Church in the 1950s to a request by a teachers' trade union to have local committees deal with maintaining and repairing school buildings. The Catholic Church had responded that there could be no interference whatever with the "inherited tradition of managerial rights of schooling". The limited proposal of the union was considered to be the thin edge of the wedge because, in due course, the request might be to interfere with "other aspects of the manager's authority *vis-à-vis* the appointment and dismissal of teachers which was of course the key concern that had been fought for and won over the years". Hardiman J referred to the "urgent desire" of the denominations to maintain their role in primary education.

33. As Hardiman J explained, the Constitution reflected this managerial structure: the obligation in Article 42 § 4) on the State to "provide for" free primary education reflected a largely State-funded, but entirely clerically administered, system of education. As a result there were approximately 3,000 national schools in Ireland: most were under the control of Catholic patrons and managers, a few were under the control of other denominations and even fewer were controlled by non-denominational groups.

34. Hardiman J noted that, in recent times and after more than a century and a half, the provision of education was belatedly and at least partially placed on a statutory basis by the Education Act 1998; prior to that Act the system had been administered by the 1965 Rules as well as by other ministerial letters, circulars and notes.

35. As to what could be gleaned from the 1965 Rules, Hardiman J noted:

> "The Minister laid down rules for national schools but they were general in nature and did not allow him to govern the detailed activities of any individual teacher. He inspected the schools for their academic performance, other than religious instruction, but it did not go further than that. He was ... deprived of the direct control of the schools, and of the enormous power which that brings, because 'there was interposed between the State and the child the manager or the committee or board of management'. Equally, the Minister did not appoint the manager or the teacher or directly supervise him. This, indeed, was the essence of the 'managerial system'. I cannot see, on the evidence, that he had any scope whatever to make a personal judgment about either of these two individuals. Moreover, it seems to have been instinctively recognised by the parents who complained about the first defendant that the person with direct authority to receive the complaint and do something about it was the clerical and clerically appointed manager. No complaint, on the evidence, was directed to the Minister or to any State body. The matter was handled, so to speak, 'in house' at the election of the complainants. The end result of the process was a voluntary resignation followed by the employment of [L.H.] in another school in the vicinity.
>
> All these factors tending to distance the Minister and the State authorities from the management of the school and the control of the first defendant are direct consequences of the long established system of education, described above and mandated in the Constitution whereby the Minister pays and, to a certain extent, regulates, but the schools and the teachers are controlled by their clerical managers and patrons. It is not the concern of the Court either to endorse or to criticise that system but merely to register its existence and the obvious fact that it deprives the Minister and the State of direct control of schools, teachers, and pupils."

36. Hardiman J observed that the sexual abuse of a pupil was the negation of what L.H. was employed to do but he also found that in 1973 it "was an unusual act, little discussed, and certainly not regarded as an ordinary foreseeable risk of attending at a school". He considered it "notable" that she did not sue the patron, the diocese of which he was bishop, his successors or his estate, the trustees of the property of the Diocese of Cork and Ross (owners of the school), the manager or his estate or successors.

37. Hardiman J concluded that, having regard to the relevant test for vicarious liability and to the above-described arrangements for the control and management of national schools, the State Defendants were not liable to the applicant for the wrongs committed against her. In particular, even applying the wider form of vicarious liability invoked, the Minister's absence of direct control over L.H., long since ceded to the manager and the patron, prevented a finding against the Minister. The relationship of L.H. and the State – a "triangular one with the Church" – was entirely *sui generis* and a product of Ireland's unique historical experience. The manager was

> "the nominee of the patron, that is of a power other than the Minister and he did not inform the Minister of any difficulties with, or complaints about, [L.H.] or of his resignation and appointment to teach elsewhere until they were *faits accomplis*. He was the agent not of the Minister, but of the Catholic Church, the power in whose interest the Minister was displaced from the management of the school".

38. Hardiman J commented on two of the applicant's original claims which had "not been proceeded with".

39. As to the claim of negligence by the State, he remarked

> "... this is a claim which could more appropriately be made against the manager. It was he who had the power to put in place appropriate measures and procedures governing the running of the school. The Minister can hardly be responsible for a failure to 'cease' a course of action of whose existence he was quite unaware".

40. As to the claim about the responsibility of the State in the provision of primary education under Article 42 of the Constitution and the measures put in place to discharge that responsibility, Hardiman J stated:

> "I have already analysed the terms of Article 42 from which it will be seen that the Minister, in the case of this national school, was simply providing assistance and subvention to private and corporate (i.e. Roman Catholic) endeavour, leaving the running of the school to the private or corporate entities. The Minister is thereby, as Kenny J pointed out in *Crowley v. Ireland* [1980] I.R. 102, deprived of the control of education by the interposing of the patron and the manager between him and the children. These persons, and particularly the latter, are in much closer and more frequent contact with the school than the Minister or the Department.
>
> I do not read the provisions of Article 42.4 as requiring more than that the Minister shall 'endeavour to supplement and give reasonable aid to private and corporate educational initiative', to 'provide for free primary education'. ... In my view the Constitution specifically envisages, not indeed a delegation but a ceding of the actual running of schools to the interests represented by the patron and the manager."

41. Hardiman J concluded by pointing out that nothing in the judgment could be interpreted as suggesting liability on the part of the Church and, in any event, it was quite impossible to do so because those authorities had not been heard by the Supreme Court since the applicant had not sued them.

42. Fennelly J, who delivered the other majority judgment, began by noting that the "calamity of the exploitation of authority over children so as to abuse them sexually" had shaken society to its foundations. Cases of sexual abuse had preoccupied the criminal courts and the Supreme Court for

many years and it was surprising that that court was confronted for the first time with questions relating to the liability of institutions including the State for sexual abuse of schoolchildren in a national school by a teacher.

43. Fennelly J also described in some detail the history and consequent legal status of national schools, which system had survived independence in 1922 and the enactment of the Constitution in 1937. He accepted the expert's evidence that it was not a State system but rather a "State-supported system". He noted the clear division of power between the State (funding and fixing the curriculum) and the manager (day-to-day running of the school including hiring and firing teachers), noting that the different religions were determined to preserve and guard their own distinct religious education so that national schools developed on a denominational basis.

44. He considered inspectors to be a crucially important part of the system of State oversight and maintenance of standards which enabled the Minister to be satisfied about the quality of the system. However, he noted that the inspection regime did not alter the division of responsibilities between the State and the manager, the inspectors having no power to direct teachers in the carrying out of their duties. The 1965 Rules reflected this allocation of responsibilities between the Church and State authorities. Even if, in modern times, the State played a more intrusive role, responsibility for day-to-day management remained with the manager. He concluded that the State was not vicariously liable for the acts of L.H. or, for the same reasons, for the failure of the manager to report the 1971 complaint to the State. L.H. was not employed by the State but, in law, by the manager. While L.H. had to have the qualifications laid down by the Minister and had to observe the 1965 Rules and while the State had disciplinary powers in those respects, L.H. was not engaged by the State and the State could not dismiss him.

45. Referring back to the reference in the Notice of Appeal to the State's liability for the failure of the manager to report the 1971 complaint, Fennelly J concluded that "[f]or the same reason, insofar as it is necessary to say so, there can be no liability for the failure of [the manager] to report the 1971 complaint. [The manager] was not the employee of the second defendant."

46. Geoghegan J dissented. He accepted that neither the Department nor its inspectors had any knowledge of the assaults. He noted that, for all practical purposes, most primary education in Ireland took the form of a joint enterprise between Church and State and he considered that that relationship was such that there was a sufficient connection between the State and the creation of the risk as to render the State liable. Geoghegan J relied, notably, on the role of school inspectors. He examined in some detail the evidence given by, and concerning the role of, school inspectors noting, *inter alia*, that if an allegation of sexual assault by a teacher on a national-school pupil was considered well-founded by an inquiry set up by the Department, it could lead to the withdrawal of recognition or to a police

investigation and, if the police found the complaint justified, to the withdrawal of the teacher's licence to teach.

47. By a judgment of 9 May 2009 the Supreme Court vacated the High Court order for costs against the applicant since it was not disputed that hers was an important and complex test case. It determined that each party had to bear its own costs related to the action against the State Defendants.

48. The applicant was legally represented throughout the civil proceedings, although she did not have legal aid.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Primary education in Ireland

1. Background

49. The Court refers to the description of the history and structure of the national-schools system of primary education provided by the Supreme Court in *O'Keeffe v. Hickey*, ([2008] IESC 72) and, notably, by Hardiman J and Fennelly J (see paragraphs 30-35 and 42-44 above).

50. Section 4 of the School Attendance Act 1926 required parents to ensure their children attended a national school or another suitable school, unless there was a reasonable excuse for not so doing, for example if the child was receiving suitable primary education elsewhere, if there was no national school accessible to which the parent did not object on religious grounds, or if the child was prevented from attending by some other sufficient cause. Attendance in full-time education was therefore compulsory for all children between 6 and 14 years of age until 1969 when the official school-leaving age was increased to 16. Primary education has been universally free in Ireland since the nineteenth century.

51. The vast majority of children attending primary school attended "national schools" which are State-financed and denominational primary-education establishments. Department reports for 1972/73 and 1973/74 recorded the existence of 3,776 and 3,688 national schools, respectively. The Department's statistical report for February 1973 indicated that 94% of primary schools were national schools. According to the 1965 *Investment in Education Report*, 91% of national schools were Catholic-run and catered for 97.6% of national-school pupils while 9% were Protestant-run, catering for 2.4% of such pupils. A 2011 report by the Department notes that approximately 96% of primary schools remained under denominational patronage and management (including 89.65% under Catholic patronage and management).

52. In 1963/64 there were 192 fee-paying non-State-aided primary schools for approximately 21,000 children which represented about 4 to 4.5% of all primary-school pupils. The vast majority of these schools were in urban areas, the great majority of which were in Dublin.

53. The "Commission on School Accommodation's Report on the Revised Criteria for the Establishment of New Primary Schools" in February 2011 confirmed that, until the 1970s, the only choice effectively available to parents was the local national school. It considered that by the end of the 1970s there was evidence of change with the establishment in 1978 of the first multi-denominational school and a growth in Irish language inter-denominational and multi-denominational schools.

2. The 1937 Constitution

54. Article 42 is entitled "Education" and reads as follows:

> "1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
>
> 2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
>
> 3. (1) The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
>
> (2) The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
>
> 4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
>
> 5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

55. In *McEneaney v. the Minister for Education* ([1941] IR 430), the Supreme Court observed that for "more than a century it has been recognised that the provision of primary education is a national obligation". Article 42 § 4) conferred on children a right to receive free primary education and the words "provide for" meant that the State did not itself have to educate children but rather had to ensure that appropriate education was provided to them (*Crowley v. Ireland* [1980] IR 102).

3. Relevant legislation

56. The Children Act 1908 governed child protection and contemplated State intervention in the form of taking a child into care in cases of inter-familial abuse. The Education Act 1998 ("the 1988 Act") was the first comprehensive legislation on education since the foundation of the State. It put on a statutory basis the State-funded and privately managed nature of primary education, making no fundamental structural changes thereto.

4. Rules for national schools ("the 1965 Rules") and relevant ministerial circulars

57. Rules in place before independence in 1922 were applied to national schools until the 1965 Rules were adopted by the Department. While the 1965 Rules were neither primary nor secondary legislation, they have legal force and form part of the relevant statutory regime (*Brown v. Board of management of Rathfarnham Parish national school and Others* ([2006] IEHC 178). Otherwise, the Department regulated matters within its remit by notes, circulars and other official Department instruments. The Minister could withdraw recognition from a school or withdraw an individual teacher's licence if the 1965 Rules were not complied with (Rules 30 and 108 of the 1965 Rules, respectively).

5. Managers and boards of management

58. Rule 15 of the 1965 Rules provided that the manager was charged with the direct government of the school, the appointment of the teachers and, subject to the Minister's approval, their removal. A manager was to visit a school and ensure the 1965 Rules were complied with (Rule 16). Subject to the authority of the manager, the principal was responsible for discipline, the control of the other members of the teaching staff and all other matters connected with school arrangements (Rule 123(4)).

59. Rule 121 set out rules for teachers' conduct: they had to, *inter alia*, act in a spirit of obedience to the law; pay the strictest attention to the morals and general conduct of their pupils; take all reasonable precautions to ensure the safety of their pupils; and carry out all lawful instructions issued by the manager. Rule 130 required teachers to have a lively regard for the improvement and general welfare of their pupils, to treat them with kindness, combined with firmness, and to govern them through their affections and reason and not by harshness and severity.

60. Most primary schools now have boards of management. A ministerial circular (16/76) set out arrangements until the 1998 Act put the boards on a statutory basis. Section 14 of that Act provides that it is the duty of the patron to appoint, where practicable and in accordance with the "principle of partnership", a board the composition of which is agreed

between the Minister and the education partners. As bodies corporate with perpetual succession, the boards could sue and be sued.

6. Inspectors

61. The 1965 Rules envisaged that the Minister and persons authorised by him (inspectors) could visit and examine the schools whenever they thought fit (Rule 11). Rule 161 defined inspectors as being agents of the Minister required to supply the Minister with such local information as he or she might require for the effective administration of the system. They were required to call the attention of managers and teachers to any rules which appeared to them to be being infringed. They were entitled to communicate with the manager with reference to the general condition of the school "or to matters requiring the manager's attention, making such suggestions as they may deem necessary". An inspector was required to pay frequent incidental visits to the schools in his district and to make obligatory annual visits to assess the work of teachers. Circular 16/59 provided guidance to inspectors as to their role *vis-à-vis* managers and teachers, as to the manner in which incidental and general inspections were to be carried out and as regards their assessment of the work of teachers.

7. Complaints

62. A Guidance Note of 6 May 1970 outlined the practice to be followed as regards complaints against teachers. The complainant was to be informed that the matter was one for the manager, in the first instance, and asked to clarify whether the complaint had been notified to the manager. The manager had to obtain observations from the relevant teacher and to forward those observations, together with the manager's own views, to the Department. The Deputy Chief Inspector within the Department would then identify whether an investigation was required. If so, the inspector was to interview the manager, the teacher and parents. If an inquiry led to relevant findings against the teacher, Rule 108 authorised the Minister to take action against a teacher if the latter had conducted him or herself improperly or failed or refused to comply with the 1965 Rules. The Minister could pursue the teacher's prosecution, withdraw recognition and/or withdraw or reduce the teacher's salary. As noted above, the manager could dismiss a teacher, subject to the Minister's approval.

B. Criminal law and related matters

63. The sexual abuse of a minor was prohibited by sections 50 and 51 of the Offences Against the Person Act 1861 (as amended). The Criminal Law Amendment Act 1935 ("the 1935 Act") was designed to make further provision for the protection of young girls and to amend the law concerning

sexual offences. Sections 1 and 2 of the 1935 Act created the offences of defilement of girls under 15 years of age and of girls between 15 and 17 years of age. Section 14 of the 1935 Act also provides:

> "It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault."

Consequently, any girl under 15 years of age cannot consent to any form of sexual contact and any such contact was (and still is) a crime. In addition to these statutory offences, these acts amounted to ordinary assault.

64. There was no limitation period applicable to indictable offences in Ireland so that an offender could be prosecuted until the end of his or her life.

65. A victim can apply for compensation for injury suffered as a result of violent crime under the Scheme of Compensation for Personal Injuries Criminally Inflicted. The Scheme is administered by the CICT. The prescription period is three months, but it can be extended. The initial decision is taken without a hearing and a hearing is held in private before a division of the CICT. The appeal decision is final. Compensation is paid on an *ex gratia* basis. It covers expenses and losses (out-of-pocket expenses and bills less social welfare payments, salary or wages received while on sick leave) and, until 1986, non-pecuniary loss.

C. Civil law and related matters

66. A tort is a civil wrong which causes someone to suffer loss resulting in legal liability for the person who commits the tortious act, the tortfeasor. The tort of negligence requires proof that there was a duty of care between the plaintiff and the defendant (which involves establishing the existence of a relationship of proximity between the parties such as would call for the exercise of care by one party towards the other), that that duty was breached and that that breach was causative of damage (for example, *Beatty v. The Rent Tribunal* [2005] IESC 66).

67. Vicarious liability is the attribution of liability to a person or entity who did not cause injury and who may not be at fault but who has a particular legal relationship to the person who did cause the injury, and who himself was at fault, including through negligence. Legal relationships that can lead to vicarious liability include the relationship of employer and employee.

68. It is also possible to rely on the Constitution to seek redress against an individual for a breach of one's constitutional rights. In *Meskell v. CIE* [1973] IR 121), the court stated:

> "... if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right that person is entitled to seek redress against the person or persons who have infringed that right."

Such a resort to constitutionally created torts only occurs if there is a gap in existing tort law which needs to be supplemented.

D. Relevant public investigations and child-protection developments

1. The Carrigan Report 1931

69. The Carrigan Committee was appointed in 1930 to consider whether certain criminal statutes needed amendments and to make proposals to deal with "the problem of juvenile prostitution". It held seventeen sittings, heard twenty-nine witnesses and considered other written submissions.

70. On 20 August 1931 the Committee submitted its final report to the Minister for Justice. The report recommended a combination of social and legislative reforms as regards, *inter alia*, sexual crimes against minors.

71. The Police Commissioner was an important witness before the Committee. Prior to appearing, he submitted statistical information he had gleaned from responses to a circular issued by him to over 800 police stations about the prosecution of sexual offences from 1924 to 1930 including for the offences of "defilement, carnal knowledge or rape" of girls under 10 years of age, between 10 and 13, between 13 and 16, between 16 and 18 and over 18 years of age. He submitted a detailed analysis of those statistics noting, *inter alia*, that there was an "alarming amount of sexual crime increasing yearly, a feature of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years of age". He was of the opinion that less than 15% of sexual crime was prosecuted for various reasons including the reluctance of parents to pursue matters for various reasons.

72. On the advice of the Department of Justice (in a memorandum accompanying the report), neither the evidence before, nor the report of, the Carrigan Committee was published. In so advising, the Department of Justice criticised the report in several respects and noted that the obvious conclusion to be drawn from it was that the ordinary feelings of decency and the influence of religion had failed in Ireland and that the only remedy was by way of police action. The debate on the report took place in a parliamentary committee. Several recommendations were implemented including the adoption of the Criminal Law Amendment Act 1935 (see paragraph 63 above). The Department of Justice's files on this report were published in 1991. Further archival material was released in 1999.

2. Reformatory and industrial schools

73. Reformatory schools were established in the 1850s and industrial schools in the 1860s. These schools were mainly denominational and State-funded. The former received young offenders but there were never more

than a few of such schools. However, there were fifty or so industrial schools which were schools for the training of children: children were lodged, clothed and fed as well as taught (section 44 of the Children Act 1908). From 1936 to 1970, a total of 170,000 children and young persons (involving about 1.2% of the relevant age group) entered industrial schools. The average stay was approximately seven years. The great majority of children were committed to industrial schools because they were "needy" and the next most frequent grounds of entry were involvement in a criminal offence or non-attendance at school. Each of these grounds involved committal by the District Court. Section 7 of the Rules and Regulations for Industrial Schools 1933 provided that children's literary instruction would be in accordance with the national-schools programme and set down recommended hours for both literary instruction and industrial training.

3. The Cussen and Kennedy Reports on reformatory and industrial schools

74. The Cussen Report, published in 1936, was commissioned by the State into the running of reformatory and industrial schools. The report endorsed the system contingent on its implementing fifty-one conclusions and recommendations. The system continued largely unchanged until a later committee, set up by the State and chaired by Justice Eileen Kennedy, surveyed these schools. The Kennedy Report was published in 1970, when the reformatory and industrial school system was already in decline. The closure of certain schools was recommended and other proposals for change were made. It found, notably, that the system of inspection had been totally ineffective and it recommended, together with other reporting mechanisms, the establishment of an independent statutory body to ensure the highest standards of child care and to act, *inter alia*, as a watchdog.

4. The Ryan Report on reformatory and industrial schools

75. Following public disclosures and controversies in the late 1980s and early 1990s about, notably, clerical child abuse in Ireland, the Prime Minister issued the following written statement on 11 May 1999:

> "On behalf of the State and of all citizens of the State, the Government wishes to make a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue."

76. The Commission to Inquire into Child Abuse Act 2000 was adopted (amended in 2005). A Commission (later known as the Ryan Commission) investigated and reported on child abuse (including sexual abuse) primarily in reformatory and industrial schools. Since there were relatively few reformatory schools, the Commission's work principally concerned industrial schools.

77. The Commission's mandate mainly covered the 1930s to 1970s, the period between the Cussen and Kennedy Reports. Evidence was collected over a period of nine years and included voluminous documentation, expert evidence and the testimony of around 1,500 complainants. The "Investigation Committee" heard evidence from witnesses who wished to have their allegations investigated whereas the "Confidential Committee" provided a private forum for witnesses to recount abuse suffered by them. The evidence to the latter committee was therefore unchallenged.

78. The Commission reported in May 2009 ("the Ryan Report"). It found that there had been widespread, chronic and severe physical, including sexual, abuse of children mainly by clergy in the reformatory and industrial schools. While the religious authorities managed cases of abuse so as to protect the congregations and minimise the risk of public disclosure, the report confirmed that they had reported complaints of sexual abuse of pupils by lay persons to the police. The Secretary General of the Department, in evidence to the Investigation Committee, regretted the significant failings in its responsibility to children in the reformatory and industrial schools: while those institutions were privately owned and operated, the State had a clear responsibility to ensure that the care children received was appropriate and the Department had not ensured a satisfactory level of care. Complaints of clerical child abuse were seldom reported to the Department itself and it had dealt inadequately with the complaints which were received.

79. Chapter 14 of Volume 1 ("the Brander Chapter") examined the career of "a serial sexual and physical abuser" who was a lay teacher in around ten schools (including six national schools) for forty years ending in 1980. After retirement, he was convicted on numerous charges of sexual abuse of pupils. The report noted that, when parents had tried to challenge his behaviour in the 1960s and 1970s, he was protected by diocesan and school authorities and moved from school to school. Evidence was given of complaints to the police in the 1960s. Complaints to the Department in the early 1980s were ignored, an attitude which, as the Department accepted before the Commission, was impossible to defend even by the standards of the time. Not only was the investigation shocking in itself, but it illustrated "the ease with which sexual predators could operate within the educational system of the State without fear of disclosure or sanction".

80. Volume III comprised the Report of the Confidential Committee which heard evidence of abuse from 1930 to 1990 from 1,090 persons about 216 institutions which comprised mainly reformatory and industrial schools but also included national schools. The Committee heard eighty-two reports of abuse from seventy witnesses in relation to seventy-three primary and second level schools: most concerned children leaving prior to or during the 1970s and sexual abuse was reported by over half of the witnesses. Contemporary complaints were made, *inter alia*, to the police and the

Department. Certain witnesses emphasised the public, and therefore evident, nature of the sexual abuse.

81. Volume IV, Chapter 1, concerned the Department which had legal responsibility under the Children Act 1908 for children committed to the reformatory and industrial schools. The Department had insufficient information because its inspections were inadequate. Department officials were aware that abuse occurred and should have exercised more of the Department's ample legal powers over the relevant schools in the interests of the children, such as the power to remove a manager. However, the Department made no attempt to impose changes that would have improved the lot of the children in those schools. Indeed:

> "The failures by the Department ... [could] also be seen as tacit acknowledgment by the State of the ascendancy of the Congregations and their ownership of the system. The Department['s] Secretary General ... [stated] that the Department had shown a 'very significant deference' towards the religious Congregations. This deference impeded change, and it took an independent intervention in the form of the Kennedy Report in 1970 to dismantle a long out-dated system."

82. Volume V contained copies of, *inter alia*, expert reports. Certain complainants had briefed a senior lecturer in Irish history, Professor Ferriter, to address the proposition that the State had only become aware, at a policy level, of the physical abuse of minors in the 1970s and of the sexual abuse of minors in the 1980s. The Commission took over as sponsor of his report and annexed it to its own report. Professor Ferriter's report put the events before the Ryan Commission in their historical context. He described the Carrigan Report (1931) as a "milestone" as regards the provision of compiled information about the rate of prosecution of sexual crime in Ireland. He also provided and analysed later prosecution statistics (from the 1930s to the 1960s) drawn from criminal-court archives. The police had been quite vigorous in their prosecution of paedophiles but the fact that most sexual crimes were not actually reported suggested that such crime was a serious problem throughout the twentieth century in Ireland. Professor Ferriter went on to point out that the criminal-court archives demonstrated a "consistently high level of sexual crime directed against young boys and girls". While most of those cases were not recorded in the media, he considered that the police had extensive contemporaneous knowledge of the existence of such crimes.

83. Volume V annexed a research report completed by Mr Rollison, requested by the Ryan Commission itself and entitled "Residential Child Care in England, 1948-1975: A History And Report". He set out the history of residential school care in England during the period 1948 to 1975. Under the heading "Abuse", Mr Rollison indicated that, prior to the mid-1980s, there was "little professional or adult sensitisation either to the word or to the possibility of abuse" and that it was "essential to avoid the trap and potential excesses" of judging this period by today's standards.

84. The Ryan Report contained several recommendations. It was considered important, as a first step, for the State to admit that abuse of children occurred because of failures of systems and policy, of management and administration, as well as of senior personnel who were concerned with the reformatory and industrial schools. A series of other recommendations were made about the development and review of child-orientated State policies and services, about accountability, about the necessity for adequate and independent inspections of all services to children and for the fullest implementation of "Children First: National Guidelines for the Protection and Welfare of Children" (see paragraph 89 below).

5. Later reports on sexual abuse

85. Later public inquiries and reports criticised the response by the Catholic Church to allegations of child sexual abuse by the clergy.

86. The Ferns Report 2005 identified over 100 complaints of child abuse made between 1962 and 2002 against twenty-one priests of the Diocese of Ferns. The report criticised the response of the Church but referenced few complaints to the State authorities prior to or during the 1970s.

87. The Murphy Report 2009 concerned the handling by the Church and State of complaints of child abuse made between 1975 and 2004 against clergy of the Archdiocese of Dublin. The report accepted that child sexual abuse by clerics was widespread during the relevant period. While the need for child-protection legislation had been clearly recognised in the early 1970s, the legislative delay until the early 1990s was described as extraordinary.

88. In 1996 the Irish Catholic Bishops adopted a framework document entitled "Child Sexual Abuse: Framework for a Church Response". The Cloyne Report 2011 examined the response of the Catholic Church authorities to complaints made to them about clerical sexual abuse after the framework document was adopted, a point at which those authorities could reasonably be considered to have been aware of the extent of the problem and of the manner of dealing with it. The report was highly critical of the response of the Church, even during this later period.

6. Additional child-protection developments

89. In November 1991 the Department issued guidelines on procedures for dealing with allegations or suspicions of child abuse (Circular 16/91). They were updated in 2001 ("Child Protection – Guidelines and Procedures") and in 2006 ("Child Protection Guidelines and Procedures for Primary Schools"). In 1999 the first comprehensive framework for child protection was adopted by the State ("Children First: National Guidelines for the Protection and Welfare of Children"). These guidelines were to assist in the identification and reporting of child abuse and to improve

professional practices in organisations providing services to children and families. The code has been updated since then, most recently in 2011. The Government have published the Children First Bill 2012 with a view to ensuring effective implementation of these guidelines.

90. The Ombudsman for Children was established in 2002 to promote public awareness of children's rights. New and focused criminal offences were adopted including the offence of reckless endangerment of a child (section 176 of the Criminal Justice Act 2006). Various compensation schemes have been set up providing redress mainly to abuse victims from reformatory and industrial schools. The "children's rights" referendum of 2012 led to the approval of the thirty-first amendment to the Constitution which proposes to insert provisions, orientated towards child rights and protection, into Article 42 of the Constitution. The amendment has not come into force pending litigation.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Council of Europe

91. The Parliamentary Assembly of the Council of Europe ("PACE") first made recommendations concerning child protection in 1969 with its Recommendation 561 entitled "Protection of Minors against ill-treatment". Although primarily concerned with the beating of children in the home, it recommended that States be invited to "take all necessary measures to ensure that the competent ministries and departments are aware of the gravity and extent of the problem of children subject to physical or mental cruelty" and, further, to "request the official services responsible for the care of maltreated children to coordinate their action as far as possible with the work undertaken by private organisations". Recommendation No. R (79) 17 of the Committee of Ministers on the protection of children against ill-treatment builds on this PACE Recommendation: governments were to take all necessary measures to ensure the safety of abused children "where the abuse is caused by acts or omissions on the part of persons responsible for the child's care or others having temporary or permanent control over him".

92. The European Social Charter 1961 provides in Article 7 that children and young persons have the right to special protection against physical and moral hazards to which they are exposed.

B. The United Nations

93. The Geneva Declaration of the Rights of the Child was adopted by the League of Nations in 1924 and emphasised, as a preamble to its five

protective principles, that mankind owed to the child "the best that it had to give". By unanimous vote in 1959, the General Assembly of the United Nations adopted its Declaration of the Rights of the Child extending the 1924 Declaration. This 1959 Declaration is prefaced by the general principle that a child, by reason of his physical and mental immaturity, needed special safeguards and care. Principle 2 provides that a child shall enjoy special protection and shall be given opportunities and facilities to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity, the best interests of the child being always paramount. Principle 8 provides that the child shall in all circumstances be among the first to receive protection and relief and Principle 9 states that the child shall be protected against all forms of neglect, cruelty and exploitation.

94. The Universal Declaration of Human Rights 1948 (UDHR) contains two Articles which expressly refer to children – Article 25 on special care and assistance and Article 26 on the right to free elementary education – as well as the catalogue of human rights which apply to all human beings including the right not to be subjected to cruel, inhuman or degrading treatment.

95. Article 24 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "every child shall have, without any discrimination ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESC) requires States to take steps, including legislating, to progressively realise the rights guaranteed by the Covenant. Article 10 of the ICESC consistently stipulates that special measures of protection and assistance should be taken on behalf of the young. Article 12 addresses the right of all to "the enjoyment of the highest attainable standard of physical and mental health", and incorporates a specific provision under which States Parties are obliged to take steps for the provision for the healthy development of children. Both Covenants were opened for signature in 1966 and they were signed and ratified by Ireland in 1973 and 1989 respectively.

96. The Preamble to the 1989 United Nations International Convention on the Rights of the Child recalls, *inter alia*, the various child-protection provisions of the 1924 and 1959 Declarations, the UDHR, the ICCPR and the ICESC. Article 19 provides that the State shall protect the child from maltreatment by parents or others responsible for the care of the child and establish appropriate social programmes for the prevention of abuse and the treatment of victims.

THE LAW

97. The applicant complained that the State failed to protect her from sexual abuse by a teacher in her national school and that she did not have an effective remedy against the State in that regard. She relied on Article 3 (alone and in conjunction with Article 13), Article 8, Article 2 of Protocol No. 1 as well as these latter Articles taken in conjunction with Article 14 of the Convention.

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

98. The Government submitted that the Court should reconsider its admissibility decision arguing that the applicant had failed to exhaust domestic remedies, that she was no longer a victim of a violation of the Convention, that her application was out of time and, finally, that her complaints were manifestly ill-founded. The applicant rejected these submissions relying, *inter alia*, on the Chamber's unanimous admissibility decision.

A. Submissions of the parties

1. The Government

99. The Government maintained, in the first place, that the applicant had failed to exhaust effective domestic remedies. They disagreed with the Chamber that she was entitled to choose remedies when the result was that her core complaint to this Court was precisely the claim abandoned before the domestic courts. Since she did not appeal to the Supreme Court the order of the High Court to the effect that she had not established a case in negligence (the "non-suit" order), the State was deprived of the opportunity to contest the negligence claims, with its evidence, in the proper domestic forum. As a result, much controversial material had been opened before this Court without the necessary domestic court analysis. The Government were not suggesting that, having unsuccessfully pursued one remedy, she should have begun another but rather that she should not have abandoned at the High Court stage an appeal concerning her core complaint to this Court.

100. Secondly, if that non-suit order of the High Court that she had not established a case in negligence was clearly not appealable, the application should be rejected as out of time as it was not introduced within six months of that order which was dated 9 March 2004.

101. Thirdly, the Government maintained that the applicant could no longer claim to be a victim given the awards of damages to her by the CICT and by the High Court (*Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I; *Hay v. the United Kingdom* (dec.), no. 41894/98,

ECHR 2000-XI and *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I). The CICT scheme was a reasonable and independent assessment of compensation for criminal damage which was drawn from public funds. If the applicant considered the CICT award inadequate, she should have taken an action in judicial review. That the CICT award was lower than that of the High Court did not mean it was inadequate: the higher award could be explained by additional information before the civil courts or by the differing elements comprising the respective awards. The interaction between the CICT award, the award against LH and any award by this Court was illustrated by the requirement to repay the CICT award if damages were received from the other two sources.

102. The Government also argued, albeit in the context of Article 13 of the Convention, that an effective remedy did not necessarily mean one in which the State was a defendant. They underlined that the Court did not find a breach of Article 13 in *Costello-Roberts v. the United Kingdom* (25 March 1993, § 27, Series A no. 247-C) as the applicant was able to sue the private school or its authorities for assault. They also relied on the sufficiency of the negligence action in *Calvelli and Ciglio v. Italy* (cited above). They considered *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V) to be distinguishable: that respondent Government had conceded that a negligence action was the only effective remedy but that that action did not lie against local authorities.

103. Finally, the Government maintained that the application was manifestly ill-founded.

2. The applicant

104. The applicant considered she had exhausted all effective domestic remedies. Given the nature of her complaints, only a remedy which determined State liability and offered adequate compensation could be considered effective. As the Chamber found, she was entitled to choose the most feasible remedy against the State (vicarious liability for acts of LH) and she was not required to exhaust other remedies once that remedy was ultimately unsuccessful. She was then entitled to introduce her application within six months of the Supreme Court judgment and not, as the Government argued, within six-months of the High Court non-suit order.

105. The applicant maintained that she retained her victim status since there had been no recognition of State liability or adequate compensation from the State. She rejected the relevance of the case-law on which the Government relied: in the above-cited *Caraher* case, the applicant was no longer a victim because his civil action was against the State and *Calvelli and Ciglio* was a medical negligence case.

106. As to the CICT award, she pointed out that the Court had already found the similar system in the United Kingdom to be an inadequate means of establishing State responsibility: the CICT did not concern, let alone

acknowledge, any liability of the State and, consistently, the award was *ex gratia*. She argued that the award was inadequate as demonstrated by the difference between it and the significantly greater civil award against LH (the core non-pecuniary award against LH was EUR 200,000 as well as EUR 100,000 in aggravated and exemplary damages and the non-pecuniary element of the CICT award was EUR 27,000). Judicial review of the CICT award stood no chance of success in which case she risked a heavy costs' order against her: there had been approximately 5 such cases since 1982 and the scope of judicial review was too narrow to accommodate a simple disagreement over the amount of the award.

107. The case against LH, the applicant submitted, did not concern State liability and, while she had done all she could to recover the award against him, she had received only a small part of it. She had registered a judgment mortgage on his interest in the family home but, since the house was registered land, the registration of a judgment mortgage did not (at the time) sever the joint tenancy or therefore allow for the sale of the house. Moreover, where the property was a family home and the judgment mortgage related to one spouse only, an order for sale would not be given. In any event, it was not a satisfactory remedy if it required her to deprive an innocent third party of a family home.

B. The Court's assessment

108. It is recalled that, even at the merits stage and subject to Rule 55 of the Rules of Court, the Court may reconsider a decision to declare an application admissible where it finds that it should have been declared inadmissible for one of the reasons outlined in the first three paragraphs of Article 35 of the Convention (for example, *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III.

109. As regards the applicant's exhaustion of domestic remedies, the Chamber retained the following relevant principle:

> "... if there are a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (*O'Reilly v. Ireland*, no. 24196/94, Commission decision of 22 January 1996; *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005; and, more recently, *Shkalla v. Albania*, no. 26866/05, § 61, 10 May 2011; as well as *Leja v. Latvia*, no. 71072/01, § 46, 14 June 2011)."

110. The Chamber noted that the applicant's core grievances concerned the State's responsibility for the sexual assaults by LH as well as the availability of a civil remedy against the State in that respect. The Chamber therefore considered her pursuit of a claim alleging the State's vicarious

liability for LH to be a reasonable choice. It could not be said that the outcome of that action was clearly foreseeable since her action was a lead case in the domestic courts and since it ended with a majority judgment of the Supreme Court. If successful, that action could have addressed her essential grievances through a finding of State responsibility and an award of damages against the State. While the basis of State responsibility invoked domestically was different to that pursued before the Court, the Court's case-law made it clear that the applicant had the right, consistently with Article 35, to pursue the vicarious liability action with a view to addressing her grievance against the State without being required, when the route reasonably chosen proved unsuccessful, to exhaust another remedy with essentially the same objective.

111. The Grand Chamber does not consider that the Government's observations undermine the Chamber's findings. Just as the established case-law of this Court entitles an applicant to choose one feasible domestic remedy over another, the applicant was entitled to devote resources to pursue one feasible appeal (vicarious liability) over another (a claim in negligence and/or a constitutional tort). The Grand Chamber re-affirms therefore the findings of the Chamber that the applicant fulfilled the exhaustion requirements of Article 35 of the Convention.

112. The Court has examined below, in the context of Article 13, whether the remedies not exhausted by the applicant could be considered, nevertheless, to be effective (paragraphs 179 and 183-186).

113. It also follows that the applicant was entitled to introduce the present application within six months of the final decision in the proceedings chosen, namely within six months of the Supreme Court judgment on vicarious liability of 19 December 2008. The application cannot therefore be dismissed as having been introduced outside of the time-limit fixed by Article 35 of the Convention.

114. As to the applicant's victim status, the Chamber was of the view that this preliminary objection had to be joined to the merits of the complaint under Article 13 of the Convention. The Grand Chamber considers that it must examine this issue as a preliminary objection. However, even assuming that a damages award in her favour could take away the applicant's victim status as the Government argued based on *Caraher v. the United Kingdom* (and related jurisprudence), the Grand Chamber considers that she can still claim to be a victim of a violation of the Convention as regards her complaints about the State's failure to protect her or to provide her with an effective remedy in that respect.

115. The Court recalls that a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (for example,

Dalban v. Romania [GC], no. 28114/95, § 44, ECHR 1999-VI). Where rights of such fundamental importance as those protected under Article 3 are at stake and where an alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 requires that there should be available to victims a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention and, furthermore, that compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies (*Z and Others v. the United Kingdom*, cited above, § 109). An applicant's victim status may also depend on the level of compensation awarded at domestic level, having regard to the facts about which the applicant complains before the Court (see, *inter alia*, *Gäfgen v. Germany* [GC], no. 22978/05, § 115 and 118, ECHR 2010).

116. As to the case-law relied upon by the Government to argue that a remedy addressing State liability was not a pre-requisite to effectiveness, the Court notes as follows. The present case is substantively different from *Costello-Roberts*: the applicant in the latter case essentially challenged the application by a teacher of the law (allowing corporal punishment) whereas the present applicant challenged the State's failure to legislate to provide an adequate legal framework of protection. *Calvelli and Ciglio* concerned medical negligence so that a civil negligence action against doctors (and, potentially, disciplinary proceedings) was considered adequate for the purposes of the procedural aspect of Article 2 of the Convention. That the Government made concessions about domestic law in *Z and Others* does not change the Convention principles stated therein to the effect that, in a case such as the present, a remedy against the State was required.

117. However, the applicant has neither obtained acknowledgement of the Convention breach alleged nor adequate redress.

118. In the first place, neither LH's criminal conviction nor the damages award against him concerned State responsibility. The CICT award, on which the Government relied, did indeed come from State funds and constituted compensation by the State to the applicant for criminal damage inflicted on her by a third party. However, it was made on an *ex gratia* basis and did not concern in any way, let alone acknowledge, any liability of the State. Consistently with this fact, the State is never a party to CICT proceedings (*Z and Others v. the United Kingdom, cited above,* § 109; *E. and Others v. the United Kingdom*, no. 33218/96, § 112, 26 November 2002; and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

119. Secondly, while the High Court awarded over EUR 300,000 to the applicant she has only been able to recover from LH approximately 10%, of that award, even following enforcement proceedings. Given LH's age, the level of monthly payments fixed and the fact that LH's main asset is a family home, the prospects of recovering the rest of that award remain

minimal. While the CICT award (EUR 54,000) included a non-pecuniary element (EUR 27,000), that was very substantially lower than the non-pecuniary damage assessed by the High Court at EUR 200,000 (for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 214-215, ECHR 2006-V). There being little evidence that the applicant's CICT non-pecuniary award was unusual by CICT standards, it has not been demonstrated that a challenge, whether before the CICT panel or on judicial review, stood any chance of success.

120. For these reasons, and even if the *Caraher* line of case-law relied upon by the Government (see paragraphs 102 and 114 above) were to apply, the Grand Chamber considers that the applicant can still claim to be a victim of a failure by the State, contrary to Articles 3 and 13, to protect her from ill-treatment and to provide her with a domestic remedy in that respect.

121. Consequently, the Grand Chamber rejects the preliminary objections of the Government, with the exception of their argument that the applicant's complaints are manifestly ill-founded as this objection must be joined to the merits of those complaints.

II. ALLEGED VIOLATION OF THE SUBSTANTIVE ASPECT OF ARTICLE 3 OF THE CONVENTION

122. Article 3 reads as follows:

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

A. The parties' submissions

1. The applicant

123. The applicant's core complaint was that the State had failed, in violation of its positive obligation under Article 3, to put in place an adequate legal framework of protection of children from sexual abuse, the risk of which the State knew or ought to have known and which framework would have countered the non-State management of national schools. There were no clear or adequate legal obligations or guidance for the relevant actors to ensure they acted effectively to monitor the treatment of children and to deal with any complaints about ill-treatment including abuse. Articles 3 and 8, as well as Article 2 of Protocol No. 1, read together put a duty on the State to organise its educational system so as to ensure it met its obligation to protect children, an obligation facilitated, but not required, by Article 42 of the Constitution.

124. Education was a national obligation (*McEneaney* and *Crowley*, cited above), as it was in any advanced democracy. Article 42 of the Constitution was permissive so that the State could and should have chosen

to provide education itself. Even if the State outsourced that obligation to non-State entities, the national-school model could and should have accommodated greater child-protection regulations. One way or the other, a State could not avoid its Convention protective obligations by delegating primary education to a private entity (see *Costello-Roberts v. the United Kingdom*[, 25 March 1993, Series A no. 247-C]). Finally, the State could not absolve itself by saying that the applicant had had other educational options which, in any event, she had not.

125. The applicant relied on certain material, notably the Carrigan and Ryan Reports, to substantiate her claim that the State either had, or ought to have had, knowledge of the risk of abuse of children in national schools. She pointed out that the Ryan Report had been published after nine years of investigation and after the Supreme Court judgment in her civil action. She also maintained that the State had or ought to have had knowledge of the fact that appropriate protective measures, including adequate monitoring and reporting mechanisms, were not in place to prevent such abuse. In short, she maintained that the abuse of national-school pupils was facilitated by the national-school model of primary education combined with a failure to put in place effective measures of protection to prevent and detect sexual abuse.

126. The measures, on which the Government relied, were inadequate and, indeed, the applicant considered they confirmed an absence of State control. The 1965 Rules and Circulars were neither primary nor secondary legislation; their legal basis was unclear; they were so numerous and overlapping that the extent to which they remained in force was also unclear; and they were not readily available to the public. In any event, those Rules and Circulars were not effective: there was no reference to sexual abuse, no procedure for complaining about abuse and no binding requirement to monitor, investigate or report abuse to a State authority. The point of contact for the parents remained the manager. Whether or not action would have been taken on foot of a complaint to the State, the absence of an effective detection and complaints procedure meant that complaints were not passed on to the State.

127. The applicant also considered that the system of inspection could have protected children from abuse, but did not. It was designed to ensure the quality of teaching and not to control the conduct of teachers or to receive complaints of abuse. Accordingly, parents considered themselves obliged to complain to the manager and, indeed, the Guidance Note of 6 May 1970 directed them to do so. There was no relationship between the inspector and the parents, either in principle or practice and none of the guidelines or circulars referred to any contact between parents and inspectors. The inadequacy of the State system of inspection was, in the applicant's opinion, established by, *inter alia*, the Ryan Report, by a comparison with the extensive child-protection guidelines which have been

adopted since then and by the facts of the present case. In this latter respect, there had been 400 instances of abuse since the mid-1960s in Dunderrow National School by L.H. and not one related complaint to an inspector.

128. More generally, the applicant pointed out the stark contrast between the State's detailed pleadings in her domestic action – where it claimed to have no control, knowledge or role in school management or as regards teachers' conduct or propensities and where it laid full responsibility squarely on the patrons and managers – and the State's position before this Court – where it is argued that there was a clear legal framework of State protection in place.

129. Finally, the causation test was set out in *E. and Others v. the United Kingdom*, [no. 33218/96], §§ 98-100[, 26 November 2002]). The applicant submitted that, had there been an effective reporting mechanism, the 1971 complaint would have been reported and there was therefore more than a "real prospect" that the 1973 abuse would not have happened.

2. The Government

130. The Government endorsed the Supreme Court's description of the development and structure of the Irish primary-education system adding that it existed when the Irish State was created in 1922 and was maintained with the enactment by the people of Article 42 of the Irish Constitution in 1937. Dunderrow National School was therefore owned, operated and managed by the Catholic Church and its representatives. L.H. was not a State employee but was employed by the manager who, in turn, managed the school on behalf of the patron. This was not a technical bureaucratic distinction but a real "ceding" of the ownership and management of schools to denominations. This situation suited the majority and minority denominations, it reflected the will of the Irish people and it was not the function of this Court to recast the relationships which formed the basis of a significant portion of the Irish primary-school system. The suggestion that primary education was a national enterprise to be entirely State run in an advanced democratic State stemmed from a particular ideological outlook that was not necessarily shared by all Contracting States and not by Ireland. They pointed to the fact that no legislation obliged a child to attend a national school as the law allowed other schooling options.

131. As regards the substantive complaint about a failure to protect under Article 3, the Government argued that the liability of the State was not engaged. The case of *Van der Mussele v. Belgium* (23 November 1983, Series A no. 70) was distinguishable because there was no question of "delegation" of obligations since Article 2 of Protocol No. 1 only required States to ensure that no one was denied an education. The above-cited *Costello-Roberts* case was different because corporal punishment was part of a disciplinary system and therefore within the ambit of education whereas L.H.'s behaviour was "the very negation" of a teacher's role. State

responsibility for criminal offences unrelated to securing a Convention right was therefore limited to an operational obligation to protect (see *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) and there was no evidence that the State knew or ought reasonably to have known in 1973 of a real risk of a teacher abusing a pupil or of L.H. abusing the applicant.

132. As to what the State actually knew, the Government noted that neither the documents disclosed in discovery, nor the evidence of the inspector of Dunderrow National School, to the High Court indicated that the State authorities had received any complaint about L.H.'s behaviour.

133. Nor could it be said that the State ought to have been aware of a risk of sexual abuse of children by teachers in national schools in the 1970s. It was fundamental to assess the question of the State's constructive knowledge without the benefit of hindsight: in 1973 awareness of the risk of child abuse was almost non-existent and standards could not be retrospectively imposed on the early 1970s on the basis of today's increased knowledge and standards. The core question was what ought to have been the perceived risk of sexual abuse of children by teachers in primary schools in Ireland in the early 1970s and the answer was none. The Government pointed out the reference by Hardiman J to the different ethos which existed in the 1970s which explained why no parent had made a direct complaint to the State authorities at the relevant time. The Government relied also on the research paper entitled "Residential Child Care in England, 1948-1975: A History And Report" annexed to the Ryan Report. The applicant herself had presented no evidence to the domestic courts as to the level of awareness of risk in the 1970s and, indeed, her own expert (Professor Ferguson) considered that there was no evidence to support the need for preventative strategies in the early 1970s. The Carrigan Report did not assist her: while it contained some information about an increase in sexual crime and indicated that the police were active in prosecuting such crimes against young girls, there was no suggestion that a girl was at risk in school from a teacher. While the Government accepted that the Department had mishandled a complaint about Mr Brander, one could not extrapolate from this a constructive knowledge on the part of the State in the 1970s of a general risk to children from sexual abuse in schools. Once the State had a relevant awareness and understanding of the issues, relevant guidelines were introduced.

134. In any event, domestic law contained effective protective mechanisms commensurate with any risks which could have been perceived at the time. The actions of L.H. were offences in the criminal law and, indeed, as soon as complaints were made to the police in the mid-1990s, a full criminal investigation was carried out and L.H. was convicted and imprisoned. The civil law of tort provided grounds for a civil action against L.H. and the religious authorities.

135. The 1965 Rules also provided protection. These were legal rules which clearly bound a teacher and a manager and which clearly set out how to make and pursue a complaint. The Government relied, in particular, on Rules 121 and 130, which set down standards for teachers conduct, as well as Rule 108 and the Guidance Note of 6 May 1970 as regards mechanisms to deal with teachers who did not conduct themselves properly. Moreover, the inspector's role was, *inter alia*, to report to the Minister on the quality of the system and, notably, on whether the 1965 Rules were being complied with and to ensure an "appropriate standard of education" in all primary schools. In addition, each manager, teacher and parent had a role in protecting children and each could have made, but did not make in the applicant's case, a complaint directly to an inspector, the Minister, the Department or to the police. Any such complaint would have led to relevant inquiries and investigations, and, as appropriate, a sanction such as the withdrawal by the Minister of a teacher's licence to teach. The real problem was that no use was made of the procedures which existed: the earlier complaint about L.H. was made to the manager and not to a State authority.

136. In sum, the Government argued that there were safeguards in place commensurate with any risk of which the State ought to have been aware at the time, that constructive knowledge ought to be assessed from the point of view of the 1970s and without the benefit of hindsight and, notably, without imposing today's knowledge and standards on a forty-year-old context.

B. The third parties' submissions

1. The Irish Human Rights Commission ("the IHRC")

137. The IHRC was established by statute in 2000 to promote and protect the human rights of everyone in Ireland and it has its origins in the Good Friday Agreement of 1998. It has already intervened as a third party in cases before the Court.

138. The IHRC noted, *inter alia*, the positive obligations to prevent treatment contrary to Article 3 including a more general duty to structure the primary-education system in such a way as to protect children, which obligations could not be avoided by delegating a public-service function to a private body. In this context, the IHRC considered that a serious question arose as to whether the State maintained a sufficient level of control over publicly funded national schools to ensure that Convention rights were upheld. The legal status of the 1965 Rules was unclear. The Rules were unclear about an inspector's role as regards a teacher's conduct and, while the Rules addressed "improper conduct" by teachers, they did not define this or indicate any process whatsoever for dealing with it. Since private fee-paying schools and home schooling were not options accessible to the vast majority of Irish parents, rendering primary education obligatory effectively

required parents to send their children to national schools, failing which they risked criminal proceedings, fines and the possibility of children being taken into care. In sum, in a typical national school, which most Irish children inevitably attended, school management had little guidance as to how to deal with allegations or suspicions of abuse, schools were under no duty to report such allegations to the Department or to the police, social services had limited powers to deal with any such allegations or suspicions and, finally, children and parents faced difficulties making any such complaints.

2. The European Centre for Law and Justice (ECLJ)

139. The ECLJ describes itself as a non-governmental organisation dedicated mainly to the defence of religious liberty. It has previously intervened as a third party in cases before this Court. The ECLJ focused on the question of whether the State could be considered responsible for the abuse by L.H. of the applicant.

140. The ECLJ noted that, since the creation of the education system, the role of the State therein was limited to financing it and controlling the quality of the syllabus and teaching. This system did not create hierarchical relationships between the State and the school and its teachers or, indeed, any legal basis for an obligation by the latter to keep the former informed. Neither did Article 2 of Protocol No. 1 require a State to directly administer schools to the point of managing all disciplinary matters.

141. As to whether, nevertheless, the State had fulfilled its positive obligation to prevent treatment in breach of Article 3, the ECLJ did not consider that the State was required to adopt other measures in addition to making criminal and civil proceedings available in the early 1970s.

142. Since the State was required neither by domestic law nor the Convention to take on the day-to-day management of primary education, the State was not responsible for the acts of a primary-school teacher. To suggest that it was responsible for not preventing the acts of a teacher would amount to imposing strict liability. The private and denominational character of school management was never an obstacle to the prevention or deterrence of abuse and never excluded the application of the law.

C. The Court's assessment

143. The relevant facts of the present case took place in 1973. The Court must, as the Government stressed, assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregard the awareness in society today of the risk of sexual abuse of minors in an educational context, which knowledge is the result of recent public controversies on the subject, including in Ireland (see paragraphs 73-88 above).

1. The applicable positive obligation on the State

144. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see *X and Y v. the Netherlands*, 26 March 1985, §§ 21-27, Series A no. 91; *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI; *Z and Others v. the United Kingdom*, [no. 29392/95], §§ 74-75[, ECHR 2001-V]; *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 109, 10 October 2002; and *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII).

145. Moreover, the primary-education context of the present case defines to a large extent the nature and importance of this obligation. The Court's case-law makes it clear that the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities (see *Grzelak v. Poland*, no. 7710/02, § 87, 15 June 2010, and *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 35, 10 April 2012).

146. In sum, having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary-education context, through the adoption, as necessary, of special measures and safeguards.

147. Furthermore, this is an obligation which applied at the time of the events relevant to this case, namely in 1973.

The series of international instruments adopted prior to this period, summarised at paragraphs 91 to 95 above, emphasised the necessity for States to take special measures for the protection of children. The Court

notes, in particular, the ICCPR and the ICESC which were both opened for signature in 1966 and signed by Ireland in 1973, although both were ratified in 1989 (see paragraph 95 above).

In addition, this Court's case-law confirmed, as early as in its fifth judgment, that the Convention could impose positive obligations on States, and it did so in the context of Article 2 of Protocol No. 1 concerning the right to education (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 3, Series A no. 6). The formulation used in *Marckx v. Belgium* (13 June 1979, § 31, Series A no. 31) to describe the positive obligations under Article 8 to ensure a child's integration into a family, has been often cited (notably, in *Airey v. Ireland*, 9 October 1979, pp. 30-31, § 25, Series A no. 32). Most pertinently, the seminal case of *X and Y v. the Netherlands*, cited above, found that the absence of legislation criminalising sexual advances to a mentally handicapped adolescent meant that the State had failed to fulfil a positive obligation to protect the Article 8 rights of the victim. In so concluding, the Court rejected the Government's argument to the effect that the facts were "exceptional" and that the legislative gap was unforeseeable. The respondent State should have been aware of a risk of sexual abuse of mentally handicapped adolescents in a privately run care home for children and should have legislated for that eventuality. Those cases concerned facts prior to or contemporaneous with those of the present application.

It is, of course, true that the Court has further elucidated the breadth and nature of the positive obligations on States since those early cases. However, this is considered to be mere clarification of case-law which remains applicable to earlier facts without any question of retroactivity arising (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 140, ECHR 2009).

148. As to the content of the positive obligation to protect, the Court observes that effective measures of deterrence against grave acts, such as those in issue in the present case, can only be achieved by the existence of effective criminal-law provisions backed up by law-enforcement machinery (see *X and Y v. the Netherlands*, cited above, § 27; as well as, for example, *Beganović v. Croatia*, no. 46423/06, § 71, 25 June 2009; *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III; and *M.C. v. Bulgaria,* cited above, § 150). Importantly, the nature of child sexual abuse is such, particularly when the abuser is in a position of authority over the child, that the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws (see *Juppala v. Finland*, no. 18620/03, § 42, 2 December 2008). The Court would clarify that it considers, as did the Government, that there was no evidence before the Court of an operational failure to protect the applicant (see *Osman,* cited above, §§ 115-16). Until complaints about L.H. were brought to the

attention of the State authorities in 1995, the State neither knew nor ought to have known that this particular teacher, L.H., posed a risk to this particular pupil, the applicant.

149. The Court also notes that it is not necessary to show that "but for" the State omission the ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E. and Others v. the United Kingdom*, cited above, § 99).

150. It is indeed the case, as emphasised by the applicant, that a State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals (see *Costello-Roberts*, cited above, § 27; see also, *mutatis mutandis*, *Storck v. Germany*, no. 61603/00, § 103, ECHR 2005-V). However, that does not mean that the present case challenges, as the Government suggested, the maintenance of the non-State management model of primary education and the ideological choices underlying it. Rather, the question raised by the present case is whether the system so preserved contained sufficient mechanisms of child protection.

151. Finally, the Government appeared to suggest that the State was released from its Convention obligations since the applicant chose to go to Dunderrow National School. However, the Court considers that the applicant had no "realistic and acceptable alternative" other than attendance, along with the vast majority of children of primary-school-going age, at her local national school (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 8, Series A no. 48). Primary education was obligatory (sections 4 and 17 of the School Attendance Act 1926) and few parents had the resources to use the two other schooling options (home schooling or travelling to attend the rare fee-paying primary schools), whereas national schools were free and the national-school network was extensive. There were four national schools in the applicant's parish and no information was submitted as to the distance to the nearest fee-paying school. In any event, the State cannot be released from its positive obligation to protect simply because a child selects one of the State-approved education options, whether a national school, a fee-paying school or, indeed, home schooling (see *Costello-Roberts*, cited above, § 27).

152. In sum, the question for current purposes is therefore whether the State's framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a national school against the risk of sexual abuse, of which risk it could be said that the authorities had, or ought to have had, knowledge in 1973.

2. Was the positive obligation fulfilled?

153. It was not disputed that the applicant was sexually abused by L.H. in 1973. L.H. pleaded guilty to several sample charges of sexual abuse of pupils from the same national school. He did not defend the applicant's civil action and the Supreme Court accepted that L.H. had abused her. The Court also considers, and it was not contested, that that ill-treatment fell within the scope of Article 3 of the Convention. In particular, when the applicant was nine years of age and for around six months, she was subjected to approximately twenty sexual assaults by L.H. who, as her teacher and school principal, was in a position of authority and control over her (see, for example, *E. and Others v. the United Kingdom*, cited above, § 89).

154. There was also little disagreement between the parties as to the structure of the Irish primary-school system, although they disputed the resulting liability of the State under domestic law and the Convention.

155. The respective roles of religious communities and the State in Irish primary education have been consistent from the early nineteenth century to date. The State provided *for* education (set the curriculum, licenced teachers and funded schools) but most primary education was provided *by* national schools. Religious bodies owned national schools (as patrons) and managed them (as managers). As pointed out by Hardiman J, the management of national schools by religious bodies was not just an authorisation by the State to take part in the provision of primary education but rather it was a "ceding" of the running of national schools to the denominational actors and to their interests, which bodies were interposed between the State and the child. The Minister for Education did not, therefore, have any direct or day-to-day management or control of national schools (see paragraphs 35 and 40 above). As observed by Hardiman J and Fennelly J in the Supreme Court, the denominations expressed their firm wish to retain that national-school model of primary education and their control of that system. Since the purpose of the denominations was to ensure that their ethos was reflected in the schools, national schools developed into a predominantly denominational system: accordingly, a Catholic-managed national school generally referred to a Catholic manager (usually the local parish priest) with Catholic teachers and pupils (see Hardiman J and Fennelly J, at paragraphs 31-32 and 43 above).

156. This national-school model was carried over through independence in 1922 and was foreseen and facilitated by the text of Article 42 § 4) of the Constitution adopted in 1937. By the early 1970s, national schools represented 94% of all primary schools. Approximately 91% of those national schools were owned and managed by the Catholic Church, although the percentage of primary-school children catered for in Catholic-managed national schools was likely to be higher.

157. Accordingly, in the early 1970s, the vast majority of Irish children under the age of 12 or 13 attended, like the applicant, their local national school. As Hardiman J and Fennelly J of the Supreme Court noted, national schools were educational institutions owned and managed by, and in the interests of, a non-State actor, to the exclusion of State control. It was, moreover, a non-State actor of considerable influence on, in particular, pupils and parents and one resolved to retain its position.

158. This model of primary education appears to have been unique in Europe. The Supreme Court recognised this, describing the system as one which was entirely *sui generis*, a product of Ireland's unique historical experience.

159. Parallel to the maintenance by the State of this unique model of education, the State was also aware of the level of sexual crime against minors through the enforcement of its criminal laws on the subject.

160. The Irish State maintained laws, or adopted new laws, after independence in 1922 specifically criminalising the sexual abuse of minors including sections 50 and 51 of the Offences Against the Person Act 1861 (as amended) and the Criminal Law Amendment Act 1935 ("the 1935 Act"). Such acts also constituted common-law offences of indecent and ordinary assault.

161. Moreover, the evidence before the Court indicates a steady level of prosecutions of sexual offences against children prior to the 1970s. It has noted, in particular, the detailed statistical evidence provided by the Police Commissioner to the Carrigan Committee as early as 1931 (see paragraph 71 above). Based on information he had gathered from 800 police stations in Ireland, he concluded that there was an alarming amount of sexual crime in Ireland, a feature of which was the large number of cases concerning minors including children under 10 years of age. Indeed, this witness considered prosecutions to represent a fraction of the offences actually taking place. Drawing a causal connection between the frequency of assaults on children and the impunity expected by abusers, the Committee's report recommended legislative changes and more severe punishments leading to the adoption of the 1935 Act which, *inter alia*, created certain sexual offences as regards young girls. Professor Ferriter's report, sponsored by the Ryan Commission and annexed to its report (see paragraph 82 above), analysed the statistical evidence of prosecutions gathered from criminal-court archives covering the period after the Carrigan Report and until the 1960s. In his report, he concluded, *inter alia*, that those archives demonstrated a high level of sexual crime directed against young boys and girls. Lastly, the Ryan Report also evidenced complaints made to State authorities prior to and during the 1970s about the sexual abuse of children by adults (see paragraphs 78-81 above). While that report primarily concerned industrial schools where the programme was different from national schools and where the resident children were isolated from families

and the community (see the description of industrial schools at paragraph 73 above), these earlier complaints still amounted to notice to the State of sexual abuse by adults of minors in an educational context. In any event, the complaints to the State prior to and during the 1970s recorded in Volume III of the Ryan Report concerned, *inter alia*, national schools (see paragraph 80 above).

162. The State was therefore aware of the level of sexual crime by adults against minors. Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have been aware, given its inherent obligation to protect children in this context, of potential risks to their safety if there was no appropriate framework of protection. This risk should have been addressed through the adoption of commensurate measures and safeguards. Those should, at a minimum, have included effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State (see paragraph 148 above).

163. The first mechanism on which the Government relied was a reporting process outlined in the 1965 Rules and the Guidance Note of 6 May 1970 (see paragraph 62 above). However, none of the material submitted referred to any obligation on a State authority to monitor a teacher's treatment of children and none provided for a procedure prompting a child or parent to complain about ill-treatment directly to a State authority. On the contrary, those with complaints about teachers were expressly channeled to the non-State denominational manager by the text of the Guidance Note of 6 May 1970 on which the Government relied. If a parent had been hesitant to bypass a manager (generally a local priest as in the present case) to complain to a State authority, the relevant rules would have discouraged them from doing so.

164. The second mechanism invoked was the system of school inspectors governed also by the 1965 Rules as well as by Circular 16/59 (see paragraph 61 above). However, the Court notes that the principle task of inspectors was to supervise and report upon the quality of teaching and academic performance. There was no specific reference, in the instruments on which the Government relied, to an obligation on inspectors to inquire into or to monitor a teacher's treatment of children, to any opportunity for children or parents to complain directly to an inspector, to a requirement to give notice to parents in advance of an inspector's visit or, indeed, to any direct interaction between an inspector and pupils and/or their parents. The rate of visits by inspectors (see paragraph 61 above) did not attest to any local presence of relevance. Consistently with this fact, the Government did not submit any information about complaints made to an inspector about a

teacher's ill-treatment of a child. As pointed out by Hardiman J in the Supreme Court, the Minister (via his inspectors) inspected the schools for their academic performance but it did not go further than that: the Minister was deprived of the direct control of the schools because the non-State manager was interposed between the State and the child (see paragraph 35 above).

165. The Court is therefore of the view that the mechanisms on which the Government relied did not provide any effective protective connection between the State authorities and primary-school children and/or their parents and, indeed, this was consistent with the particular allocation of responsibilities in the national-school model.

166. The facts of the present case illustrate, in the Court's opinion, the consequences of this lack of protection and demonstrate that an effective regulatory framework of protection in place before 1973 might, "judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered" by the present applicant (see *E. and Others v. the United Kingdom*, cited above, § 100). There were over 400 incidents of abuse concerning L.H. since the mid-1960s in Dunderrow National School. Complaints were made in 1971 and 1973 about L.H. to the denominational manager but, as the Supreme Court accepted, the manager did not bring those complaints to the notice of any State authority. The inspector assigned to that school made six visits from 1969 to 1973 and no complaint was ever made to him about L.H. Indeed, no complaint about L.H.'s activities was made to a State authority until 1995, after L.H. had retired. Any system of detection and reporting which allowed such extensive and serious ill-conduct to continue for so long must be considered to be ineffective (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 83, 20 March 2012). Adequate action taken on the 1971 complaint could reasonably have been expected to avoid the present applicant being abused two years later by the same teacher in the same school.

167. Finally, Professor Ferguson's letter, on which the Government relied, was not an expert investigation report but rather pre-litigation advice and thus inevitably also concerned with issues such as chances of success and costs exposure. The comments of Professor Rollison, on which the Government also relied, were directed to the state of awareness of the risk of sexual abuse in the United Kingdom whilst the issue before the Court requires a country-specific assessment.

168. To conclude, this is not a case which directly concerns the responsibility of L.H., of a clerical manager or patron, of a parent or, indeed, of any other individual for the sexual abuse of the applicant in 1973. Rather, the application concerns the responsibility of a State. More precisely, it examines whether the respondent State ought to have been aware of the risk of sexual abuse of minors such as the applicant in national

schools at the relevant time and whether it adequately protected children, through its legal system, from such treatment.

The Court has found that it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary-education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (national schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational managers (see paragraph 163 above). The consequences in the present case were the failure by the non-State manager to act on prior complaints of sexual abuse by L.H., the applicant's later abuse by L.H. and, more broadly, the prolonged and serious sexual misconduct by L.H. against numerous other students in that same national school.

169. In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention. Consequently, the Court dismisses the Government's preliminary objection to the effect that this complaint was manifestly ill-founded.

III. ALLEGED VIOLATION OF THE PROCEDURAL ASPECT OF ARTICLE 3 OF THE CONVENTION

170. The applicant argued that the State had also failed to investigate properly or provide an appropriate judicial response to an arguable case of ill-treatment. She maintained that the lack of effective detection and reporting mechanisms meant that the 1971 complaint about L.H. was not reported and led to a long delay before a criminal investigation and L.H.'s conviction.

171. The Government argued that sufficient procedures existed in 1973 but that no complaint had been made to a State actor until 1995. At that point, the State fulfilled its procedural obligations: police investigations took place, L.H. was convicted, an award was made by the Criminal Injuries Compensation Tribunal, the applicant's civil action against L.H. was successful and her civil action in negligence against the State failed on evidential grounds only.

172. The Court reiterates the principles outlined in *C.A.S. and C.S. v. Romania* (cited above, §§ 68-70) to the effect that Article 3 requires the authorities to conduct an effective official investigation into alleged ill-treatment inflicted by private individuals, which 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. That investigation should be conducted independently, promptly and with reasonable expedition. The victim should be able to participate effectively.

173. The existence of adequate detection and reporting mechanisms has been examined above in the context of the positive obligations of the State under the substantive aspect of Article 3 of the Convention. Thereafter, the procedural obligations arise once a matter has been brought to the attention of the authorities (see *C.A.S. and C.S. v. Romania*, § 70, with further references therein). In the present case, once a complaint about the sexual abuse by L.H. of a child from Dunderrow National School was made to the police in 1995, the investigation opened. The applicant was contacted for a statement which she made in early 1997 and she was referred for counselling (see, for example, *C.A.S. and C.S. v. Romania*, § 82). L.H. was charged on 386 counts of sexual abuse involving twenty-one pupils from Dunderrow National School. L.H. pleaded guilty to twenty-one sample charges. He was convicted and imprisoned. It is not clear from the submissions whether the applicant's case was included in the sample charges: however, she did not take any issue with the fact that L.H. was allowed to plead guilty to representative charges or with his sentence. Any question concerning her inability to obtain recognition of, and compensation for, the State's failure to protect falls to be examined below under Article 13 of the Convention taken in conjunction with Article 3.

174. For these reasons, the Court finds that there has been no violation of the procedural obligations of the State under Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH THE SUBSTANTIVE ASPECT OF ARTICLE 3

175. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

176. The applicant complained that she was entitled to, but did not have, an effective domestic remedy against the State as regards the failure of the State to protect her from sexual abuse. The Government argued that effective remedies existed against the State and non-State actors.

177. The Court observes, as it did at paragraph 115 above, that in a case such as the present, Article 13 requires a mechanism to be available for establishing any liability of State officials or bodies for acts or omissions in breach of the Convention and that compensation for the non-pecuniary damage flowing therefrom should also be part of the range of available remedies (see *Z and Others v. the United Kingdom*, cited above, § 109). The Court also observes the relevant case-law and principles set out at paragraphs 107 and 108 of the judgment in *McFarlane v. Ireland* ([GC], no. 31333/06, 10 September 2010). In particular, the Court's role is to determine whether, in the light of the parties' submissions, the proposed procedures constituted effective remedies which were available to the applicant in theory and in practice, that is to say, were accessible, capable of providing redress and offered reasonable prospects of success. The importance of allowing remedies to develop in a common-law system with a written Constitution is also stressed (see, in particular, *D. v. Ireland* (dec.), no. 26499/02, § 85, 27 June 2006).

A. Civil remedies against non-State actors

178. The Government argued that the applicant should have sued the past and/or current patron of the school, the diocese of which he was bishop, the manager and/or the *de facto* manager or their successors or estates, pointing out that Hardiman J of the Supreme Court found the failure to do this to be "notable". Without prejudice to her primary submission that a remedy against the State was required, the applicant noted that the patron and manager had passed away at the time of her civil action, that the present bishop denied liability in response to her pre-action letter and that the law was in his favour given that a bishop could not be sued as he was not a corporation sole with perpetual succession.

179. Since the Court considers that the applicant was entitled to a remedy establishing any liability of the State, the proposed civil remedies against other individuals and non-State actors must be regarded as ineffective in the present case, regardless of their chances of success (the patron and manager) and regardless of the recoverability of the damages awarded (civil action against L.H.). Equally the conviction of L.H. also relied upon by the Government, while central to the procedural guarantees of Article 3, was not an effective remedy for the applicant within the meaning of Article 13 of the Convention.

B. Civil remedies against the State

1. The parties' submissions

180. The Government argued that the applicant should have pleaded the State's vicarious liability for the patron and/or manager. However, the Government mainly relied on two other remedies. In the first place, they referred to an action claiming that the primary-education system, foreseen by Article 42 of the Constitution, breached her unenumerated constitutional right to bodily integrity (the constitutional tort action). Secondly, they argued that she could have continued her claim in negligence in her appeal to the Supreme Court arguing that the State had failed to structure the primary-education system so as to protect her from abuse. This was her complaint under Article 3 of the Convention. The High Court had summarily dismissed ("non-suited") her claims because she had failed to adduce any evidence: indeed, her own expert (Professor Ferguson, see paragraph 24 above) had advised her against litigating on the basis of a lack of relevant awareness of risk on the part of the State. It was therefore disingenuous to argue that she should now be excused from appealing because she had been non-suited on evidential grounds. In any event, the Government maintained that certain domestic case-law indicated that a non-suit on evidential grounds was appealable and, further, that she could have appealed the non-suit because the High Court gave no clear reasons for that decision and because it failed to address her negligence claim separately.

181. The applicant maintained that she had pleaded, in her domestic action, the State's vicarious liability for the patron and/or manager. She also disputed the effectiveness of the other two remedies against the State on which the Government relied. The High Court's dismissal of the constitutional tort claim was unappealable. The State's protection for the unenumerated constitutional right to bodily integrity was implemented through the law of tort and there was no discrete action for damages for breach of the constitutional right to bodily integrity. Neither would the negligence action have been effective. She was non-suited at first instance and, although no reasons were given, it was clearly because her evidence did not demonstrate a prima facie case of negligence. However, she did not have the resources to carry out the necessary investigation, the extent of which was demonstrated by the enormous State resources later required by the Ryan Commission's investigation and report (see paragraph 77 above). An appeal against an evidential finding of the High Court was unlikely to succeed whether or not one applied the case-law on which the Government relied.

2. The IHRC's submissions

182. The IHRC did not consider the constitutional tort remedy to be effective. In particular, it pointed out that, while the courts had, in theory, endorsed the idea of fashioning remedies for alleged breaches of constitutional rights (*Byrne v. Ireland* [1972] IR 241, p. 281; and *Meskell v. CIE* [1973] IR 121), the same courts tended to avoid replacing existing statutory and common-law remedies with a separate constitutional remedial regime so that the constitutional courts relied on existing remedies such as tort (*W v. Ireland (no. 2)* ([1999] 2 IR 141). The IHRC submitted that this was precisely what had occurred in this case: to dispose of the constitutional claim against the State it was sufficient to direct the applicant to a remedy in tort for breach of her rights to bodily integrity and privacy. However, the nature of the tortious relationship (negligence/vicarious liability) defined the State's obligations and liabilities rather than the possibly broader duty of the State to vindicate the rights of a child in the public education system. This, in turn, raised the question of whether the private law remedy in tort was adequate to protect the substance of the applicant's constitutional rights not least because the private-law remedy focused on the State's conduct rather than on the applicant's rights.

3. The Court's assessment

183. The Court is not persuaded that any of the remedies against the State has been shown by the Government to be effective in the present case.

184. In the first place, the Supreme Court rejected the State's vicarious liability for the acts of L.H., who was a lay teacher with a salary funded by the State. The State's vicarious liability for the patron and/or manager, who were clerics not paid by the State, must be considered to have been even less likely. Consistently, Fennelly J noted that there could be no State liability for the manager since he was not employed by the State (see paragraph 45 above).

185. Secondly, a claim against the State in direct negligence would require the recognition, *inter alia*, of a relationship between the State and the applicant of such proximity as to give rise to a duty of care on the part of the State to the applicant (see paragraph 66 above). However, the interposition of the denominational managers to the exclusion of State control in national schools would appear to be incompatible with the existence of any such duty of care (see also Hardiman J at paragraphs 35 and 39 above).

186. Thirdly, the Government argued that the applicant should have maintained her constitutional tort claim before the Supreme Court (see paragraph 180 above). However, even if the Supreme Court would not have directed her to existing tort remedies as the High Court did, the Government have not demonstrated, with relevant case-law, how the State could be held

responsible for a breach of her constitutional right to bodily integrity because of a system which was specifically envisaged by Article 42 of the Constitution. Whether or not this ground was properly pleaded before the Supreme Court, it remains relevant to note that Hardiman J of the Supreme Court rejected it (see paragraph 40 above).

C. The Court's conclusion

187. For these reasons, the Court considers that it has not been demonstrated that the applicant had an effective domestic remedy available to her as regards her complaints under the substantive limb of Article 3 of the Convention. There has, therefore, been a violation of Article 13. The Court therefore dismisses the Government's preliminary objection that this complaint was manifestly ill-founded.

V. ALLEGED VIOLATION OF ARTICLE 8 AND ARTICLE 2 OF PROTOCOL NO. 1, ALONE AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

188. Article 8, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

189. Article 2 of Protocol No. 1 reads as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

190. Article 14, in so far as relevant, reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground ..."

191. The applicant also complained under Article 8 about the State's failure to protect her from sexual abuse, relying on her submissions under Article 3 and adding that the State's margin of appreciation could not diminish its responsibility to protect her physical integrity. She submitted that the sexual abuse suffered by her caused her significant relationship, sexual and marital problems thereafter. The Government considered it unnecessary to consider separately the complaint under Article 8 and, alternatively, argued that that there had been no violation of that Article,

relying on their submissions made under Article 3 and underlining the margin of appreciation accorded to the State under Article 8.

192. The Court notes that the complaint under Article 8 concerns the same facts and issues evoked under Article 3 and that the parties relied on essentially the same submissions. The case does not concern a particular and separate Article 8 issue, such as the specific home and family life matters to which the facts of the above-cited case of *C.A.S. and C.S. v. Romania* gave rise (§ 12). The impact of the abuse on the applicant's later life can equally be a consequence of the Article 3 breach established above. The Court concludes that the complaint under Article 8 does not give rise to any issue separate to that examined already under Article 3 of the Convention (the above-cited cases of *A. v. the United Kingdom*, *Z and Others v. the United Kingdom*; and *E. and Others v. the United Kingdom* and, most recently, *Valiuliene v. Lithuania*, no. 33234/07, § 87, 26 March 2013).

193. As regards Article 2 of Protocol No. 1, the applicant argued that that Article was prominent in the Court's mind when it found that the liability of the State could be engaged in relation to the conduct of a teacher in a private school. She also complained under Article 14 in conjunction with Article 8 and Article 2 of Protocol No. 1 to the Convention because the State had accepted responsibility and compensated those abused in a reformatory or industrial school but not those who had suffered such ill-treatment in National Schools. The Government rejected these complaints. They submitted, *inter alia*, that there had been no discriminatory difference in treatment because the reference groups were not analogous: on the one hand, a child in a reformatory and industrial school where the State was to a significant degree in *loco parentis* and, on the other, a day pupil in a National School otherwise living at home and in the community. Moreover, the suggestion that there was discrimination as regards compensation was artificial and academic when the applicant had in fact been compensated (CICT and the High Court award against LH).

194. Having regard to the Court's finding of a violation under Article 3 of the Convention and the reasoning leading to thereto, it considers that these complaints under Article 2 of Protocol No. 1 and under Article 14 of the Convention as described above, do not give rise to any issues separate to those examined already under Article 3 of the Convention.

195. The Court concludes that it is not necessary to examine separately the complaints under these Articles of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

196. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

197. The applicant claimed 223,000 euros (EUR) in non-pecuniary damage: the High Court award of EUR 250,000 (general and aggravated damages) less the Criminal Injuries Compensation Tribunal (CICT) non-pecuniary award of EUR 27,000 and assuming that reimbursement of the CICT award would not be sought by the State. She referred to medical and psychiatric evidence before the High Court as to the impact on her of the sexual abuse by L.H. Having regard to the nature of the abuse, its duration and impact on her, she considered that the breach of Article 3 had to be considered as extremely serious. She also claimed EUR 5,104 in pecuniary loss, being the sum vouched by her before, and awarded by, the High Court as special damages. This award comprised past and future medical, travel and other expenses related to the sexual abuse suffered by her. The applicant accepted that the CICT award, as well as the money already recovered by her from L.H., amounted to partial reparation.

198. The Government argued that the applicant's claims for pecuniary and non-pecuniary loss were not properly itemised or substantiated and they considered that there was no causal link between the violation established and any damage. The Government did not propose a sum for non-pecuniary damage but they challenged the applicant's reliance, without more, on the High Court non-pecuniary damages award. That reliance was misplaced (as it was an award concerning L.H.'s actions and not the State) and insufficient (the High Court award was uncontested by L.H.). The applicant had obtained some payments to date, she had a range of enforcement mechanisms available to her against L.H. and the State was not responsible for L.H.'s finances. The Government also highlighted the CICT award funded by the State and noted that the applicant accepted the relevance of that award for any just satisfaction award. The Government similarly challenged the applicant's reliance, as regards her pecuniary claim to this Court, on the High Court's award of special damages.

2. The Court's assessment

199. The Court reiterates that Article 41 empowers it to afford the injured party such satisfaction as appears to it to be appropriate.

200. If the Court finds a violation of an important Convention right which has led to significant pain and suffering, it may award a sum in non-pecuniary damages (see, for example, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 269, ECHR 2012).

201. As regards pecuniary loss, there must be a clear causal connection between the damage claimed and the violation of the Convention established. A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) may be prevented by the inherently uncertain character of the damage flowing from the violation but an award can be made: the question is the level of just satisfaction, in respect of both past and future pecuniary losses, which it is necessary to award, the matter to be determined by the Court at its discretion, having regard to what is equitable (see *E. and Others v. the United Kingdom*, no. 33218/96, §§ 120-21, 26 November 2002).

202. The Court has taken note of the evidence accepted by the High Court as to the applicant's past and future pecuniary losses (comprising mainly past and future medical and psychiatric treatment expenses) and of the sum of EUR 5,104 awarded in that respect. Moreover, having regard to the nature of the serious ill-treatment to which the applicant was subjected, the Court considers that she has suffered non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation of the Convention. While there is a distinction to be made between the awards made domestically not concerning State liability and the present complaint focusing on State liability, the Court considers that any award under Article 41 should take account of the High Court award (EUR 305,104 in total) as well as the extent to which that award has been, and will be, paid by L.H. Account must also be taken of the CICT award paid to the applicant (EUR 53,962.24), assuming that it will not have to be reimbursed. Both awards had pecuniary and non-pecuniary elements.

203. Having regard to the financial compensation received by the applicant to date and in light of the uncertainties about any future payments by L.H., the Court has decided to award a global figure for pecuniary and non-pecuniary damage. On an equitable basis therefore, the Court awards the sum of EUR 30,000 in total as regards pecuniary and non-pecuniary loss, plus any tax that may be chargeable.

B. Costs and expenses

204. The applicant claimed EUR 355,039.38 as regards the costs and expenses of the domestic proceedings: she did not have legal aid and each party was required to pay their own costs and expenses.

205. The Government disputed this claim underlining, in particular, that the claim had not been properly itemised, detailed or vouched as required by the Court's Practice Direction and case-law. They argued, *inter alia*, that the issues before this Court had already been dealt with by the High Court as early as March 2004 so that later legal expenses were not necessarily incurred. The Government accepted that the costs and expenses of the High Court action until March 2004 amounted to EUR 75,000.

206. The applicant also claimed EUR 115,730.50 as regards the costs and expenses of the Convention proceedings. The Government accepted the vouched travel expenses for the hearing before the Grand Chamber (EUR 3,606.96) but otherwise considered this claim excessive also considering that it was neither properly vouched nor sufficiently detailed.

207. The Court recalls its established case-law to the effect that an applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (for example, *X and Others v. Austria* [GC], no. 19010/07, § 163, 19 February 2013). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (*A, B and C v. Ireland* [GC], no. 25579/05, § 281, ECHR 2010).

208. The Court notes that the Government accepted as reasonable the sum of EUR 75,000 as far as the High Court costs and expenses were concerned. It is also true that the Court has endorsed the applicant's later appeal to the Supreme Court in response to the Government preliminary objections. However, significant parts of the billed costs and expenses, concerning the Supreme Court and the later Convention proceedings, are unsubstantiated, in particular, as regards the hours spent by the solicitors and barristers working on specific tasks as well as their hourly rates.

209. Having regard to the parties' submissions and ruling on an equitable basis, the Court awards EUR 85,000 in total, plus any tax that may be chargeable, in respect of the costs and expenses of the domestic and Convention proceedings.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Dismisses,*
   (a) by eleven votes to six, the Government's preliminary objections that the applicant failed to exhaust domestic remedies and failed to lodge the application within the six-month time-limit;
   (b) by twelve votes to five, the Government's preliminary objection that the applicant had lost her victim status;

2. *Joins to the merits*, by fourteen votes to three, the Government's preliminary objection that the complaints are manifestly ill-founded;

3. *Holds*, by eleven votes to six, that there has been a violation of the substantive aspect of Article 3 of the Convention as regards the State's failure to fulfill its obligation to protect the applicant and, consequently, *dismisses* the Government's objection that that complaint was manifestly ill-founded;

4. *Holds*, by eleven votes to six, that there has been a violation of Article 13 of the Convention taken in conjunction with the substantive aspect of Article 3 on account of the lack of an effective remedy as regards the State's failure to fulfill its obligation to protect the applicant and, consequently, *dismisses* the Government's objection that that complaint was manifestly ill-founded;

5. *Holds*, unanimously, that there has been no violation of the procedural aspect of Article 3 of the Convention;

6. *Holds*, unanimously, that it is not necessary to examine separately the complaints under Article 8 or under Article 2 of Protocol No. 1, whether alone or in conjunction with Article 14 of the Convention;

7. *Holds*, by eleven votes to six,
(a) that the respondent State is to pay the applicant, within three months, the following amounts:
(i) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage; and
(ii) EUR 85,000 (eighty-five thousand euros), plus any tax that may be chargeable to the applicant, in respect of the costs and expenses of the domestic and Convention proceedings;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 January 2014.

Michael O'Boyle	Dean Spielmann
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 Ziemele;

(b) joint partly dissenting opinion of Judges Zupančič, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek; and

(c) partly dissenting opinion of Judge Charleton.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I endorse the view of the majority in this case. My disagreement relates only to the reasoning, and more specifically to paragraph 143, which outlines the methodology used in analysing the facts and the submissions of the parties. This case raises the issue of the application of the Convention over time. Recently the Court has been increasingly confronted with this issue (see, for example, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009, and *S.H. and Others v. Austria* [GC], no. 57813/00, § 84, ECHR 2011 (in the latter case, see also the joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria); see also *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, ECHR 2013). It is indeed high time that the Court acknowledged the issue of time and took care to explain clearly its methodology as regards the application of the Convention over time.

2. The facts giving rise to the domestic proceedings and subsequently the proceedings before the European Court of Human Rights took place in 1973. The domestic proceedings began in 1998, and the applicant lodged a complaint with the European Court of Human Rights in 2009. In this context, the Government rather naturally argued that "[i]t was fundamental to assess the question of the State's constructive knowledge without the benefit of hindsight: in 1973 awareness of the risk of child abuse was almost non-existent and standards could not be retrospectively imposed on the early 1970s on the basis of today's increased knowledge and standards" (see paragraph 133 of the judgment).

3. The Court decides to deal with the issue of application of the Convention over time as follows:

> "The Court must, as the Government stressed, assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregard the awareness in society today of the risk of sexual abuse of minors in an educational context ..." (see paragraph 143).

It should be noted that there are two strands to the Government's argument. Firstly, the Government say that knowledge and awareness of the issue of child abuse have grown considerably since that time. Secondly, they say that [legal] standards cannot be applied retroactively. In fact, both arguments are perfectly correct. For the Court, however, the task is to establish what the legal standards were in 1973. The Court indeed says as much. What the Court does not address is the commonly accepted evolution of the applicable standards. Nor does the Court explain why the evolution of standards should not be examined since there is a difference, as just suggested, between raised awareness and the evolution of legal standards. It is in this respect that I find paragraph 143 incomplete.

4. Furthermore, the subsequent arguments of the Court concerning Ireland's obligations in 1973 do not sit very easily with the approach taken. For example, although the two International Human Rights Covenants to which the Court refers were adopted in 1966, Ireland signed them in 1973 and ratified them even later, in 1989 (see paragraph 147). Indeed, it could be said that the case-law referred to was also adopted subsequent to the events in this case (see paragraph 147). These difficulties are directly linked to the approach chosen by the majority in this case.

5. Before explaining what the approach should have been, a few preliminary clarifications are called for. Firstly, this is not a case in which the Court's jurisdiction *ratione temporis* is at issue (see, conversely, *Janowiec*, cited above). Ireland had ratified the Convention by 1973 and thus Article 3 was applicable. It is also clear that the treatment to which the applicant was subjected while attending primary school was contrary to Article 3 at that time. The only disputed issue is whether or not Ireland was under an obligation to put in place mechanisms and safeguards that would have at least minimised the risk of child abuse in primary-education establishments at that time. On this point, the Irish Government's argument is twofold. Firstly, they argue, there was an adequate mechanism in place. Secondly, it was a historical tradition in Ireland for primary schools to be run by the Catholic Church and there was nothing wrong with this system *per se*, and in any event the State could not be held responsible for the lack of knowledge of the risks that the system might entail.

6. I certainly agree with the majority that the basic principle of intertemporal law requires that the wrongfulness of an act be assessed in the light of the law applicable at the time the facts occurred. It is however true that the law is not static. It evolves. The International Law Commission (ILC), in its commentary on draft Article 13, noted the following with reference to the Advisory Opinion of the International Court of Justice (ICJ) in the *Namibia* case[1]: "One possible qualification [of the basic rule of intertemporal law] concerns the progressive interpretation of obligations ... But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases, but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct" (see ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001).

7. In the ICJ case on *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, one of the questions was whether the Italian courts were justified under international law in denying immunity to

1. *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Reports 16 ("the *Namibia* case").

Germany for the acts committed by its armed forces during the Second World War. The International Court of Justice decided that these acts fell outside its jurisdiction *ratione temporis*. However, with regard to the decisions of the Italian courts which were given much later and thus came within its jurisdiction *ratione temporis*, the ICJ stated as follows: "The Court must nevertheless inquire whether customary international *law has developed* to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict" (see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*), ICJ judgment of 3 February 2012, § 83, emphasis added).

8. I have already pointed out that in 1973 L.H.'s behaviour was clearly contrary to Article 3 of the Convention for the reason that, in accordance with Article 1, Ireland was under an obligation to ensure that children in its territory were not subjected to ill-treatment contrary to Article 3. There was clearly a general obligation. When it comes to its detailed implementation, it is quite true that with time more knowledge is acquired as to how to tackle the problem of child abuse more effectively. The time factor is important as regards making improvements and filling the gaps. At the same time, there is nothing in the field of the rights of the child, as now regulated by the 1989 United Nations Convention on the Rights of the Child in particular, to suggest that a new or particular understanding of the vulnerability of children has come about in recent years. It is true that there have been some important clarifications, especially those developed within the framework of the Committee on the Rights of the Child, and to that extent it can be said that the law has been elaborated upon, but there was really no development of new rights or general obligations to implement those rights over the period concerned in the present case. The 1959 Declaration of the Rights of the Child stated as follows:

> "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

9. At least since 1959 children have been identified as a group in need of special attention and the principle of the best interests of the child as a guiding light in developing mechanisms for the protection of children has been articulated (see more in paragraph 93 of the judgment). I think it would have been relevant for the purposes of the judgment to refer to post-1973 developments in international human rights law to demonstrate that the underlying principle has been maintained and has given rise to a detailed set of proposals as to how to ensure the rights of children. It is very clear that in itself the principle and the related obligation are not recent. The Court does not apply them retroactively. The law has evolved and has acquired more detail while the general obligation remains the same. The area of the

protection of children from abuse matches perfectly the exception referred to by the ILC, and the ICJ Opinion in the *Namibia* case is the right analogy to follow. It should be recalled that South Africa argued in those proceedings that the Mandate system created under the auspices of the League of Nations did not impose an obligation to eventually grant independence to the colonies (see the *Namibia* case, cited above, § 50). The ICJ examined the nature of the Mandate system as adopted at the time of the League of Nations and disagreed with the South African interpretation. It further noted that "[e]vents subsequent to the adoption of the instruments in question should also be considered" (ibid., § 51). The ICJ's ultimate statement on how to take developments in relevant legal concepts into consideration reads as follows:

> "All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. *Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned" (§ 53, emphasis added).

10. There is little doubt that the prohibition of ill-treatment was applicable to young children in the Contracting States at the time the Convention was adopted and in 1973. The nature of obligations is by definition an evolving concept, precisely in conjunction with the evolution of understanding and of means. In the domain of human rights, as in that of self-determination, important developments occurred before and since 1973. These developments should have been taken into consideration by the Court in interpreting the obligations under Article 3 in this case. A fully-fledged test of intertemporal law would have been appropriate in this judgment.

11. Finally, the parties did not invoke any arguments relating to the principle that the Convention is a living instrument. In order to make my point clear, however, it is necessary to invoke this principle briefly. It is important to distinguish between the application of the Convention over time in situations where it is clear that the Convention obligation was applicable in the circumstances of the case, as in the case at hand, and the interpretation of the Convention Articles in a manner which brings within

the scope of the right in issue new elements that were clearly not there at the time of the drafting of the Convention (see, for example, *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008). I do not exclude the possibility that there may at times be some confusion also in the Court's case-law between these principles, and it is quite obvious that the Court needs to provide more clarity as to its choice of the applicable methodological principle when adjudicating the case before it. It is clear that in the case at hand we are not dealing with the principle of the Convention as a living instrument or with the retroactive application of the Convention. This is a case about the assessment of the State's compliance with its obligations over time.

JOINT PARTLY DISSENTING OPINION OF JUDGES ZUPANČIĆ, GYULUMYAN, KALAYDJIEVA, DE GAETANO AND WOJTYCZEK

1. The present case concerns the responsibilities of the State for the protection of children against sexual abuse committed by a teacher in the 1970s. Like our colleagues who voted for the majority judgment, we consider child sexual abuse to be a quintessential example of inhuman treatment proscribed by Article 3; we are also in agreement that States are under an obligation to undertake the necessary measures to protect children from such abuse.

2. Like the majority, we sympathise with the applicant's suffering because of what she had to go through. She was subjected to the sexual assaults of a lay and married teacher (L.H., who was also the school principal) during music lessons held in his classroom from early to mid-1973, at a time when she was nine years old. At that time neither she nor her parents were aware of the complaints of parents of other victims of sexual abuse (at the hands of the same teacher) raised before the manager of the school. Later evidence indicated that in September 1973 other parents brought to the applicant's parents' attention certain "difficulties" in connection with the said teacher, and that the parent of a child had complained to Ó. (the *de facto* manager) that L.H. had sexually abused her child in 1971. Following a meeting of parents chaired by Ó., L.H. went on sick leave. In September 1973 he resigned from his post (see paragraphs 14-17 of the judgment).

3. It is an uncontested fact that neither the parents, the victims nor the manager of the school reported the above-mentioned facts to the police or to any public authority until 1995 – more than twenty years after the events. Nor did the applicant do so after attaining majority in 1985. The applicant reacted only in 1996 – when contacted by the police in the context of an investigation into the 1995 complaint of another former pupil of Dunderrow National School. In this context, it is important to underscore that if the applicant's complaint concerning abuse by a private party had been lodged with the Court prior to 1995 and without having first been brought before a domestic authority, that complaint would have been declared inadmissible on account of the lapse of time and/or on account of the failure to exhaust domestic remedies (Article 35 of the Convention).

4. The Irish authorities reacted as soon as they became aware of the abuse. It has not been contested that at the time of the events Irish law envisaged criminal sanctions for the perpetrators of sexual abuse of children as well as compensatory remedies for the victims, and this regardless of the context in which the crime was perpetrated. Following the statements made to the police some twenty years after the events, L.H. was charged with 386 criminal offences, he pleaded guilty to twenty-one sample charges and was

sentenced to imprisonment. In 1998 the applicant applied to the Criminal Injuries Compensation Tribunal. She eventually obtained 53,962.24 euros (EUR). In 2002 she accepted this sum and gave the standard undertaking to repay this sum to the Tribunal from any other award, from whatever source received, in relation to the same injury (see paragraph 21). The applicant also brought a civil action against L.H., the Minister for Education and Science, the Attorney General and the State of Ireland, and on 24 October 2006 obtained a default judgment against L.H. in the total sum of EUR 305,104. L.H.'s licence to teach was withdrawn by the Minister of Education under Rule 108 of the National School Rules of 1965.

5. There is nothing to indicate that these measures were not applicable or could not have been imposed at an earlier point in time. Had similar criminal or civil proceedings been undertaken in the 1970s or 1980s, the complaints lodged before this Court would have been declared inadmissible on the ground that the applicant no longer had victim status.

6. We cannot emphasise enough the fact that the complaints of insufficient protection and insufficient prevention of abuse on the part of the State could be examined by this Court only as a result of the authorities' *prompt response to reports of abuse made more than twenty years after the events*. It is, indeed, doubtful whether such a prompt and effective response would have been equally available in the legal systems of all States Parties to the Convention, and whether the lapse of time would not have prevented, through extinctive prescription, other domestic authorities from imposing the measures described above as a reaction to complaints. In our view these measures constituted sufficient protection for the applicant's rights under Article 3 of the Convention. The fact that an appropriate and prompt reaction was provided in the case only after 1995 – despite the lapse of twenty years – cannot legitimately be turned into a *nunc pro tunc* instrument of analysis for the purposes of declaring admissible the complaints against the respondent State. These are our reasons for disagreeing with the majority on the question as to the admissibility of the complaints.

7. We also regret being unable to follow the majority in their analysis and conclusions as to the scope of the positive obligations of the State in the circumstances of the present case. These positive obligations have to be construed with due consideration to the different values and rights protected by the Convention. According to the Preamble to the Convention, fundamental freedoms are best maintained in an effective political democracy. The notion of a democratic society encompasses the idea of subsidiarity. A democratic society may flourish only in a State that respects the principle of subsidiarity and allows the different social actors to self-regulate their activities. This applies also to the domain of education. Legislation pertaining to private education should respect the legitimate autonomy of private schools. Article 2 of Protocol No. 1 guarantees the right of parents to ensure education and teaching in conformity with their

own religious and philosophical convictions. It is clear that the democratic State has to respect the education choices of the parents as well as the parents' primary responsibility for the development and well-being of their children.

8. The interpretation of the Convention and the understanding of the scope of State obligations that it imposes have evolved considerably since the Convention's entry into force. This means that the relevant facts occurring in 1973 may not be legitimately examined in terms of standards attained subsequently. These facts should be assessed in the light of the Convention *as understood at that time and in the context of international law as in force at that time*. The same principle applies to State obligations. The scope of State obligations in 1973 should be assessed in the context of international law as is stood at that time. In this regard the majority attempts to demonstrate (in our view, and with all due respect, in a strained way) that a positive obligation to protect, and prevent the ill-treatment of, children at school through an appropriate framework of regulations *encouraging* complaints was clearly established under the Convention in 1973. There is, however, no relevant case-law which supports this view. The *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* ((merits), 23 July 1968, Series A. no 6) pertains to a completely different question and order of ideas, namely "the right to be educated in the national language or in one of the national languages, as the case may be", and is not related to the right of children to protection against ill-treatment. All the other cases cited in the present judgment were determined many years after the abuse of the applicant in 1973.

9. We disagree with the retrospective application of the present-day understanding of positive obligations of the State to a situation obtaining about forty years ago. It is Kafkaesque to blame the Irish authorities for not complying at the time with requirements and standards developed gradually by the case-law of the Court only in subsequent decades.

10. Being unable to cite relevant case-law from the pre-1973 period, the majority further refers to various international declarations and covenants (see paragraphs 91-96). A proper analysis of the instruments pertaining to children's rights shows an acute deficit regarding the protection of children under international law until the entry into force of the 1989 United Nations Convention on the Rights of the Child. The declarations cited contain general principles of protection of children lacking specificity, and are of a non-binding nature. At that time States preferred non-binding instruments to treaties imposing legal obligations on them. Furthermore, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which impose firm legal obligations on States, were signed by Ireland on 1 October 1973 and ratified only in 1989. Therefore, none of the international instruments cited by the majority

can be seen as relevant to the assessment of the liability of Ireland in the present case.

11. Even assuming that present-day standards established by the case-law of the Court might be applicable to facts that occurred in 1973, we are not able to follow the majority as to the scope of the positive obligations of the State. In this regard the current case-law of this Court requires the enactment and effective enforcement of criminal legislation that penalises sexual abuse of minors by private parties as a positive obligation for adequate protection against treatment contrary to Article 3 committed by private parties (see, *inter alia*, *X and Y v. the Netherlands*, 26 March 1985, §§ 23-24, Series A no. 91, and *M.C. v. Bulgaria,* no. 39272/98, § 153, ECHR 2003-XII), as well as appropriate civil responsibility and compensation. It is not contested that Irish law envisaged such protection and that it was afforded as soon as the authorities were duly informed.

12. The majority, however, merges or rather confuses the examination of the responsibilities of State authorities under Article 3 of the Convention to protect against ill-treatment by private parties with a presumed responsibility arising under Article 2 of Protocol No. 1 to examine "the risk of ill-treatment in the context of education", and comes to the conclusion that there was a specific obligation to prevent the risk of ill-treatment in the context of education (see paragraph 162). This extends the scope of these obligations under the Convention in such a way that they are no longer predictable.

13. In coming to this conclusion, the majority appears to base its factual analysis on several unjustified assumptions.

(i) The first of these assumptions is that the applicant's suffering was the result not of the unpredictable criminal conduct of a private individual, but of some inherent risk of such treatment arising in the context of education. Regrettably, child abuse of various kinds takes place both in a private and in a public context. While we agree that children must be under the constant and special protection of the State, we remain unconvinced that the risk of such abuse is necessarily inherent, or higher, in the context of education, or that such acts are necessarily more visible if committed (albeit secretly) in a school than if committed in a family context.

(ii) The second unjustified assumption is based on a fact to which the majority appears to attribute special importance, namely that the respondent State had "ceded" its responsibility for the education of children in national schools to a private entity – the Catholic Church. We fail to see a causal link between this choice of the respondent State and the frequency of sexual abuse by teachers, or knowledge thereof, in State-managed schools as compared with schools managed by private entities. In the absence of complaints the authorities will remain equally unaware of this risk and/or of the failure to report such abuse.

(iii) The third unjustified assumption on the basis of which our colleagues arrive at the conclusion that further specific positive obligations arose in the context of education is their view that "the State was aware" (see paragraph 162) of the said inherent risk in the context of education in 1973. This assumption is especially dangerous as it implies not only that the allegedly inherent risk was known to the authorities, but also that, having criminalised the acts at the relevant time, the authorities "ought to have had knowledge" of the risk notwithstanding the absence of complaints. This unjustified conclusion appears to have been reached by merging *with hindsight* a twenty-first century level of social awareness of child abuse with the results of reports on such abuse in *closed institutions* dating back to the 1930s, as well as with studies and analyses carried out in the 1980s and 1990s. We find it necessary to distinguish the information available to the national authorities in 1973 from what was available to Irish society after the mid-1980s as a result of *ex post facto* studies of child sexual abuse in Ireland. The Carrigan Report of 1931 (see paragraphs 69-72) and the Cussen and Kennedy Reports (see paragraph 74) appear to have been the only sources of public information existing and available in 1973. They concerned primarily the abuse of children deprived of parental care and control in closed institutions – a situation manifestly and fundamentally different from the circumstances of the present case (albeit equally repugnant and regrettably still valid for many parts of the world).

(iv) It was only "[f]ollowing public disclosures and controversies in the late 1980s and early 1990s" (see paragraph 75) that on 11 May 1999 the Prime Minister of Ireland issued a statement of "sincere and long overdue apology to the victims of childhood abuse for [the] collective failure to intervene, to detect their pain, to come to their rescue". A closer look at the results of the subsequently commissioned inquiries shows that these are not necessarily relevant to the circumstances of the present case, which concerns acts committed by a lay teacher in an open school – a matter on which the reports cited do not shed much light. However, these reports show that "[w]hile the religious authorities ... [minimised] the risk of public disclosure [in the closed institutions, that is, in reformatory and industrial schools] ... they had reported complaints of sexual abuse of pupils by lay persons to the police" (see paragraph 78). We cannot see why the same could not be validly expected in regard to the open national schools as a matter of principle – in contrast to the findings of the majority that the "ceding" of State responsibility for education was linked to the failure of the manager of Dunderrow School. In this regard the subsequent reports cited seem only to confirm a high probability of reporting on lay perpetrators. The reports also show that "[t]he police had been quite vigorous in their prosecution of paedophiles but the fact that most sexual crimes were not actually reported suggested that such crime was a serious problem throughout the twentieth century in Ireland ... the criminal-court archives

demonstrated a 'consistently high level of sexual crime directed against young boys and girls'", and that "[w]hile most of those cases were not recorded in the media ... the police had extensive contemporaneous knowledge of the existence of such crimes" (see paragraph 82). In our understanding this only confirms that, when made, complaints and the reporting of such acts were followed by appropriate measures. The fact that one of these reports also referred to a particular instance of failure to react to complaints in the case of a lay teacher (described as "a serial sexual and physical abuser" at paragraph 79) simply goes to prove the rule, namely that when reports were made to the State authorities, these always reacted promptly and appropriately.

(v) Our conclusion, therefore, is that it has not been shown that Irish society, or the Irish authorities, were aware or should have been aware of some inherent risk of child abuse in (the open) national schools in the mid-1970s. Moreover, to our best knowledge, no social studies show that this risk is higher in schools than anywhere else (other than closed institutions); and nothing has been submitted to indicate a difference in risk between publicly managed and privately managed (open) schools. We regret that in this regard the majority failed to give appropriate consideration to an expert's opinion (see paragraph 83) that "prior to the mid-1980s, there was 'little professional or adult sensitisation either to the word or to the possibility of abuse' and that it was 'essential to avoid the trap and potential excesses' of judging this period by today's standards".

(vi) These unjustified assumptions resulted in the retrospective expansion of the positive obligations of States, imposing standards far beyond those existing not only in 1973 but also today.

14. In *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) the Court required that "it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (see *Osman*, § 116, emphasis added). The Court held that it was sufficient for an applicant to show that the authorities had not done all that could reasonably be expected of them to avoid a *real and immediate* risk to life of which they had or ought to have had knowledge. Ever since *Osman* the Court has stated that a positive obligation to prevent unnecessary loss of life arises only in the *particular circumstances of an imminent and known risk to life*. More recently, and in the context of Article 3, the Court has required that a State take all steps that can reasonably be expected "to prevent real and immediate risks" where vulnerable persons are concerned (see, for example, in relation to prisoners, *D.F. v. Latvia*, no. 11160/07, § 84, 29 October 2013, and other cases referred to in that judgment).

15. In our view the majority went far beyond the principles established in *Osman* (cited above) and later judgments concerning the limited positive obligations of States to protect persons against unpredictable human conduct. The majority judgment imposes a positive obligation of constant and retrospective vigilance with regard to assumed inherent risks arising out of unpredictable human conduct "in an educational context", which in our view amounts to imposing (to use the Court's words in *Osman*) "an impossible and disproportionate burden".

16. In an effort to bridge the gap between the extent to which it was shown that the authorities "knew" of the allegedly inherent general risk and the standards of *Osman* (cited above) concerning established knowledge of an imminent risk in respect of specific individuals, the majority came to the conclusion that the authorities were not informed as a result of the system, which "discouraged" complaints and failed to provide for a procedure "prompting a child or parent to complain about ill-treatment directly to a State authority" (see paragraph 163), while at the same time the way in which schools were managed made inadequate provision for appropriate participation by parents.

17. The essence of the first argument concerns the victims' parents' failure to complain to the relevant State authorities and thus their failure to avail themselves of the existing remedies. In this regard the finding converts their failure into a reproach wrongly addressed to the authorities. We are not aware of any earlier case in which the authorities were blamed for the victims' failure to complain. This approach defeats the admissibility requirement to exhaust domestic remedies. Moreover, in setting retrospectively a positive obligation to "encourage complaints" in any context of governance, the reasoning of the majority seems to open the gates for any person to claim to have been a victim of a failure to encourage his or her complaints at any moment from the ratification of the Convention to the present day. In the instant case parents *had noticed* the abuse of their children. In addition to the possibility of informing the police, parents (like managers) could also complain directly to the inspectors, or to the Department, which provided them with additional instruments of protection that complemented the protection offered by the criminal legislation. The facts show clearly that in response to the acts of L.H. a meeting of parents chaired by Ó. took place, following which L.H. went on sick leave. It is a different question whether these parents and/or the applicant's parents wished, or demonstrated that they had requested, any further measures to be taken at the time. We do not wish to be seen as cynical and we can understand their hesitation to do so. What we wish to emphasise in any event is that there is nothing to support the assumption that these parents would have complained more vigorously if "encouraged" by further regulations and/or by the creation of a special body responsible for examining complaints about teachers. The reality remains that victims of

child sex abuse understandably feel embarrassed to complain, while their parents more frequently prefer to withhold complaints so as to protect their children from exposure to the further distress of inevitable inquiries. Regrettably, silence constitutes the major difficulty in investigating these cases. The respondent State cannot be held responsible for the parents' silence in 1973.

18. We are not convinced that if such allegations of child abuse had been brought by the parents and examined by either the Department of Education or the police in 1971 – when the first instance of abuse was noted by a parent – this would not have resulted in the appropriate and sufficient measures envisaged by the law at the time. In this regard our answer to the question posed in paragraph 152 – whether the State's 1973 framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children attending a national school against the risk of sexual abuse – differs from that of the majority. We are of the view that not only were appropriate measures envisaged by the national law at the time, they were also imposed *ex officio* as soon as the authorities became aware of the facts. In our view, no further positive obligations arise in the present case above and beyond those that existed in 1973 and were promptly fulfilled in the 1990s.

19. We are further concerned that the reasoning of the majority is founded on ideological premises that are difficult to accept. The majority states that "when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have been aware ... of potential risks to their safety if there was no appropriate framework of protection" (see paragraph 162). What is advocated as a solution to the problem is the creation of mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body. This part of the reasoning is based on the implicit assumption that educational systems with a strong State role or State participation offer better protection to children. There is no social-science evidence to support this belief. In particular, there is no evidence that States which provide for an "intensive" surveillance of both public and private schools obtain better results in eradicating paedophilia. There is nothing to support the assumptions that the applicant would not have become a victim of sexual abuse had she been a pupil in a school placed under stricter State surveillance or that the acts of L.H. would have been reported if the school had been placed under such surveillance. The approach adopted by the majority is in contradiction with the idea of a democratic society flourishing within the legal framework of subsidiarity. It calls unnecessarily into question the Irish model of education, which is deeply rooted in the nation's history. In this regard the majority does not hesitate to venture into the field of relatively detailed questions of internal social organisation and State administration in the field of education, areas

which fall within the exclusive domestic competence of States and should therefore be left to the appreciation of the High Contracting Parties.

20. In conclusion, we discern no causal link between the circumstances of the present case and the fact that the school, in which the applicant was abused by a lay teacher, was managed by the Catholic Church. It cannot be said that Ireland failed to honour the positive obligations imposed on it by the Convention. We regret to note that the Court, established to ensure the protection of human rights and fundamental freedoms, promotes as a remedy for rights violations a model of the State which restricts the scope of freedom and individual responsibility.

21. Judge Zupančič voted for a finding of inadmissibility of the present application. In the proceedings before the Chamber (and before relinquishment) he voted in favour of admissibility. He changed his position for the reasons explained in paragraphs 2 to 6 above.

PARTLY DISSENTING OPINION OF JUDGE CHARLETON

1. A dissent from the majority opinion is necessitated on three grounds: firstly, the approach of the majority to Article 35 of the Convention which requires the exhaustion of domestic remedies; secondly, the finding of the Court that Ireland is responsible under Article 3 of the Convention for subjecting the applicant to torture or to inhuman or degrading treatment or punishment; and, finally, on the finding of the Court that the applicant was left by Ireland without an effective remedy under Article 13 of the Convention.

2. The facts and the analysis of Irish law are as stated in the majority judgment. In applying that analysis, the majority opinion is dissented from. In what follows, particular reliance is placed on the factors that: the applicant was abused while a minor attending a day school and in the legal custody of her parents; she was abused by L.H., a married head teacher in that day school; a report in 1971 to a Roman Catholic priest acting in place of the manager of the school was not reported by him or the parent complaining to the police or to the Department of Education; the discovery in 1973 by parents of children attending the school of the abuse of multiple victims led those parents solely to insist that the head teacher L.H. leave the school; neither the parents nor the school manager reported the crimes thus uncovered to the police or to the Department of Education; there was no inhibition in Irish law or in administrative procedure against such a report; the abuse of the applicant and the other victims was a serious crime in Irish law (sexual assault or indecent assault on a person under 15 years of age); when one of the victims of these crimes reported the abuse to the police from 1995 on, the police immediately initiated a thorough investigation, uncovering the abuse of the applicant, and commenced appropriate prosecutions; the head teacher L.H. was swiftly brought before the courts and was convicted of a representative sample of his crimes; in pursuing Ireland in respect of civil liability, the applicant chose to allege negligence and vicarious liability, but on those claims not succeeding before the court of trial (High Court) her legal representatives chose only to appeal the negative vicarious liability finding to the final appeal court (Supreme Court); there thus was a failure to exhaust domestic remedies. The applicant was the victim of L.H. She was subjected to a hideous experience that has been a burden over decades. She could have done nothing to prevent what occurred. L.H. subjected the applicant to torture. Here the issue is whether Ireland breached the Convention, essentially by not finding some means to prevent that abuse. Like any legal analysis, this depends upon the application of the conditions of responsibility to the precise facts. In 2014, awareness of paedophilia suggests that children be informed against unwanted touching and thus empowered against predators like L.H. In 1973, no one would have suspected that a senior head teacher could be a source of

sexual violence to his child pupils. Without proof that Ireland in the 1970s should have taken the precautions that bitter experience and decades of official reports now demonstrate is appropriate, the case that Ireland failed in human rights obligations is not made out.

Article 35 of the Convention

3. The availability of the transcript of the domestic proceedings only after the admissibility decision necessitates a reconsideration of this issue. Article 35 of the Convention provides:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

4. This is a claim of negligence against Ireland. That this is the claim now being made is referenced clearly by the majority in paragraph 123:

> "The applicant's core complaint was that the State had failed, in violation of its positive obligation under Article 3, to put in place and adequate framework of protection of children from sexual abuse, the risk of which the State knew or ought to have known and which framework would have countered the non-State management of National Schools."

5. The majority judgment, at paragraph 162, references the claim under Article 3 as being one of failure to put in place in schools "effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body". This is regarded as one which might have been expected to avoid, or at least minimise the risk or damage suffered (referencing *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002). That claim is for a civil finding to be made in negligence against Ireland. That claim in negligence is the same claim which was dismissed in the High Court for no evidence. That ruling was not appealed to the Supreme Court. In the majority judgment, at paragraphs 69 to 90, reference is made to evidence that was presented in argument before this Court and which was never referenced before the domestic tribunal. The Carrigan Report of 1931 concerned child prostitution. There is no connection between that issue and the control of teachers in ordinary primary schools. Even if there were such, that issue was required by Article 35 to be debated as to its impact before a domestic tribunal. It was not. The Ryan Report of May 2009 is after the High Court judgment of 20 January 2006 dismissing the negligence claim for no evidence. Yet, this report is referenced in the majority opinion as evidence of Ireland's failure to protect children. Such a case, if brought by one of the inmates of such an industrial school or a reformatory school would be completely different factually to this application. The Ryan Report of 2009 concerned children who were through being brought before the District Court, including for such minor

infractions as not attending school, or through parental poverty, sent to industrial schools or reformatory schools. The context is entirely different. Those children were isolated from parental intervention. The resonance in the majority judgment is that these places of incarceration were somehow equivalent to boarding schools. There is no evidence that in 1973, the teachers in day schools might be anticipated to behave in a sexually abusive way against their pupils. Further, even were such a connection demonstrated, the proper place for debate as to the impact of such evidence is before the domestic tribunal. There was no discussion of the impact of this report before the domestic tribunal. Reference is also made to reports of sexual abuse of children by Catholic clerics, almost always outside any kind of educational setting, in the Ferns Report of 2005 and the Murphy Report of 2009. How are these relevant? The abuser in this instance was LH, a married school head teacher and not a celibate cleric. The relevance of such reports might, perhaps, be debated. But is that not a matter for the domestic forum of trial? Any possible reference to the need for a heightened State of awareness among school inspectors cannot be debated before this court under Article 35 of the Convention unless that case has been made, in this case in negligence, before a domestic tribunal.

6. This is not a question of an applicant legitimately choosing one domestic remedy over another where the choice of that remedy addresses the essential grievance; as in *Odièvre v. France* [GC],no. 42326/98, § 22, ECHR 2003-III, referenced at paragraph 108-109 of the majority judgment. It is not a question of choosing, as the majority say at paragraph 111, "one feasible domestic remedy over another" or of pursuing "one feasible appeal (vicarious liability) over another (a claim in negligence and or a constitutional tort)." Furthermore, the majority judgment conflates the concept of vicarious liability with that of liability in negligence in ruling at paragraph 110 "that the applicant had the right, consistently with Article 34, to pursue the vicarious liability action with a view to addressing her grievance against the State without being required, when the route reasonably chosen proved unsuccessful, to exhaust another remedy with essentially the same objective." This is incorrect in law. Two points need to be made.

7. Firstly, the prior decisions of the Court underline that a case cannot be made before the Court without full debate before a domestic tribunal and any relevant appeals. This must be correct as it accords with the wording of Article 35 of the Convention. In *Selmouni v. France* ([GC], no. 25803/94, ECHR 1999-V), paragraph 74 illustrates:

> "The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions ... Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of

> the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law."

8. This principle is referenced in later cases (see particularly, *D v. Ireland*, no. 26499/02, (dec.), 27 June 2006). The authorities in Ireland have not had any opportunity to consider whether the evidence uncovered in official investigations about child sexual abuse in other contexts - abuse of children while in State confinement (Ryan report of May 2009) and abuse by celibate Roman Catholic clerics (Ferns report of 2005 not referenced in evidence before the High Court and Murphy report of 2009) - established liability. It is not in accordance with established practice that novel evidence which was not referenced before a domestic tribunal is introduced before the Court with a view to establishing a case based on negligence which the applicant pleaded apart from such reports before the High Court, lost and did not appeal to the Supreme Court. Further, it must be noted that those reports were not introduced in evidence at the trial; many of them being dated subsequently (Ryan report and Murphy report, both of 2009). Professor Ferguson was consulted by the applicant prior to the domestic proceedings and furnished a report dated April 2003. In that report he advised the applicant that he was not convinced that an argument that preventative strategies should have been in place at the time the applicant was abused would succeed in terms of proof of her case. This opinion was given in the context of the sociological and historical context of the 1970s. As noted at Volume 5 Chapter 8 of the Ryan Report, referencing Rollinson – Residential Child Care in England, 1948 – 1975: A History and Report, "Prior to the mid-1980s there was little professional or adult sensitisation either to the word or to the possibility of abuse (Corby et al, 2001)." The majority reference this view by dismissing its relevance. Why is it not relevant? Surely the answer is that if it is relevant, the place to consider such evidence as advancing or undermining the case is before the domestic tribunal. As to the majority referencing statistics on prosecutions for the sexual abuse of children, it must be remembered that Ireland was aware that the crime of child abuse could occur; otherwise, the criminalisation measures that provided for imprisonment would not be in place. What was unexpected was the abuse of children by principal teacher in a local day school. No one expected that. Contrary to the majority view, the statistics cited show an active criminal justice system. That criminal justice system dealt effectively with the case of the victims of LH once a report was made to the police from 1995 on. Furthermore, if a case of negligence was to be made, then the school manager or the school board would have to answer for a lack of action in respect of the 1971 complaint, as Professor Ferguson

advised. They were not joined in the proceedings; see below § 12 of this opinion.

9. Fundamentally, in dissenting on this point, it needs to be pointed out that the law which binds the Court through Article 35 has been elided in favour of the Court now being asked to decide an issue of negligence which was abandoned by the applicant. On advice, the applicant appealed only on vicarious responsibility issue to the Supreme Court. The Court should not take on the task of analysing facts which could have been presented before domestic tribunals. Every government has the entitlement to debate such evidence before the domestic forums of justice. That debate would necessarily have been through the examination of witnesses and the scrutiny of any reports on which they founded opinions. That entitlement is central to Article 35. It has been by-passed.

10. Secondly, the majority statement in paragraphs 110 to 113, does not distinguish properly the nature of vicarious liability from a claim of failure to foresee and take appropriate precautions against abuse. These are not the same. Only vicarious liability was debated before the Supreme Court on appeal. That concept may be illustrated. An employee accidentally injures a visitor to the employer's premises by the employee doing a negligent action within the scope of employment. The relationship of employer-employee, together with the task through which the damage occurred being mandated by that employment, establishes the resultant liability of the employer to pay damages. This is so even though the employer warned against such conduct and trained employees in order to prevent its occurrence. That establishes vicarious responsibility: a wrong by an employee and the necessary relationship of responsibility within the scope of employment makes an employer liable. On the other hand, a failure to engage in appropriate training when the employer knew or ought reasonably to have known that the risk of such an accident existed is negligence. Negligence liability depends on proof of a foreseeable risk of harm and a failure to take reasonable measures in prevention. In negligence, the defendant is liable because the defendant did not take care or was at fault. In vicarious liability, the employer as defendant is liable even though that employer defendant did take care and so was not at fault but the employee of that defendant was at fault. These heads of liability, in negligence and in vicarious responsibility, are very different. They are not, to paraphrase the words of the Court in *Odièvre v. France* (§ 22 cited above and referenced at paragraph 108 of the majority judgment) remedies which are essentially the same. What is essentially the same about a defendant being liable for that defendant's own failure to take appropriate care (the tort of negligence abandoned after the High Court ruling of January 2005 and not appealed to the Supreme Court) and a defendant being liable despite carefully training employees but who becomes liable because of the employment relationship and because the wrong of the employee is within the scope of the employment relationship

(the attribution of vicarious responsibility for the wrong of another)? The vicarious liability claim was argued fully before the relevant domestic tribunals in Ireland; it was claimed before the High Court and appealed when it did not succeed to the Supreme Court. The negligence claim was abandoned once the High Court ruled against it. It does not accord with Article 35 to now revive and argue this claim afresh.

11. Finally, if the applicant's legal representatives had decided to pursue the Catholic hierarchy for the failure of the school manager to report the incident of 1971, then section 78 of the Courts of Justice Act 1936 allowed the joinder of such parties without a penalty in costs. This provides:

> "Where, in a civil proceeding in any court, there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the Court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed."

Thus another domestic remedy was left aside.

Article 3 of the Convention

12. Article 3 of the Convention provides:

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

13. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

14. To find torture or inhuman or degrading treatment regard must be had to all of the circumstances, including "the duration of the treatment, its physical and mental effects" and where relevant "the sex, age and state of health of the victim" (see *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008). Because of its gravely invasive nature and consequent on the deep wounds that it inflicts on the psyche, sexual violence is indisputably torture within the meaning of Article 3. The experience of the applicant was dreadful; the issue is the liability of Ireland for that appalling ill-treatment.

15. It is not disputed that there is a positive obligation on States to ensure that those within their jurisdiction are freed from torture or inhuman or degrading treatment (see *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, ECHR 2005-VII). The prohibition in Article 3 is absolute (see *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008). Further, positive obligations must be assumed by States to place torture or inhuman or degrading treatment outside the sphere of lawful conduct. States cannot abide by Article 3 through passing empty laws securing that right merely on

paper. Nor may States pursue administrative measures that have the appearance of advancing that right while not empowering or, similarly, through dis-empowering, the national authorities from taking potent measures against torture or inhuman or degrading treatment or punishment.

16. Two related principles might usefully now be reaffirmed. Firstly, Article 3 protects against conduct at a minimum level of seriousness (*Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25). The abuse of the applicant undoubtedly meets that standard. Secondly, however, the terms of Article 3 make it clear that the prohibition is against subjecting anyone over whom a State has authority to torture or inhuman or degrading treatment. The scope of this Article, correctly construed, engages both serious conduct as to the action against the victim and a requirement that for a State to be found by the Court to infringe Article 3, it must have responsibility for subjecting someone within its jurisdiction to that conduct. To make a finding under Article 3 against a State is thus a most serious matter for the Court. This remains the position in law notwithstanding the development of case-law. Earlier decisions of the Court were to the effect that a finding that a State had subjected a person within their jurisdiction to torture should not be made unless proven beyond reasonable doubt (see *Ireland v. United Kingdom*, cited above). Even still, the present jurisprudence of the Court affirms that there must be proof of the dual nature of an Article 3 violation: conduct of the level of gravity required for each of the separate tests of torture, of inhuman or of degrading treatment is established; and that the respondent State bears culpability for subjecting the applicant to that breach. In *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, ECHR 2005-VII) the Court declared:

> "147. ... According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights ..."

17. Extensions beyond the scope of the Convention as to when a State subjects a person to torture cannot be made without running the risk that the integrity of the prohibition in its absolute nature will be undermined, thereby replacing legal certainty with the less satisfactory standard that what may merely be argued actually represents the law. Since it is agreed that the actions of L.H., the school head teacher, infringed Article 3 by what he did to the applicant no further analysis is necessary on that issue. It is the finding that Ireland subjected the applicant to torture that is at issue. This finding is unsupportable on a plain reading of the facts. It is also inconsistent with the established jurisprudence of the Court.

18. The requirement of a close connection between a State and the wrong prohibited by Article 3, together with the culpability in moral terms that a finding of a breach of Article 3 intrinsically engages, demands that the Court should not retreat from these principles. In particular, common carelessness is not a sufficient basis for an Article 3 finding; unless that want of care is shown to be morally culpable in the context of State inaction. In particular, the negligence standard on its own cannot, without culpable moral wrong on behalf of a State, amount to subjecting a person to torture or inhuman or degrading treatment. No sustainable evidence of negligence by Ireland was produced by the applicant before the High Court in Ireland and the dismissal by that court on the basis of no evidence was not appealed by the applicant to the Supreme Court.

19. No one in 1971 to 1973 then anticipated that a head teacher in a primary school could be a serial paedophile. It is also accepted by the majority that the Department of Education knew nothing about the predation on school children by their teacher L.H. It is further accepted in the agreed facts that the police were not informed once the crimes had been reported to parents. For whatever reason, the person representing the school manager, namely Father Ó., did not pass on knowledge of any crime either in 1971 or 1973 to any official authority of Ireland and nor did the parents of the twenty-one child victims. Instead, the board of the school – representatives of the local community – met in 1973 in consequence of a general parental decision not to allow children to attend the school. There is no information as to how long this lasted but, by clear inference from the evidence, the board presented L.H. with a "resign or be sacked" situation in consequence of which he went elsewhere, apparently with no stigma. If there is fault here, and no comment is made, it is not the fault of the Irish State.

20. There was no failure to enact legislation. The reference by the majority to *X and Y v. the Netherlands* (26 March 1985, Series A no. 91) at paragraph 144 on the lack of legislation criminalising sexual advances to a mentally handicapped adolescent, contrasts the availability of genuine prohibitory remedies in Ireland; sexual touching of a minor was then and is now a crime in Ireland and consent was rightly deemed irrelevant to liability (see the analysis of Irish law at paragraphs 63-65 of the majority judgment). Article 3 engages positive obligations. States must adopt legislation or administrative measures that, considered as a whole, are an effective deterrent against torture or inhuman or degrading treatment or punishment: see *A. v. the United Kingdom* (23 September 1998, *Reports* 1998-VI) on the burden of proof in assault on a child by way of domestic chastisement, and *Opuz v. Turkey* (no. 33401/02, ECHR 2009) on complaints to domestic violence responses being manifestly inadequate. Article 3 thus requires that States put in place effective measures of investigation that are thorough and expedient and independent, and that are thus capable of leading to prosecution in the case of violation by domestic or State actors (see

Mikheyev v. Russia, no. 77617/01, 26 January 2006, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000-X). As the Court said in *Veznedaroğlu v. Turkey* (no. 32357/96, 11 April 2000) at paragraph 32:

> "... where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible ... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity ..."

21. In Ireland, the Criminal Law Amendment Act 1935 prohibited sexual intercourse with a girl under 15 and further negatived any apparent consent to sexual assault, thus rendering a victim incapable in law of ostensibly agreeing to any form of sexual action. All such acts were classified as indecent assaults, and later renamed more appropriately as sexual assaults: crimes in which a victim could not be criminally complicit. There is a complete absence of evidence that this law was an empty piece of hypocrisy. Its usefulness is demonstrated by the vigorous investigation by police authorities starting in 1995 immediately a criminal complaint was made against L.H., and by his conviction and imprisonment three years later. What happened in 1995 would most likely have happened in 1971. Thus the horrible experience of this victim in 1973 would have been prevented. Further, even the reports cited by the majority, including Carrigan and Ryan, reference the enthusiasm of the police authorities in Ireland for such forms of prosecution. There is no clearer indication that an action is prohibited by a State, moreover, than the declaration that said action is a crime. If the Irish police and administrative authorities are not engaged, counsels of perfection in retrospect are not to replace the fundamental requirements that a finding under Article 3 is only to be made in circumstances of grave moral failure by a State. That is absent here. The failing that the majority judgment purport to identify here under Article 3 cannot be regarded as compatible with a legislative failure, such as occurred in the above-cited case of *X and Y v. the Netherlands* (§§ 21-27) where there was an absence of legislation prohibiting the sexual exploitation of mentally handicapped adolescents. As to civil protection, any form of unwanted touching in Ireland is a civil wrong by law; it is the tort of assault. This is demonstrated as effective on the evidence by the award of damages in favour of the applicant against L.H.

22. In the majority judgment, the allegation is made that such rules as governed Ireland's relationship with national schools did not require parents to complain to the police or to seek redress from any other body except the

school manager (see paragraphs 163-65). The majority judgment, at paragraphs 57 to 62, correctly quotes these rules and then at paragraph 168 makes the claim that the rules "directed away" complaints to a non-State actor, namely the school manager. No case can be made that the relevant rules discouraged parents from making complaints to the police and to another official authority. It is inappropriate to quote a rule which suggests that complaints about a teacher should initially be made to the school manager as an inhibition against a criminal complaint to police. Every school in every European country must have a mechanism for dealing with complaints about a teacher in his or her capacity as a teacher. What, considered in any common-sense way, are such rules about? Parents complain about teachers: the teacher is not good at a particular subject, the teacher does not turn up on time or at all, the teacher has a personal problem which interferes with his or her teaching. This has nothing to do with directing criminal complaints of sexual abuse away from the police. Any such rule does not operate to divert a complaint that a teacher committed a crime against a child. Could anyone reasonably construe such a rule in this way? The matter was not even debated before the national trial court. This is not surprising at all. This ostensible view of the majority could not be a reference to Rule 15 of the 1965 Rules which provides for the manager to govern the school. That means what it says: governing a school does not permit or encourage any breach of the criminal law; in every legal system a crime is a breach of the fundamental rules of society, not a problem within education. Nor could Rule 121 be relevant to the majority judgment in that it requires teachers to "act in a spirit of obedience to the law". That rule further demands "strict attention to the moral and general conduct of pupils" and for teachers to take "reasonable precautions to ensure [their] safety". In so far as it may be said that teachers were obliged to "carry out the lawful instructions" of the school manager, there was no instruction not to report a crime to anyone. The text of the relevant rules indicates no such situation of discouragement or diversion or suppression of criminal complaints. Further, any person would draw the obvious distinction between a complaint about a teacher as a teacher, thus perhaps engaging the rules, and a complaint that a teacher was a serial sexual abuser of children and thus a criminal, thereby engaging the criminal law. The Guidance Note of 6 May 1970 of the Department of Education outlined a practice to be followed in respect of complaints against teachers. There are many complaints about teachers, often totally unjustified: incompetence, absence, indolence, bullying, drinking. Every country has a procedure for dealing with such justifiable or unjustifiable complaints in the sphere of education. Ireland has this too, unsurprisingly, and Ireland also has a criminal law where the complaint to be made is of sexual violence. Nothing in that procedure obliged or directed or encouraged parents whose children were sexually abused [to refrain] from going to the police. Before dissenting, the transcript of the domestic

proceedings was obtained and carefully considered. In the evidence at trial in the High Court of Ireland, neither the victims of L.H. who gave evidence nor the parent who complained in 1971 to the cleric acting in place of the school manager referenced the Guidance Note, or any other rule, as [constituting] a diversion, a "directing away" or a discouragement [with regard to making] a complaint to the police. In fact, the issue was not even discussed. Article 35 is, similarly, relevant here. There is no suggestion or hint that this Guidance Note was referenced by anyone in relation to the complaint to the manager in 1971 and there is no reference that it in any way directed the parents who became aware of the scale of the abuse in 1973 away from the police. Nor is there any evidence whatsoever that the parents were impeded in any way in making a complaint. The matter simply never came up at trial. The question was not put.

23. The majority judgment fails to complain of an absence of rules requiring the reporting of serious sexual crime. Such a development of mandatory reporting is a matter of serious debate (see the discussion by Simon O'Leary in "A Privilege for Psychotherapy? Parts 1 and 2" ([2007] Bar Reviews 75 and 76). But it can be wondered: is this the underlying but tacit reasoning of the majority judgment? The setting of appropriate rules requiring reporting may now be thought necessary in some situations in order to prevent and detect the sexual abuse of children; but that is a matter in respect of which the majority offer no view and no decided case to date has established liability for an Article 3 violation on the basis of the absence of such a rule. The setting of any such rule would require careful evaluation as to its scope and the circumstances of its application by the High Contracting Parties in the light of the national conditions that may be thought to require its application. The absence of any such rule was not argued as a ground by the applicant.

24. In the context of the litigation, the applicant's representatives commissioned an educational expert, Professor Ferguson, to direct how child abuse might have been prevented in the relevant period forty and more years ago now. As previously referenced at paragraph 24 of the majority judgment, he concluded that there was no basis on which he could testify that Ireland had failed in its duty of care towards school children. Since even the expert on behalf of the applicant cannot say that Ireland failed, there is no combination of legal ingredients that can possibly replace the Court's jurisprudence. His reasoning was that it was not possible to project onto the past the knowledge and systems of accountability of the present day. This is right. The same emerges from another report referenced but not analysed by the majority, that of Mr Rollinson, which the Ryan Commission appended to Volume V of its report.

25. The Convention is a living document. This has been reiterated in many cases. In *Tyrer v. the United Kingdom* (25 April 1978, § 31, Series A

no. 26) the Court set down a standard that has been consistently followed since:

> "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field ..."

26. In *Henaf v. France* (no. 65436/01, § 55, ECHR 2003-XI) the Court reiterated its view that:

> "... certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies ..."

27. The Convention has developed over time in accordance with changing conditions and with developing understanding. The obverse cannot be the case. Is it either logical or legally correct for the Court to pursue jurisprudence that the obligations under the Convention develop according to the times and conditions of the day while at the same time not recognising that the prevention and detection of child sexual abuse has been in a process of development over several decades? It is not supportable to find Ireland liable on the basis of not having programmes that only modern experience and a more open recognition of the criminal sickness of paedophilia and its repetitive nature have now revealed. The majority might ask: how was this to be expected in 1973? To make a finding under Article 3 is to detract from the living nature of the Convention as a fundamental document for the protection of human rights that evolves over time. This finding is instead, and in the absence of evidence, to make a State culpable of torture for failing to do what should today be recognised as appropriate.

28. Further, there is no other indication in any research carried out by the Court that contemporary practice in Ireland should have been applied forty years ago.

29. Effectively, the main finding of the majority has been made on an interpretation of the evidence that stretches rules away from their clear purpose and intent and, in addition, applies the best practice of the suspicious present as to the protection of children to a time when consciousness of this danger is not demonstrated to be as it is today, four decades later. Furthermore, the Ryan, Murphy and other reports indicate a growing awareness that led to the current practice of warning and detection in relation to child sexual abuse. The investigations by Ireland into this grave wrong demonstrate a serious determination to uncover wrongs related to this gross human violation and to set standards in the future that ensure

the protection of children in accordance with the most modern experience and thinking.

Article 13 of the Convention

30. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

31. The applicant was the repeated victim of several crimes of sexual abuse. That crime was not reported to the police authorities by the parents of the several victims who identified the nature of the gross abuse of their children to each other and to the school manager. Instead the abuse was first reported by one of the victims to the police on that victim attaining majority age some twenty years later. There were up to twenty-one such sets of parents or single parents or guardians. A single complaint to the school manager was made in 1971 and was not acted upon by him. The several complaints that were uncovered in September 1973 were responded to by a meeting of parents chaired by the school manager that led to the result outlined in the majority judgment at paragraphs 12 to 20, that is to say the resignation of L.H. and his displacement to another school. The lack of reporting to the police authorities cannot be blamed, as it is in paragraph 168 of the judgment of the majority, on complaints being "directed away" from the police. There was simply no evidence of this at the trial before the High Court. No rule relating to discouragement from reporting a breach of the criminal law is referenced. Furthermore, at trial, there was no case made by either of the victims who gave evidence or by the parent of the child who complained to the school manager in 1971 that they were discouraged from a police complaint by any rule. That was not even discussed at the trial. The criminal law of Ireland was there to be accessed by any person and the evidence indicates that it worked effectively

32. The criminal remedies were of Convention standard. Following a complaint, several years after the 1973 meeting of parents which merely resulted in the resignation of L.H., in 1995 a victim complained to the police. The applicant was interviewed. Her evidence was investigated. A large body of evidence was collected. Ireland did not have any law which prohibited or inhibited a trial on a serious criminal charge such as this – even after a gap of this duration. In other words, Ireland has no statute of limitation for the initiation of a criminal investigation or the prosecution of an offender on a serious crime. This accepted state of the law resulted in the complaint being acted upon. This led to the conviction of L.H. and his imprisonment. There is no legal deficit. Furthermore, there is no suggestion

that the rules referenced by the majority as ostensibly diversionary, changed in any way or were replaced.

33. In terms of remedies, the majority complain of the interposition of "denominational actors" between Ireland and school children and that this would "appear incompatible with the recognition of a direct duty of care between the State and children". Remedies were available against the State on proof of fault; a claim in negligence which, experience tells, is the most frequently litigated civil wrong before the Irish courts. The proof of such fault, amounting to negligence, could have resulted in an award against the State. No sustainable evidence was led at trial that the Irish authorities either knew or ought to have known that the person appointed as principal of Dunderrow National School was a paedophile. As the Court held in *Mastromatteo v. Italy* ([GC], no. 37703/97, § 95, ECHR 2002-VIII), the availability of a remedy only on proof of actual fault is not incompatible with the Convention:

> "It is true that these remedies are available only on proof of fault on the part of the relevant authorities. However, the Court observes that Article 2 of the Convention does not impose on States an obligation to provide compensation on the basis of strict liability and the fact that the remedy ... is made dependent on proof of malice or gross negligence on the part of the judge ... is not such as to render the procedural protection afforded under domestic law ineffective ..."

34. It might also be commented that a State is entitled to organise for a minimum level of education for its citizens in the way which accords to the arrangement in Ireland. In terms of actual fault, such a finding was made at the civil trial against L.H. only, and not against Ireland, and damages were ordered. The inability of L.H. to pay more than the approximately 10% of the award paid to date is a regrettable circumstance but there is no obligation under any of the Articles of the Convention that defendants who are in fact liable, in contrast to defendants against whom a finding of no fault has been made and not appealed, should be able to pay the full amount of damages.

35. Had there been proof of fault on the part of Ireland in failing reasonably to foresee and to take appropriate measures of care thus leading to damages, there existed a remedy for establishing any liability of State actors for such acts or omissions and for the payment of compensation. That remedy was the tort remedy in negligence which was, first of all, not proven against the State at trial and was then abandoned on appeal. Contrary to the majority analysis at paragraphs 183 to 186 of the judgment, this demonstrates a system that was accessible and was capable of providing redress and offered reasonable prospects of success once there was appropriate evidence.

Result

36. It is thus on the absence of evidence on which this dissent is based. The standards of today can illuminate how those four decades ago were remiss in protecting children. The standards of today based on experience up to today are not necessarily how conduct in the past is fairly to be judged. The applicant was subjected to conduct that amounts to torture or inhuman or degrading treatment. Ireland did not subject the applicant to that horrible experience; L.H. did. The Irish authorities could not reasonably have anticipated that the origin of such behaviour would be a head teacher with a mandated duty to protect children under his care. It is to be recognised that the victims of sexual abuse can be locked up in their experience over decades and be thus unable to report those crimes. It is also to be recognised that parents would not easily let their children into the criminal justice system to relive their experience as witnesses in the cold forum of a criminal trial. What cannot be avoided in any discussion of the facts of this sad case is that the result of the complaints of parents in 1973 was that the teacher left the school to take up teaching elsewhere. If there was failure here, this demonstrates that it was a failure of society in approaching this criminal behaviour and not failure by Ireland as a State.