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

FIRST SECTION

CASE OF M.C. v. BULGARIA

(Application no. 39272/98)

JUDGMENT

STRASBOURG

4 December 2003

FINAL

04/03/2004

In the case of M.C. v. Bulgaria,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr E. LEVITS
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Deputy Registrar*,

Having deliberated in private on 13 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 39272/98) against the Republic of Bulgaria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, M.C. ("the applicant"), on 23 December 1997. In the proceedings before the Court, the President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr Y. Grozev, a lawyer practising in Sofia. Mr Grozev submitted a power of attorney dated 27 November 1997, signed by the applicant and her mother. The Bulgarian Government ("the Government") were represented by their Agents, Ms V. Djidjeva, Ms M. Dimova and Ms M. Kotzeva, of the Ministry of Justice.

3. The applicant alleged violations of her rights under Articles 3, 8, 13 and 14 of the Convention in that domestic law and practice in rape cases and the investigation into the rape of which she had been a victim did not secure the observance by the respondent State of its positive obligation to provide effective legal protection against rape and sexual abuse.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was initially allocated to the Fourth Section of the Court (Rule 52 § 1).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First

Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 5 December 2002, the Chamber declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). In addition, third-party comments were received from Interights, a non-governmental organisation based in London, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and former Rule 61 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Bulgarian national who was born in 1980.

10. She alleged that she had been raped by two men on 31 July and 1 August 1995, when she was 14 years and 10 months old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex.

A. The events of the night of 31 July to 1 August 1995

1. The evening of 31 July

11. On 31 July 1995 the applicant and a friend of hers had been waiting to enter a disco bar in the town of K., when three men, P. (21 years old at the time), A. (20 years old at the time) and V.A. (age not specified), arrived in a car owned by P. The applicant knew P. and A. She had met P. in the same disco bar and had danced with him once. A. was the older brother of a classmate of hers.

12. A. invited the applicant to go with him and his friends to a disco bar in a small town 17 km away. According to the applicant, she agreed on condition that she would be back home before 11 p.m.

13. In the bar, one or two of the group had drinks. The applicant saw some friends, with whom she had a short chat. According to the applicant, she repeatedly told the others it was time to leave, as it was getting late.

14. At some time late in the evening, the group left and headed back to K. On the way, they were briefly stopped and checked by traffic police.

15. A. then suggested stopping for a swim at a nearby reservoir. According to the applicant, they went there despite her objections. She submitted that she had not suspected the men's intentions.

2. Events at the reservoir

16. At the reservoir, the applicant remained in the car, in the front passenger seat, saying that she was not interested in swimming. The three men headed towards the water. Soon afterwards, P. came back and sat in the front seat next to the applicant.

17. In her statements to the investigating authorities, the applicant submitted that P. had then pressed his body against hers, proposed that they "become friends" and started kissing her. The applicant had refused his advances and had asked him to leave. P. had persisted in kissing her while she had tried to push him back. He had then moved the car seat back to a horizontal position, grabbed her hands and pressed them against her back. The applicant had been scared and at the same time embarrassed by the fact that she had put herself in such a situation. She had not had the strength to resist violently or scream. Her efforts to push P. back had been unsuccessful, as he had been far stronger. P. had undressed her partially and had forced her to have sexual intercourse with him.

18. In her testimony, the applicant stated: "It was my first time and it hurt a lot. I felt sick and I wanted to throw up. I started crying."

19. According to P.'s statements, he had had sex with the applicant in the car with her full consent. He had started kissing her, she had responded, and he had tried unsuccessfully to unbutton her jeans or loosen her belt, whereupon she had done so herself and had taken off her pants.

20. After P. had finished, he left the car and walked towards A. and V.A. In his submissions to the police, A. said that P. had told them that he had "shagged" the applicant. Shortly afterwards, the three men returned to the car and the group drove off.

21. In her submissions to the investigator, the applicant stated that she had later come to suspect that the three men had planned to have sex with her and had invented the pretext of swimming to drive to a deserted area. In particular, she did not remember A. and V.A. being wet when they had come back to the car, although they had insisted on going to the reservoir for a swim.

3. The alleged second rape

22. The applicant later testified that after the first rape she had been very disturbed and had cried most of the time. According to the version of events given by P. and A. when later questioned, the applicant had been in an excellent mood, had started caressing A., which had irritated P., and had asked to go to a bar or a restaurant. The group had gone to a restaurant, where the applicant had briefly talked with a Ms T., the singer performing there. Ms T. had been sitting at a table there with one Mr M.

23. Ms T., the singer, stated that on 1 August 1995 she had been in the restaurant with Mr M. Shortly after midnight the applicant, whom she knew vaguely, had approached her and asked whether her group would be performing in the next few days. Ms T. recalled having seen at that moment a man waiting at the door. Having heard the answer to her question, the applicant had left. Ms T. stated that the applicant had appeared cheerful and that there had been nothing unusual in her behaviour.

24. Mr M. was also questioned by the police. He stated that he knew the applicant very well and that he did not remember having seen her that night.

25. The applicant disputed the statements of P., A., V.A. and Ms T., maintaining that there had been no visit to a restaurant and that she did not know Ms T. The applicant and her mother later accused Ms T. of perjury (see paragraphs 66-68 below).

26. Instead of returning to K., at around 3 a.m. the group went to a neighbouring town, where V.A.'s relatives had a house. A., V.A. and the applicant got out of the car. P., who was the owner of the car, drove off.

27. The three men and a baker, Mr S., called by them as a witness, later maintained that in the meantime there had been a short stop at Mr S.'s bakery. Mr S. allegedly had the key to the house. Mr S., when interrogated, stated that at about 2 a.m. he had given the key to V.A. and had seen the applicant waiting in the car, apparently in a good mood. Loud music had been coming from the car. The applicant disputed that there had been any visit to a baker's shop and accused the baker of perjury. P., A. and V.A. submitted in their statements that they had decided to go to the house as the applicant had told them that she had quarrelled with her mother and did not want to go back home.

28. The applicant stated to the police that she had felt helpless and in need of protection. As A. was the brother of a classmate of hers, she had expected such protection from him and had followed him and V.A. into a room on the ground floor of the house.

29. There was one bed in the room and the applicant sat on it. The two men smoked and talked for a while. V.A. then left the room.

30. The applicant maintained that at that point A. had sat next to her, pushed her down onto the bed, undressed her and forced her to have sex with him. The applicant had not had the strength to resist violently. She had only begged the man to stop. She later related in her statement:

> "I started crying and asked him to stop ... He started caressing my breasts and sucking my neck ... At some point he took my jeans and my pants off with his feet. Then he spread my legs apart with his legs and forced his way into me ... [After he finished] I started crying and I continued crying until some time in the morning, when I fell asleep ... [V.A.] woke me up telling me that [A.] had gone to find a car to drive me back to K. I sat on the bed and started crying."

31. A.'s position before the police was that he had had sex with the applicant with her full consent.

4. The morning of 1 August 1995

32. On the following morning at around 7 a.m., the applicant's mother found her daughter in the house of V.A.'s relatives. The applicant's mother stated that, having learned from neighbours that her daughter had been seen the previous evening with A., she had been on her way to A.'s house when she had met V.A. in the street. V.A. had allegedly tried to mislead the applicant's mother in an effort to gain time and warn A. However, she had insisted.

33. The applicant and her mother maintained in their submissions during the investigation that the applicant had told her mother right away that she had been raped. A. had also been there. He had told the applicant's mother that "a truck driver" had had sex with her daughter the previous night.

34. According to A.'s version of events, the applicant and her mother had quarrelled, the applicant allegedly refusing to go with her and telling her to go away. A neighbour, apparently named as a witness by A. or V.A., stated that he had heard the quarrel and, in particular, the refusal of the applicant to leave with her mother and her saying that nothing had happened to her. The applicant accused the witness of perjury.

35. The applicant and her mother went directly to the local hospital, where they were directed to see a forensic medical examiner. The applicant was examined at about 4 p.m.

36. The medical examiner found that the hymen had been freshly torn. He also noted grazing on the applicant's neck, measuring 35 mm by 4 mm, and four small oval-shaped bruises. As noted in the medical certificate, the applicant had reported only one rape, stating that it had occurred between 10.30 and 11 p.m. the previous day at the reservoir.

B. Events between 1 and 11 August 1995

37. The applicant submitted that during the next few days she had refused to talk to her mother about the incident. She had given no details and had not mentioned the second rape at all. She explained that she lived in a conservative small-town environment where virginity was considered to be an asset for marriage. She felt ashamed of the fact that she had "failed to protect her virginity" and of "what people would say about it".

38. On the first evening after the events, on 1 August 1995, P. visited the applicant's family. The applicant and her mother stated that that evening P. had begged for forgiveness and had claimed that he would marry the applicant when she came of age. The applicant's mother had considered that accepting the offer would be reasonable in the circumstances. This had influenced the initial behaviour of the applicant, who had accepted her mother's idea of minimising the damage.

39. On one of the following evenings, the applicant went out with P. and some of his friends.

40. P. and V.A., the latter claiming that he had been with P. during the visit to the applicant's house on the evening of 1 August 1995, stated that the applicant's mother had told them that "all pleasure must be paid for" and had tried to extort money from them.

41. P.'s grandmother also made a statement to the police. She asserted that on an unspecified date the applicant's mother had visited her, trying to extort money.

42. With regard to that visit and other relevant events, Mrs D., a neighbour and friend of the applicant's mother, stated that the applicant's mother had been very upset about the events and had agreed to her daughter going out with P. as he had maintained that he loved the applicant. The applicant's mother had nevertheless decided to talk to P.'s parents. On an unspecified date Mrs D. and another neighbour had approached the house of P.'s family, but his grandmother had told them to go away, stating that the applicant had slept not only with P. but also with A. At that moment A. had arrived. Mrs D. had asked him whether it was true that he had slept with the applicant. He had confirmed that it was true, adding that he had the money and power to do as he pleased. Until then, the applicant's mother had not known about the second rape.

43. The applicant submitted that a visit by A.'s father on 8 August 1995 had caused her to break down. She had then confided to her mother about the second rape. On 10 August 1995 the applicant's father returned home, after being absent for several days. The family discussed the matter and decided to file a complaint. The applicant's mother did so on 11 August 1995.

C. The investigation

1. The initial police inquiry

44. On 11 August 1995 the applicant made a written statement about the events of 31 July and 1 August. On the same day P. and A. were arrested and made written statements. They claimed that the applicant had had sexual intercourse with them of her own free will. The two men were released. Written statements were also made by V.A. and a person who

lived next to the house where the second alleged rape had taken place. On 25 August 1995 a police officer drew up a report and forwarded the file to the competent prosecutor.

45. On 14 November 1995 the district prosecutor opened a criminal investigation into the alleged rape and referred the case to an investigator. No charges were brought.

46. No action was taken on the case between November 1995 and November 1996.

2. The proceedings in relation to the complaints by P. and A. alleging perjury

47. On 24 August 1995 P. and A. filed complaints with the district prosecutor's office, stating that the applicant and her mother had been harassing them by making false public accusations.

48. On the basis of these complaints, on 28 August 1995, the district prosecutor ordered a police inquiry. In September and October 1995 several persons were heard and made written statements.

49. On 25 October 1995 a police officer drew up a report apparently accrediting the allegations of P. and A. and disbelieving the version of the facts as submitted by the applicant and her mother.

50. On 27 October 1995 the file was transmitted to the district prosecutor's office with jurisdiction to decide whether or not to institute criminal proceedings against the applicant and her mother. It appears that the matter was left hanging and no decision was taken.

3. The resumed investigation into the rape case

51. Between 2 November and 9 December 1996 the investigator questioned the applicant, her mother and other witnesses. P. and A. were heard as witnesses.

52. The applicant gave a detailed account of the facts, repeating that P. had overcome her resistance by pressing her against the car seat and twisting her hands, and that thereafter she had been in a state of shock and unable to resist A.

53. In his evidence, P. claimed that the applicant had actively responded to his advances. He also asserted that the applicant had spoken with Mr M. at the restaurant they had allegedly gone to after having sex.

54. Both A. and P. stated, *inter alia*, that shortly after having sex with P. at the reservoir, the applicant had started caressing A. in the car.

55. On 18 December 1996 the investigator completed his work on the case. He drew up a report stating that there was no evidence that P. and A. had used threats or violence, and proposed that the prosecutor close the case.

56. On 7 January 1997 the district prosecutor ordered an additional investigation. The order stated that the initial investigation had not been objective, thorough or complete.

57. On 16 January 1997 the investigator to whom the case had been referred appointed a psychiatrist and a psychologist to answer several questions. The experts were asked, *inter alia*, whether it was likely that the applicant would have spoken calmly with Ms T., the singer at the restaurant, and then listened to music in the car, if she had just been raped and whether it was likely that several days after the alleged rape the applicant would have gone out with the person who had raped her.

58. The experts considered that, owing to her naivety and inexperience, the applicant had apparently not considered the possibility that she might be sexually assaulted. There was no indication that she had been threatened or hurt, or that she had been in a state of shock during the events, as she had demonstrated a clear recollection of them. The experts considered that during the events she must have been suddenly overwhelmed by an internal conflict between a natural sexual interest and a sense that the act was reprehensible, which had "reduced her ability to resist and defend herself". They further found that the applicant was psychologically sound and that she had understood the meaning of the events. In view of her age at the time, however, she "could not assert a stable set of convictions".

59. The experts also found that, if there had indeed been a meeting between Ms T. and the applicant after the events at the reservoir – and this was disputed – it was still possible that the applicant could have had a short exchange with Ms T. after being raped. As to the applicant going out with P. several days after the events, this could be easily explained by her family's desire to lend a socially acceptable meaning to the incident.

60. On 28 February 1997 the investigator concluded his work on the case and drew up a report, again proposing that the case should be closed. He considered that the experts' opinion did not affect his earlier finding that there was no evidence demonstrating the use of force or threats.

61. On 17 March 1997 the district prosecutor ordered the closure of the criminal investigation. He found, *inter alia*, that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established.

62. The applicant lodged consecutive appeals with the regional prosecutor's office and the Chief Public Prosecutor's Office. The appeals were dismissed in decisions of 13 May and 24 June 1997 respectively.

63. The prosecutors relied, *inter alia*, on the statements of the alleged perpetrators and V.A. that the applicant had not shown any signs of distress after having sex with P. at the reservoir, and the evidence of the three men and Ms T. that the latter had met the applicant and had spoken with her that night. As regards the applicant's objections that those statements should be

rejected as being untrue, the decision of 13 May 1997 stated that "prosecutors' decisions cannot be based on suppositions, and witnesses' statements cannot be rejected only on the basis of doubts, without other evidence ...".

64. The decision of 13 May 1997 also stated:

> "It is true that, as can be seen from the report of the forensic psychiatric experts, the young age of the applicant and her lack of experience in life meant that she was unable to assert a stable set of convictions, namely to demonstrate firmly her unwillingness to engage in sexual contact. There can be no criminal act under Article 152 §§ 1 (2) and 3 of the Criminal Code, however, unless the applicant was coerced into having sexual intercourse by means of physical force or threats. This presupposes resistance, but there is no evidence of resistance in this particular case. P. and A. could be held criminally responsible only if they understood that they were having sexual intercourse without the applicant's consent and if they used force or made threats precisely with the aim of having sexual intercourse against the applicant's will. There is insufficient evidence to establish that the applicant demonstrated unwillingness to have sexual intercourse and that P. and A. used threats or force."

It was further noted that the applicant had explained that the bruises on her neck had been caused by sucking.

65. The decision of 24 June 1997 reiterated those findings, while noting that the statements of Ms T., the singer at the restaurant, were not decisive. It also stated:

> "What is decisive in the present case is that it has not been established beyond reasonable doubt that physical or psychological force was used against the applicant and that sexual intercourse took place against her will and despite her resistance. There are no traces of physical force such as bruises, torn clothing, etc. ...
>
> It is true that it is unusual for a girl who is under age and a virgin to have sexual intercourse twice within a short space of time with two different people, but this fact alone is not sufficient to establish that a criminal act took place, in the absence of other evidence and in view of the impossibility of collecting further evidence."

4. Other proceedings

66. In June or July 1997 the applicant and her mother requested the institution of criminal proceedings against Ms T. and other witnesses, including V.A., alleging that they had committed perjury in that their statements in connection with the investigation into the rape of the applicant had been false.

67. On 14 July 1997 the same prosecutor from the district prosecutor's office who had ordered the closure of the rape investigation refused the request, stating that it was unfounded and even abusive, as all the facts had been clarified in previous proceedings.

68. An ensuing appeal by the applicant was dismissed on 6 February 1998 by the regional prosecutor's office.

D. The expert opinion submitted by the applicant

69. In June 2001 the applicant submitted a written opinion by two Bulgarian experts, Dr Svetlozar Vasilev, a psychiatrist, and Mr Valeri Ivanov, a psychologist, who had been asked by the applicant's lawyer to comment on the case.

70. The experts stated, with reference to scientific publications in several countries, that two patterns of response by rape victims to their attacker were known: violent physical resistance and "frozen fright" (also known as "traumatic psychological infantilism syndrome"). The latter was explained by the fact that any experience-based model of behaviour was inadequate when the victim was faced with the inevitability of rape. As a result the victim, terrorised, often adopted a passive-response model of submission, characteristic of childhood, or sought a psychological dissociation from the event, as if it were not happening to her.

71. The experts stated that all the scientific publications they had studied indicated that the "frozen-fright pattern" prevailed. Further, they had conducted their own research for the purposes of their written opinion in the present case. They had analysed all the cases of young women aged 14 to 20 who had contacted two specialised treatment programmes for victims of violence in Bulgaria during the period from 1996 to 2001, declaring that they had been raped. Cases that were too different from that of the applicant had been excluded. As a result, twenty-five cases had been identified, in twenty-four of which the victim had not resisted violently, but had reacted with passive submission.

II. RELEVANT DOMESTIC LAW AND PRACTICE

72. By Article 151 § 1 of the Criminal Code, sexual intercourse with a person under 14 years of age is a punishable offence (statutory rape). Consent is not a valid defence in such cases.

73. Consent is likewise irrelevant where the victim is more than 14 years old, but did not "understand the essence and meaning of the occurrence" (Article 151 § 2 of the Code). That provision has been applied in cases where the victim did not grasp the meaning of the events owing to a mental disorder (see judgment no. 568 of 18 August 1973, case no. 540/73, Supreme Court-I).

74. Article 152 § 1 of the Criminal Code defines rape as:

> "sexual intercourse with a woman
>
> (1) incapable of defending herself, where she did not consent;
>
> (2) who was compelled by the use of force or threats;
>
> (3) who was brought to a state of helplessness by the perpetrator."

75. Although lack of consent is mentioned explicitly only in the first sub-paragraph, the Supreme Court has held that it is an element inherent in the whole provision (see judgment no. 568, cited above).

76. According to judicial practice, the three sub-paragraphs of Article 152 § 1 can only be applied alternatively, each of them referring to a separate factual situation. The Supreme Court has held that general references to two or all of the sub-paragraphs are not acceptable (see judgment no. 247 of 24 April 1974, case no. 201/74, Supreme Court-I; judgment no. 59 of 19 May 1992, case no. 288/90, Supreme Court-I; and many others).

77. Therefore, an accused person may be found guilty of rape only if it has been established that he had sexual intercourse with a woman in circumstances covered by one of the three sub-paragraphs.

78. The first and third sub-paragraphs concern particular factual situations where the victim was in a state of helplessness at the time of sexual intercourse. The third sub-paragraph refers to cases where the perpetrator put the victim in a state of helplessness before raping her, whereas the first sub-paragraph refers to cases where he took advantage of the victim's existing state of helplessness.

79. The courts have stated that a victim is in a state of helplessness ("incapable of defending herself" or "brought to a state of helplessness") only in circumstances where she has no capacity to resist physically owing to disability, old age or illness (see judgment no. 484 of 29 July 1983, case no. 490/83, and judgment no. 568, cited above) or because of the use of alcohol, medicines or drugs (see judgment no. 126 of 11 April 1977, case no. 69/77, Supreme Court-II).

80. The second sub-paragraph is the provision applicable in all other cases of alleged rape. Thus, where no special circumstances such as the state of helplessness of the victim are reported, an investigation into an alleged rape will concentrate on establishing whether or not the victim was coerced into having sexual intercourse by the use of force or threats.

81. It is an established view in the case-law and legal theory that rape under the second sub-paragraph of Article 152 § 1 of the Criminal Code is a "two-step" offence – that is to say, the perpetrator first starts employing force or threats and then penetrates the victim.

82. The parties in the present case offered their views on the meaning of the words "use of force and threats" and their interpretation in practice (see paragraphs 113, 122 and 123 below).

83. The Supreme Court has stated that lack of consent is to be deduced from the fact that a situation covered by one of the three sub-paragraphs of Article 152 § 1 has been established, either from the victim's state of helplessness or from the fact that physical or psychological force has been used (see judgment no. 568, cited above).

84. In one case, the Supreme Court stated that "force" was not only to be understood as direct violence, but could also consist of placing the victim in a situation such that she could see no other solution than to submit against her will (see judgment no. 520 of 19 July 1973, case no. 414/73). In that particular case, the perpetrator, after demonstrating his desire for close relations with the victim by his behaviour over a period of two or three days (following her and trying to hold her and kiss her), entered her room, locked the door and asked her to undress. She refused, whereupon he tried to spread her legs apart. Realising that she had no other choice, the victim opened the window and jumped, sustaining serious injury. The perpetrator was convicted of attempted rape resulting in serious injury.

85. Legal commentators have not commented in detail on situations where coercion through force or threats may be considered to have been established, apparently taking the view that this was a matter for judicial interpretation (Al. Stoynov, Наказателно право, Особена част, 1997; A. Girginov, Наказателно право, Особена част, 2002). One commentator has stated that the essential characteristic of rape is the victim's lack of consent and that the three sub-paragraphs of Article 152 § 1 of the Criminal Code embody different situations of lack of consent. He further notes that in previous centuries the utmost resistance by the victim was required and that that view is now outdated. Without reference to case-law, he considers that what is now required is nothing more than the resistance necessary to eliminate any doubt as to the victim's lack of consent (N. Antov, Проблеми на изнасилването, 2003).

86. Under Article 152 § 1 of the Criminal Code, rape committed by a man against a woman is punishable by two to eight years' imprisonment. At the material time, Article 157 § 1 of the Code provided for one to five years' imprisonment in cases of forced sexual intercourse with a person of the same sex. In 2002 the punishment prescribed under the latter provision was brought into line with that applicable in cases of rape under Article 152 § 1, and is now two to eight years' imprisonment.

87. At the material time, the age of consent in respect of sexual intercourse with a person of the same sex was 16 years (Article 157 § 2 of the Code). In 2002 it was lowered to 14 years.

III. RELEVANT COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

A. Provisions on rape in the domestic law of some European countries

88. In the legal systems of a number of European States, rape and sexual assault are "gender-neutral" offences, whereas in other countries rape may only be committed by a man against a woman.

89. The minimum age of consent for sexual activity in most States is 14, 15 or 16 years. In some countries, there is a different age of consent for sexual acts without penetration and for sexual acts with penetration, or different penalties depending on the age of the victim. The approaches vary significantly from one country to another.

90. Article 375 §§ 1 and 2 of the Belgian Criminal Code (referred to by Interights), as amended in 1989, read:

> "Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.
>
> In particular, there is no consent where the act is forced by means of violence, coercion or ruse or was made possible by the victim's disability or physical or mental deficiency."

91. Article 241 § 1 of the Czech Criminal Code (Law no. 140/1961, as amended) provides:

> "A person who coerces another into an act of sexual penetration or a similar sexual act through violence or the threat of imminent violence or by taking advantage of the person's helplessness shall be liable to imprisonment for a term of two to eight years."

92. Sections 216(1) and 217 of the Danish Penal Code (referred to by the intervener) provide:

> "Any person who coerces [another into having] sexual intercourse by violence or under threat of violence shall be guilty of rape and liable to imprisonment for a term not exceeding eight years. The placing of a person in such a position that the person is unable to resist shall be equivalent to violence ..."
>
> "Any person who by means of unlawful coercion (according to section 260 of this Act) other than violence or the threat of violence procures sexual intercourse for himself, shall be liable to imprisonment for a term not exceeding four years."

93. Chapter 20, sections 1 and 3, of the Finnish Penal Code (as amended in 1998) provides:

"Section 1: Rape

(1) A person who coerces another into having sexual intercourse by the use or threat of violence shall be sentenced for rape to imprisonment for at least one year and at most six years.

(2) A person shall also be guilty of rape if he/she takes advantage of the incapacity of another to defend himself/herself and has sexual intercourse with him/her, after rendering him/her unconscious or causing him/her to be in a state of incapacity owing to fear or another similar reason ...

Section 3: Coercion into having sexual intercourse

(1) If the rape, in view of the low level of violence or threat and the other particulars of the offence, is deemed to have been committed under mitigating circumstances, the offender shall be sentenced for coercion into having sexual intercourse to imprisonment for at most three years.

(2) A person who coerces another into having sexual intercourse by a threat other than that referred to in section 1(1) shall be guilty of coercion into having sexual intercourse."

94. Articles 222-22, 222-23 and 227-25 of the French Criminal Code provide:

"Sexual aggression is any sexual assault committed by violence, coercion, threats or surprise."

"Any act of sexual penetration, whatever its nature, committed against another person by violence, coercion, threats or surprise, shall be considered rape. Rape shall be punishable by fifteen years' imprisonment."

"A sexual offence committed without violence, coercion, threats or surprise by an adult on the person of a minor under 15 years of age shall be punished by five years' imprisonment and a fine of 75,000 euros."

95. The following information about French case-law on rape may be gathered from the authoritative publication *Juris-Classeur* (2002):

(i) The words "violence, coercion, threats or surprise" are given a broad meaning in practice. For example, in one case it was stated that the fact that the victim was begging the perpetrator to stop, without further resistance, where she had previously agreed to enter his car and to be kissed by him, was sufficient to establish that there was rape (judgment of the Court of Cassation, Criminal Division ("*Cass. crim.*"), 10 July 1973, *Bulletin Criminel* ("*Bull. crim*.") no. 322; *Revue de Science Criminelle*, 1974, p. 594, observations of Levasseur; see also, for an opposing view, *Crim*., 11 October 1978, Dalloz 1979. IR, 120). The victim's refusal may be inferred from the circumstances, such as paralysing shock, as a result of which the victim could not protest or escape (*Cass. crim*., 13 March 1984, *Bull. crim*. no. 107).

(ii) There is "surprise" where the victim cannot freely consent because, for example, she is physically or mentally disabled (*Cass. crim*., 8 June 1984, *Bull. crim*. no. 226), in a particular psychological state, involving depression, fragility, or simply distress (*Cass. crim*., 12 November 1997, *Juris-Data* no. 2000-005087; Paris Court of Appeal, 30 March 2000, *Juris-Data* no. 2000-117239), or where the perpetrator used trickery to deceive the victim as to the real situation (*Cass. crim*., 14 April 1995, *Juris-Data* no. 1995-002034).

(iii) The courts have considered that there is always "surprise", and therefore rape, where the victim is of such a low age as not to understand the concept of sexuality and the nature of the acts being imposed (*Cass. crim.*, 11 June 1992, *Bull. crim*. no. 228; Limoges Court of Appeal, 5 April 1995, *Juris-Data* no. 1995-042693; Paris Court of Appeal, 14 November 2000, *Juris-Data* no. 2000-134658). In some other cases, however, it has been stated that in principle the age of the victim cannot as such, without additional elements, establish the existence of "surprise" (*Cass. crim*., 1 March 1995, *Bull. crim*. no. 92).

96. The relevant part of Article 177 (Sexual coercion; Rape) of the German Criminal Code reads:

> "1. Anyone who coerces another person
>
> (1) by force,
>
> (2) by the threat of immediate danger to life or limb, or
>
> (3) by exploiting a situation in which the victim is defenceless and at the mercy of the actions of the perpetrator
>
> into submitting to sexual acts performed by the perpetrator or by a third person or into performing such acts on the perpetrator or on the third person, shall be punished by imprisonment for not less than one year."

97. Article 197 § 1 of the Hungarian Criminal Code (Law no. 4 of 1978) provides:

> "A person who by violent action or a direct threat to life or limb forces a person to have sexual intercourse, or uses a person's incapacity to defend himself/herself or to express his/her will to have sexual intercourse shall be guilty of a serious offence punishable by imprisonment for two to eight years."

98. In Ireland, section 2(1) of the Criminal Law (Rape) Act 1981 and section 9 of the Criminal Law (Rape) (Amendment) Act 1990 (referred to by the intervener) provide:

> "A man commits rape if (a) he has sexual intercourse with a woman who at the time of intercourse does not consent and (b) at the time he knows she does not consent or is reckless as to whether or not she is consenting."

"It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of the person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act."

99. Article 180 § 1 of the Slovenian Criminal Code reads:

"Anyone who compels a person of the same or the opposite sex to submit to sexual intercourse by force or the threat of imminent attack on life and limb shall be sentenced to imprisonment from one to ten years."

100. In the United Kingdom, section 1(1) of the Sexual Offences (Amendment) Act 1976 (referred to by the intervener) provides:

"[A] man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or is reckless as to whether she consents to it."

B. Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence

101. The Committee of Ministers recommends that member States adopt and implement, in the manner most appropriate to each country's national circumstances, a series of measures to combat violence against women. Paragraph 35 of the appendix to the recommendation states that, in the field of criminal law, member States should, *inter alia*:

"– penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance;

...

– penalise any abuse of the position of a perpetrator, and in particular of an adult *vis-à-vis* a child."

C. The International Criminal Tribunal for the former Yugoslavia

102. In *Prosecutor v. Anto Furundžija* (case no. IT-95-17/1-T, judgment of 10 December 1998), in the context of the question whether or not forced oral sexual penetration may be characterised as rape under international law, the Trial Chamber made the following relevant remarks about rape under international criminal law:

"The Trial Chamber notes the unchallenged submission ... that rape is a forcible act: this means that the act is 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression'. ...

> ... all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless."

103. The Trial Chamber defined rape as:

> "sexual penetration ... by coercion or force or threat of force against the victim or a third person."

104. Noting that the terms "coercion", "force", or "threat of force" from the *Furundžija* definition were not intended to be interpreted narrowly, the Trial Chamber in another case (*Prosecutor v. Kunarac, Kovač and Vuković*, case no. IT-96-23, judgment of 22 February 2001) observed:

> "In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which ... as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.
>
> ... the basic underlying principle common to [the national legal systems surveyed is] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim ... [F]orce, threat of force or coercion ... are certainly the relevant considerations in many legal systems but the full range of [the relevant] provisions ... suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*. "

105. In *Kunarac, Kovač and Vuković*, a Muslim girl in an occupied area was taken by armed soldiers to a building which served as military headquarters. After being raped by two soldiers there, she was brought to a room where she herself initiated sexual contact with the accused Mr Kunarac, the commanding officer. The Trial Chamber noted that the victim had been told by soldiers that she should satisfy their commander sexually or risk her life. The victim therefore "did not freely consent to any sexual intercourse with Kunarac [as she] was in captivity and in fear for her life". The Trial Chamber also rejected Kunarac's defence that he was not aware of the fact that the victim had only initiated sexual intercourse with him because she feared for her life. The Chamber found that, even if Kunarac had not heard the threats made by other soldiers, he could not have been "confused" by the behaviour of the victim, given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls in the region.

106. In the context of the above facts, the Trial Chamber made the following observations on the elements of rape under international law:

> "The basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

> In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator [are present].
>
> ... coercion, force, or threat of force [are] not to be interpreted narrowly ... coercion in particular would encompass most conduct which negates consent ...
>
> In light of the above considerations, the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by ... sexual penetration ... where [it] occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."

107. In the same case, on an appeal by the perpetrators based on the argument, *inter alia*, that there was no rape without force or threat of force and the victim's "continuous" or "genuine" resistance, the Appeals Chamber, in its judgment of 12 June 2002, stated:

> "The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.
>
> Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force ...
>
> For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent."

D. The United Nations Committee on the Elimination of Discrimination against Women

108. In its General Recommendation 19 of 29 January 1992 on violence against women, the Committee made the following recommendation in paragraph 24:

> "(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
>
> (b) States parties should ensure that laws against ... abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. ..."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3, 8 AND 13 OF THE CONVENTION

109. The applicant complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim had resisted actively were prosecuted, and that the authorities had not investigated the events of 31 July and 1 August 1995 effectively. In her view, the above amounted to a violation of the State's positive obligations to protect the individual's physical integrity and private life and to provide effective remedies in this respect.

110. The relevant Convention provisions read:

Article 3

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

Article 8 § 1

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

Article 13

> "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."

A. The parties' submissions

1. The applicant

111. The applicant considered that domestic law and practice in rape cases should determine the existence, or lack, of consent to sexual intercourse on the basis of all relevant factors. In her view, a legal framework and practice that required proof of physical resistance by the victim, and thus left unpunished certain acts of rape, were inadequate.

112. The applicant relied on the written expert opinion she submitted (emphasising that the majority of children or other young rape victims displayed passive psychological reactions of panic – see paragraphs 69-71 above) and also on developments in international and comparative law as to the elements of the crime of rape.

113. The applicant then offered her analysis of Bulgarian law and practice concerning rape and sexual abuse. She made the following submissions:

(i) According to the practice of the Bulgarian investigating and prosecuting authorities, the prosecution of rape was only possible if there was evidence of the use of physical force and evidence of physical resistance. Lack of such evidence would lead to the conclusion that sexual intercourse had been consensual.

(ii) It was not possible to support the above assertion directly with a case study since investigators' and prosecutors' decisions were not publicly available; they could only be found in the relevant case files and there was no system of sorting, reporting or analysis that could serve as the basis of a study. Also, the impugned practice was not based on written instructions but on institutional tradition and culture.

(iii) Because of the existing policy of the prosecuting authorities not to bring charges unless there was evidence of physical force and resistance, the issue had not been addressed directly by the courts.

(iv) Nevertheless, an overview of the reported judgments of the Supreme Court and the Supreme Court of Cassation (judgments of lower courts were not reported) provided indirect evidence about the type of cases that were likely to be brought to court by the prosecuting authorities. The applicant had searched all reported judgments in rape cases and produced copies of twenty-one judgments considered relevant by her counsel.

(v) Almost all reported cases concerned rape accompanied by substantial use of physical force and/or threats. Those cases typically involved the following acts of violence: dragging the victim from a car to a house and locking her up; tearing clothes and hitting the victim; punching the victim on the head and kicking her; suffocating the victim; causing concussion and fracture of the nose; or beating causing substantial bleeding. In several cases

the victim had been threatened with violence or other consequences. In three cases the victim had committed or attempted to commit suicide as a result.

(vi) The research had produced only two cases in which a more context-sensitive approach could be noted. In one case a teacher, having attempted flirting, forced his student to have sex with him repeatedly over a certain period of time by threatening her with negative consequences at school and with violence. The Supreme Court found that there had been repeated acts of rape committed through the use of threats and acknowledged that the victim had gradually been put into a state of a psychological dependence. In another case, a 14-year-old girl who suffered from epilepsy and was mentally retarded had been raped by an acquaintance of the family; the courts noted that the girl had offered weak resistance (she had tried to get up after being pushed down on the floor by the perpetrator) but concluded that that "level of resistance", seen in the context of the girl's age and health, had been "sufficient to demonstrate her unwillingness to have sex".

114. The applicant submitted a copy of a letter by a Bulgarian psychotherapist working with victims of sexual violence, who stated that in her experience the prosecuting authorities brought charges only in cases where the attacker was a stranger to the victim, where there were serious injuries or where there were witnesses. In the applicant's view, that confirmed her allegation that the predominant tendency in practice was to infer consent from insufficient proof of physical resistance.

115. She further stated that, by setting at 14 the age of consent for sexual intercourse and at the same time limiting the prosecution of rape to cases of violent resistance by the victim, the authorities had left children insufficiently protected against rape.

116. The applicant submitted that, in her case, the prosecutors had put undue emphasis on the absence of physical violence and had not taken into account the fact that, at the age of 14, she had never taken important decisions herself, particularly under the pressure of time. The prosecutors had failed to have regard to the unlikelihood of a 14-year-old girl who had never had sexual intercourse consenting to sex with two men in a row.

117. Furthermore, the investigation had not been thorough and complete. The crucial issue of the timing of all the moves of the three men and the applicant during the night in question – which could have shown that there had been no visit to a restaurant after the rape at the reservoir – had not been investigated. Contradictions in the evidence had been disregarded. The police patrol who had stopped the group on their way to the reservoir had not been identified. The investigator had accredited the testimony of the alleged perpetrators and of witnesses called by them and had at the same time disbelieved or ignored the testimony of other witnesses and the applicant's account of the events.

118. In the applicant's view, seen in the context of all the relevant facts, her clear and consistent testimony that she had begged P. to stop and had pushed him away until he had twisted her arms, and her account of the distress she had felt and of her resistance – reasonable in the circumstances – should have led to the conviction of the perpetrators if a correct interpretation of "rape", consonant with the State's positive obligations under Articles 3, 8 and 13 of the Convention, had been applied.

2. The Government

119. The Government submitted that the investigation had been thorough and effective. All possible steps had been taken: seventeen persons had been questioned, some of them repeatedly, experts in psychiatry and psychology had been appointed and all aspects of the case had been explored. The Government therefore considered that the conclusion of the national authorities that P. and A. must have acted on the assumption of the applicant's consent had been well-founded. In particular, the authorities had relied on all evidence about the events of 31 July to 1 August 1995, including information about the behaviour of the applicant. Furthermore, the applicant had gone out with P. after the events and there had been allegations by witnesses that her mother had attempted to extort money from P. and A. in return for dropping the rape allegations.

120. In the Government's submission, the facts of the case did not, therefore, concern the issue of protecting a person's integrity or ill-treatment. As a result, no positive obligations arose under Articles 3 or 8 of the Convention.

121. The Government maintained that, in any event, Bulgarian law and practice in rape cases and their application in the present case did not violate any positive obligation that could arise under the Convention.

122. Describing the domestic law and practice in their initial submissions at the admissibility stage, the Government stated that proof of physical resistance was required in cases of rape and that, moreover, in accordance with "international practice, including in France" rape was only possible between strangers, whereas the applicant knew the alleged perpetrators.

123. In their submissions on the merits, the Government corrected their earlier statements and submitted that lack of consent was an essential element of rape under Bulgarian law. Proof of lack of consent was derived from evidence demonstrating that the victim was in a state of helplessness or had been put in such a state by the perpetrator, or from evidence of physical or psychological violence by the perpetrator. The Government submitted copies of several relevant judgments of the Supreme Court. They did not dispute the reliability of the analysis of Bulgarian case-law offered by the applicant.

124. In the applicant's case – the Government argued – after a careful and impartial investigation, the authorities had not found it established, to the level of proof necessary to secure a criminal conviction, that rape had been committed. On the other hand, it was open to the applicant to submit a civil action for damages against the alleged perpetrators. She would be required to prove the unlawfulness of the perpetrators' acts, but no proof of *mens rea* would be necessary.

125. Finally, the Government submitted that the applicant had had effective criminal and civil remedies at her disposal, as required by Article 13 of the Convention.

3. Submissions by Interights

(a) General submissions

126. The intervener stated that over the past two decades the traditional definition of rape had undergone reform in civil and common law jurisdictions and in international law. This was the result of the evolving understanding of the nature of the offence and the manner in which it was experienced by the victim. Research had demonstrated that women, and more particularly minors, often did not physically resist rape either because they were physically unable to do so through paralysing fear, or because they were seeking to protect themselves against the increasing level of force being used against them.

127. Interights submitted that the reform of rape law reflected a shift from a "historical approach" to the "equality approach" to the question of consent. Rape was an offence against women's autonomy and its essential element was lack of consent. A central concern underlying reforms in rape law had been to clarify that it was not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent.

128. That tendency had been reflected in developments in international criminal law. In particular, the International Criminal Tribunals for Rwanda and the former Yugoslavia had characterised as rape sexual penetration "in circumstances which are coercive" or committed through "coercion or force or threat of force". That approach had also been taken in the Statute of the International Criminal Court and its draft Rules.

(b) Submissions on the law of several countries

129. Interights submitted copies of reports on the relevant law of several European and non-European countries, prepared by legal scholars or professionals, or by research assistants. The information and assessments contained therein may be summarised as follows.

(i) Belgium

130. The list in Article 375 of the Belgian Criminal Code, amended in 1989, of situations where there is no consent was meant to preserve the case-law dating from before 1989. The list of situations is not considered to be exhaustive, although one commentator is of the opposite opinion.

131. Historically, what was required to prove rape was proof of sufficiently serious and physically violent acts to break, paralyse or destroy the resistance of the victim. The 1989 amendments replaced the notion of "serious threats" (present in the Criminal Code since 1867) with the broader notion of "coercion" which includes not only fear for one's physical integrity but also any other general fear.

132. Nowadays, the prosecution is required to prove sexual penetration and lack of consent. Any elements that might show lack of consent will be taken into account, but the prosecution will mostly try to prove the existence of at least one of the factors "nullifying consent", set out in the second paragraph of Article 375, namely violence, coercion, ruse or disability.

133. Lack of consent is proved where there is proof of physical resistance. However, even if there is no proof of physical violence or physical resistance, proof of coercion is sufficient. Whether or not there was coercion is a question to be assessed with reference to the capacities of the victim (age, actual state at the time of the facts).

134. There is a different age of consent for sexual acts of any kind (statutory indecent assault) on the one hand, and for acts involving sexual penetration (statutory rape) on the other. The age of consent for sexual penetration is 14 years and the age of consent for sexual acts of any kind is 16 years. As a result, sexual intercourse with a person aged 14 to 16, in the absence of proof of lack of consent, would be punished as statutory indecent assault. In practice, where the victim is between 14 and 16 years, charges of statutory indecent assault are more frequent than charges of rape.

(ii) Denmark

135. Coercion is nowadays understood broadly and is not limited to threats of serious violence.

136. Evidence of lack of consent is particularly important in cases where the accused and the victim knew each other. While the act of saying "no" would be a sufficient expression of lack of consent, proving that it was said and understood as being meant seriously could be difficult.

137. In a case from 1982, a man accused of raping a 16-year-old girl was acquitted on the ground that he had not understood that the intercourse had been involuntary. The accused had taken the girl for a ride in his van. According to him, the girl had wished to be taken to her home. According to the girl, she had felt compelled to accept the offer to be taken home because of the situation, particularly once the accused had put his bicycle in his car.

On the way, the accused had talked about his sexual problems and needs. The accused had regarded the fact that the girl had let him discuss these subjects as an acceptance that the situation was developing towards intimate contact. The victim had been afraid that the accused would turn violent if she did not let him talk. At one point, the accused had stopped the car and asked the victim to get into the luggage compartment, where sexual intercourse had taken place. The accused had asked the girl several times whether she agreed or not. The victim stated that she had had a mental block and had been afraid. The city court had convicted the accused, finding that the girl had not consented and that the accused had acted with intent, as he would only have had reason to put questions to the victim if he had doubted that she agreed to sexual intercourse. The court of appeal, however, found that the statement of the accused that he had perceived the victim's passivity as acceptance could not be disregarded and acquitted him.

(iii) Ireland

138. The principle that the prosecution must prove lack of consent, and not the presence of force, is well established. Absence of consent is a matter of fact for the jury to decide, having regard to all relevant circumstances and following the judge's directions. As regards the *mens rea* of rape, a defence of "genuine belief" is open to the accused, so that he is entitled to acquittal if it genuinely did not occur to him that the victim might not be consenting.

(iv) The United Kingdom

139. Before 1976 the common-law definition of rape was unlawful sexual intercourse with a woman without her consent, by force, fear or fraud. Historically, injury to the body was required as proof of force and as proof of resistance.

140. Under current law, after 1976, the prosecution must prove that the victim did not consent. Absence of consent is the key element of the *actus reus*. The burden is on the prosecution. There is no statutory definition of consent or lack of it. "Does not consent" is a question of fact for the jury, which it decides after hearing the judge's directions. In the leading case of *Olugboja* [1982] Queen's Bench 320, [1981] 3 All England Law Reports 443, two teenage girls had been given a lift home by the accused and his friend. Instead of taking the girls home, the two men took them to another house where the accused person's friend raped one of the girls, who was 16 years old. The accused then also had intercourse with her. He told her to take off her trousers. She did so because she was frightened and the room was dark. She told him "why can't you leave me alone". He pushed her onto a sofa and had intercourse with her. She did not cry out or struggle. He was convicted of rape. Lord Justice Dunn said:

> "[The jury] should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference

> between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent ... [The jury] should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind."

141. According to some legal commentators, despite *Olugboja*, the reality is that prosecution is unlikely to proceed where women have submitted in circumstances of similar psychological duress and entrapment to those in *Olugboja*, but in the absence of threats.

142. The prosecution must also prove the *mens rea* of rape, which is either knowledge that the victim does not consent or recklessness as to whether she consents or not. The perpetrator is reckless where he "never gave it a thought", or was aware that the other person "might not be consenting but goes on just the same" (*R. v. Gardiner* [1994] Criminal Law Reports 455).

(v) The United States of America

143. The fifty States define what is commonly referred to as "rape" in a number of different ways but, despite significant variations in wording, the States converge on the question of non-consent. In particular, it is an established principle that a victim is not required physically to resist her attacker to prove that she did not consent to the act. Verbal expressions of dissent suffice. In *Commonwealth v. Berkowitz* (641 A.2d 1161 (Pennsylvania, 1994)), the defendant had sexual intercourse with an acquaintance in his college dormitory room although she said "no" throughout the experience. The Pennsylvania courts held that the victim's repeated expressions of "no" were sufficient to prove her non-consent.

144. In thirty-seven States, non-consensual intercourse without extrinsic force (force extrinsic to that required to effect penetration) is expressly criminalised by statute as a felony, a sexual crime of the highest order, or a misdemeanour. Although it appears from the language of the remaining thirteen State codes that extrinsic force may be required, courts in twelve states have accepted, for example, that the statutory force requirement was met when the defendant only pushed or pinned his victim down or otherwise physically manipulated her; the test for "force" was found to be "whether the act was against the will of [the victim]" (*Freeman v. State*, 959 S.W.2d 401 (Arkansas 1998)). Thus, "force" was established where the perpetrator "pushed his body weight against [the victim]" and he was "large" or "husky" and the victim "petite" or "small" (*State v. Coleman*, 727 A.2d 246 (Connecticut, 1999) and *State v. Plunkett*, 934 P.2d 113 (Kansas, 1997)). The New Jersey Supreme Court has stated:

> "[A]ny act of sexual penetration ... without the affirmative and freely given permission of the victim ... constitutes the offence of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required

for such penetration to be unlawful (*In the Interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992)).”

145. Historically, a number of States required a rape victim to display the “utmost resistance”. Today, that requirement has been rejected. Only two States continue to require a sexual assault victim to display “earnest” resistance (Alabama and West Virginia); however, they do not require her to resist if she reasonably believes that resistance would be futile or would result in serious bodily injury (*Richards v. State*, 457 So.2d 893 (Alabama, 1985) – earnest resistance proved by victim's pleas to put her down and stop).

146. Increasingly, courts in the United States are taking into account relevant social science data indicating that sexual assault victims react in unpredictable ways under conditions of psychological and physical abuse. In 1992, for example, the Supreme Court of New Jersey, when rejecting the resistance requirement for a sexual assault conviction, referred to “empirical research” to discredit “the assumption that resistance to the utmost or to the best of the woman's ability was the most reasonable or rational response to rape”. Indeed, rapists often employ subtle coercion or bullying when this is sufficient to overcome their victims. In most cases of rape against children, violence is not necessary to obtain submission. Courts are also recognising that some women become frozen with fear at the onset of a sexual attack and thus cannot resist (*People v. Iniguez*, 872 P.2d 1183, 1189 (California, 1994)).

(vi) Other legal systems

147. Interights also submitted analyses of the relevant law in Australia, Canada and South Africa, concluding that lack of consent was the defining element of rape and sexual abuse in those countries and that proof of use of physical force by the perpetrator or of physical resistance by the victim was not required.

B. The Court's assessment

1. General approach

(a) The existence of a positive obligation to punish rape and to investigate rape cases

148. Having regard to the nature and the substance of the applicant's complaints in this particular case, the Court finds that they fall to be examined primarily under Articles 3 and 8 of the Convention.

149. The Court reiterates that the obligation of the 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 together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2699, § 22; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73-75, ECHR 2001-V; and *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002).

150. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23-24 and 27, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

151. In a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I).

152. Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3164, § 128,).

153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

(b) The modern conception of the elements of rape and its impact on the substance of member States' positive obligation to provide adequate protection

154. In respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account.

155. The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

156. The Court observes that, historically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area (see paragraphs 88-108 and 126-47 above).

157. Firstly, it appears that a requirement that the victim must resist physically is no longer present in the statutes of European countries.

158. In common-law countries, in Europe and elsewhere, reference to physical force has been removed from the legislation and/or case-law (see paragraphs 98, 100 and 138-47 above, in relation to Ireland, the United Kingdom, the United States of America and other countries). Irish law explicitly states that consent cannot be inferred from lack of resistance (see paragraph 98 above).

159. In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape (see paragraphs 90-97, 99 and 130-37 above).

160. Belgian law was amended in 1989 to state that any act of sexual penetration would constitute rape when committed in respect of a person who had not given consent. Thus, while the reference to “violence, duress or ruse” as punishable means of imposing a non-consensual act remains in the statute, violence and/or physical resistance are not elements of rape in Belgian law (see paragraphs 90 and 130-34 above).

161. Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence (see paragraphs 95 and 130-47 above).

162. The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, “[including] in cases where the victim does not show signs of resistance”, is necessary for the effective protection of women

against violence (see paragraph 101 above) and have urged the implementation of further reforms in this area.

163. In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances (see paragraphs 102-07 above). While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.

164. As submitted by the intervener, the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

165. Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy.

166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

(c) The Court's task in the present case

167. In the light of the above, the Court's task is to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.

168. The issue before the Court is limited to the above. The Court is not concerned with allegations of errors or isolated omissions in the investigation; it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility.

2. Application of the Court's approach

169. The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a predominant practice of prosecuting rape perpetrators only in the presence of evidence of significant physical resistance.

170. The Court observes that Article 152 § 1 of the Bulgarian Criminal Code does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. As seen above, many legal systems continue to define rape by reference to the means used by the perpetrator to obtain the victim's submission (see paragraphs 74 and 88-100).

171. What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions. For example, in some legal systems "force" is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim's consent or because he held her body and manipulated it in order to perform a sexual act without consent. As noted above, despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non-consensual sexual act (see paragraphs 95 and 130-47).

172. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue on the basis of the Supreme Court's judgments and legal publications (see paragraphs 75-85 above). Whether or not a sexual act in a particular case is found to have involved coercion always depends on a judicial assessment of the facts. A further difficulty is the absence of a reliable study of prosecutorial practice in cases which never reached the courts.

173. Nonetheless, it is noteworthy that the Government were unable to provide copies of judgments or legal commentaries clearly disproving the allegations of a restrictive approach in the prosecution of rape. The Government's own submissions on the elements of rape in Bulgarian law were inconsistent and unclear (see paragraphs 122-23 above). Finally, the fact that the vast majority of the Supreme Court's reported judgments concerned rapes committed with the use of significant violence (except those where the victim was physically or mentally disabled), although not decisive, may be seen as an indication that most of the cases where little or no physical force and resistance were established were not prosecuted (see paragraphs 74-85, 113, 122 and 123 above).

174. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation

of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

175. Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The case was investigated and the prosecutors gave reasoned decisions, explaining their position in some detail (see paragraphs 44-65 above).

176. The Court recognises that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little "direct" evidence. The Court does not underestimate the efforts made by the investigator and the prosecutors in their work on the case.

177. It notes, nonetheless, that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of the events proposed by P. and A. and the witnesses called by them. In particular, the witnesses whose statements contradicted each other, such as Ms T. and Mr M., were not confronted. No attempt was made to establish with more precision the timing of the events. The applicant and her representative were not given the opportunity to put questions to the witnesses whom she accused of perjury. In their decisions, the prosecutors did not devote any attention to the question whether the story proposed by P. and A. was credible, although some of their statements called for caution, such as the assertion that the applicant, 14 years old at the time, had started caressing A. minutes after having sex for the first time in her life with another man (see paragraphs 16-65 above).

178. The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

179. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. That approach transpires clearly from the position of the investigator and, in particular, from the regional prosecutor's decision of 13 May 1997 and the Chief Public Prosecutor's decision of 24 June 1997 (see paragraphs 55, 60, 61, 64 and 65 above).

180. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented (see the text of the prosecutors' decisions in paragraphs 64 and 65

above). The prosecutors forwent the possibility of proving the perpetrators' *mens rea* by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them (see paragraphs 21, 63 and 66-68 above).

181. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

182. That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence.

183. The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors (see paragraphs 58-60 above).

184. Furthermore, they handled the investigation with significant delays (see paragraphs 44-46 above).

185. In sum, the Court, without expressing an opinion on the guilt of P. and A., finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

186. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature (see paragraphs 124 and 148-53 above).

187. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention. It also holds that no separate issue arises under Article 13 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

188. Comparing the texts of Articles 157 § 2 and 152 of the Bulgarian Criminal Code, which concern the age of consent for sexual activity, the applicant complained that the law afforded better protection against rape to "homosexual children" than to "heterosexual children".

Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

189. In the light of its findings above, the Court considers that it is not necessary to examine the complaint under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

190. 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

191. The applicant stated that she was continuing to suffer psychological trauma years after she had been raped. That was to a large extent due to the fact that the relevant law and practice had not ensured effective protection. Furthermore, the investigation in her case had been flawed and had victimised her.

192. On that basis, referring to several of the Court's judgments in cases of sexual abuse, the applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

193. The Government submitted that the amount claimed was excessive.

194. The Court considers that the applicant must have suffered distress and psychological trauma resulting at least partly from the shortcomings in the authorities' approach found in the present case. Making an assessment on an equitable basis, the Court awards her EUR 8,000.

B. Costs and expenses

195. The applicant claimed EUR 4,740 for a total of 118.5 hours of legal work on her case, at the rate of EUR 40 per hour. She submitted a fee

agreement with her lawyer, signed in 2003 by her mother, and a time sheet. The applicant's lawyer explained that the fee agreement had been signed by the applicant's mother because he had been initially hired by her, the applicant having been under age at the time.

196. The Government stated that the fee agreement was not valid because the applicant had turned 18 in September 1998 and since then her mother had no longer been entitled to act on her behalf. Even at the time of the initial, apparently oral, agreement between the mother and the lawyer, the applicant had been over 14 years of age and had thus been entitled under Bulgarian law to perform legal acts with her mother's approval.

197. The Government also stated that the parties had agreed on the hourly rate of EUR 40 in 2003, at the final stage of the proceedings, which meant that a high and arbitrary fee had been fixed. In "other circumstances", the applicant would not have agreed to pay such amounts.

198. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

199. The Government have not disputed the fact that the applicant's lawyer had carried out legal work in her case, after being given a power of attorney dated 27 November 1997 signed by the applicant and her mother, at a time when the applicant had not yet reached the age of majority (see paragraphs 2 and 9 above). It has not been alleged that the applicant disputes the costs her lawyer has charged her or that the amounts claimed are unrelated to the violation found in the present case. In these circumstances, there is no doubt that the legal costs claimed were actually and necessarily incurred.

200. The Government have not objected to the number of hours of legal work claimed. The Court further considers that the hourly rate of EUR 40 is not excessive. Accordingly, deducting EUR 630 received in legal aid from the Council of Europe, it awards EUR 4,110 in respect of costs.

C. Default interest

201. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Holds* that there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention;

2. *Holds* that no separate issue arises under Article 13 of the Convention;

3. *Holds* that it is not necessary to examine the applicant's complaints under Article 14 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,110 (four thousand one hundred and ten euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 December 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Tulkens is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE TULKENS

(Translation)

In this particularly sensitive and delicate case, I should simply like to make a few additional observations.

1. I consider that it was important and significant that the Court should examine the case under both Article 3 and Article 8 of the Convention. Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8.

2. I agree entirely with the Court's general approach (see paragraphs 148 et seq. of the judgment) and the manner in which it was applied in the present case (see paragraphs 169 et seq.). The only point I wish to clarify concerns the use of criminal remedies. Relying, in particular, on *X and Y v. the Netherlands* (judgment of 26 March 1985, Series A no. 91), the Court considers that "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape" (see paragraph 153). Admittedly, recourse to the criminal law may be understandable where offences of this kind are concerned. However, it is also important to emphasise *on a more general level*, as, indeed, the Court did in *X and Y v. the Netherlands* itself, that "[r]ecourse to the criminal law is not necessarily the only answer" (p. 12, § 24 *in fine*). I consider that criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of "restraint". As to the assumption that criminal remedies are, in any event, the most effective in terms of deterrence, the observations set out in the *Report on Decriminalisation* by the European Committee on Crime Problems clearly show that the effectiveness of general deterrence based on the criminal law depends on various factors and that such an approach "is not the only way of preventing undesirable behaviour"[1].

3. That said, in the present case, as in *X and Y v. the Netherlands* (p. 13, § 27), once the State has opted for a system of protection based on the criminal law, it is of course essential that the relevant criminal-law provisions are fully and rigorously applied in order to provide the applicant with practical and effective protection. In that connection, the Court's observation that "[t]he investigation and its conclusion must be centred on the issue of non-consent" (see paragraph 181 of the present judgment) is, in my opinion, of fundamental importance.

---

1. European Committee on Crime Problems, *Report on Decriminalisation*, Strasbourg, Council of Europe, 1980, pp. 75-78.