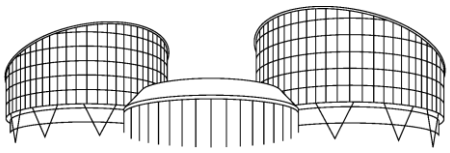

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SÖDERMAN v. SWEDEN

(Application no. 5786/08)

JUDGMENT

STRASBOURG

12 November 2013

In the case of Söderman v. Sweden,

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

Josep Casadevall, *President*,
Guido Raimondi,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Zdravka Kalaydjieva,
Kristina Pardalos,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Helen Keller,
Helena Jäderblom,
Johannes Silvis, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 3 April 2013 and on 25 September 2013,

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

PROCEDURE

1. The case originated in an application (no. 5786/08) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Ms Eliza Söderman ("the applicant"), on 21 January 2008.

2. The applicant was represented by Mr J. Södergren, Mr K. Lewis and Mr C. Crafoord, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agents, Mr A. Rönquist, Ms G. Isaksson and Mr O. Widgren, of the Ministry of Foreign Affairs.

3. The applicant alleged that the Swedish State had failed to comply with its obligation under Article 8 of the Convention to provide her with remedies against her stepfather's violation of her personal integrity when he had attempted secretly to film her naked in their bathroom when she was 14 years old. She also relied on Article 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Its President acceded to the applicant's request not to have her name disclosed (Rule 47 § 3), and the case was called *E.S. v. Sweden*. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and the application was assigned to the newly composed Fifth Section. On 21 June 2012 a Chamber composed of Dean Spielmann, President, Elisabet Fura, Karel Jungwiert, Mark Villiger, Ann Power-Forde, Ganna Yudkivska, André Potocki, judges, and Claudia Westerdiek, Section Registrar, delivered its judgment. It decided to examine the complaint under Article 8 alone and unanimously declared it admissible, holding, by four votes to three, that there had been no violation of that provision. The joint dissenting opinion of Judges Spielmann, Villiger and Power-Forde was annexed to the judgment.

5. On 19 September 2012 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and a panel of the Grand Chamber accepted the request on 19 November 2012.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed further observations on the merits (Rule 59 § 1).

8. In addition, third-party comments were received from the Human Rights Centre of Ghent University, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

9. On 22 March 2013, the President of the Grand Chamber acceded to the applicant's request of 12 March 2013 to lift the anonymity granted to her.

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

There appeared before the Court:

(a) *for the Government*

Mr A. RÖNQUIST, Agent, Ambassador and
Director General for Legal Affairs,
Ministry of Foreign Affairs, *Counsel*,

Ms G. ISAKSSON, Co-Agent, Deputy Director,
Ministry of Foreign Affairs,

Mr O. WIDGREN, Co-Agent, Special Adviser,
Ministry of Foreign Affairs,

Mr M. SÄFSTEN, Senior Legal Adviser, Ministry of Justice,

Ms V. LÅNG, Deputy Director, Ministry of Justice,

Mr C. ROSENMÜLLER, Legal Adviser, Ministry of Justice, *Advisers*;

(b) *for the applicant*
Mr J. SÖDERGREN,
Mr K. LEWIS,
Mr C. CRAFOORD, *Counsel*.

The applicant was also present.

The Court heard addresses by Mr Crafoord, Mr Lewis, Mr Södergren and Mr Rönquist, as well as their replies to questions put by Judges Ziemele, Sicilianos, Pinto de Albuquerque and Zupančič.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1987 and lives in Ludvika.

12. In September 2002, when she was 14 years old, she discovered that her stepfather had hidden a video-camera in the laundry basket in the bathroom, which was in recording mode and directed towards the spot where she had undressed before taking a shower. Immediately after the incident, the film was burned without anyone seeing it.

13. In September 2004, two years later, the applicant's mother reported the incident to the police. An officially appointed counsel (*målsägandebiträde*) was assigned to the applicant on 5 October 2004.

14. On 21 October 2005 the public prosecutor indicted the applicant's stepfather for sexual molestation (*sexuellt ofredande*) under Chapter 6, Article 7 § 3, of the Penal Code. He was also charged on two counts of sexual molestation of the applicant's cousin, committed during the spring and summer of 2003 when the cousin was 16 years old, for having caressed her thigh and for having expressed his desire to have sex with her. He was charged on a fourth count of sexual molestation for having allegedly looked through the window of the applicant's room when she was undressing in the late summer of 2003.

15. On 20 January 2006 the applicant, represented by counsel, submitted a claim for damages of 25,000 Swedish kronor (SEK): SEK 15,000 in compensation for violation of her personal integrity and SEK 10,000 for pain and suffering, to be joined to the criminal proceedings. The applicant based her private claim on "the criminal act for which her stepfather was being prosecuted", without invoking any specific sections of the Tort Liability Act.

16. The applicant, her stepfather, her mother and her cousin gave evidence before the District Court of Falun (*Falu Tingsrätt*). The applicant explained that on the relevant day in September 2002, as she was about to

take a shower, her stepfather had been doing something in the bathroom. When she discovered the camera, it was in recording mode, making a buzzing sound and flashing. She did not touch any of the buttons. She went to her mother in tears, taking the video-camera wrapped in a towel. H stepfather took the camera from her mother. Subsequently, the applicant saw her mother and stepfather burning a film, but she was not sure whether it was a recording of her.

17. The applicant's mother confirmed the applicant's statement and added that she did not know whether anything had been recorded since the film had been burned without her seeing it. She had not reported the incident to the police until 2004, when she had heard that the applicant's cousin had also experienced incidents with the accused.

18. The applicant's stepfather explained that he had lived with her mother from 1997 until the autumn of 2003. They had separated on account of the incident in question, among other things. He had wanted to try to film with a hidden camera, but it had been an impulsive act. He was not sure whether the camera had been in recording mode or whether a film had been recorded. The applicant's mother had burned the film without any of them seeing it.

19. By a judgment of 14 February 2006, the District Court convicted the applicant's stepfather on all four counts of sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code. As regards the first count of sexual molestation, it found it established that he had had a sexual intention in hiding the camera in the laundry basket and directing it at the part of the bathroom where it was usual to undress. It added that the buzzing sound from the camera heard by the applicant strongly suggested that the camera was switched on and was actually recording. Otherwise, there would have been no point in hiding the camera among the clothes in the laundry basket. The hole in the laundry basket indicated that the strategy was quite refined. Regardless of the fact that, afterwards, no one had verified the contents of the film, it could under the circumstances be considered established that the applicant's stepfather had actually filmed her while she was naked.

20. The applicant's stepfather was given a suspended sentence combined with seventy-five hours' compulsory community service. Moreover, he was ordered to pay the applicant damages in the amount of SEK 20,000.

21. On appeal, by a judgment of 16 October 2007, the Svea Court of Appeal (*Svea hovrätt*) convicted him on the two counts of sexual molestation committed against the cousin, for which he was given a suspended sentence and ordered to pay sixty day-fines of SEK 50, amounting to a total of SEK 3,000.

22. The Court of Appeal acquitted him on the counts of sexual molestation allegedly committed against the applicant.

23. As to the incident in September 2002, the Court of Appeal found it established that the applicant's stepfather had put a camera in the bathroom

and that he had started the recording before she was about to take a shower. Whether a recording had actually been made, however, was unclear. It was apparent, the court continued, that his motive had been to film the applicant covertly for a sexual purpose. Given that motive, it was also regarded as certain that he had not intended the applicant to find out about the filming. Nor, according to the court, had he been indifferent to the risk that she would find out about it. In assessing whether the act legally constituted sexual molestation within the meaning of Chapter 6, Article 7 § 3, of the Penal Code, the Court of Appeal referred to a Supreme Court judgment (published in *Nyatt jurisdiskt arkiv* (NJA) 1996, p. 418) concerning a man who had covertly filmed his sleeping girlfriend while he masturbated. The man was acquitted of sexual molestation because he had not intended his girlfriend to find out about the filming. Moreover, in the said judgment the Supreme Court held that the isolated act of filming was not a crime in itself, as in Swedish law there was no general prohibition against filming an individual without his or her consent. Following that line of reasoning, and despite finding that the situation the applicant's stepfather intended to film was obviously of a sensitive nature as regards her personal integrity and that the violation was particularly serious on account of the applicant's age and relationship to her stepfather, the Court of Appeal found that he could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. The court noted that the applicant had become aware of her stepfather's attempt to film her, but that this had not been covered by his intent.

24. The Court of Appeal went on to point out that the act might, at least theoretically, have constituted the crime of attempted child pornography (*försök till barnpornografibrott*) considering the applicant's age. However, since no charge of that kind had been brought against the applicant's stepfather, the Court of Appeal could not examine whether he could be held responsible for such a crime. In conclusion, despite finding his behaviour extremely reprehensible, he was acquitted and the applicant's claim for damages dismissed.

25. As regards the incident in the late summer of 2003, the Court of Appeal found it established that the applicant's stepfather had wanted to look at her secretly. Thus, although the court found such behaviour reprehensible, he had lacked the intent that the applicant should see him.

26. On 12 December 2007 the Supreme Court (*Högsta domstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Sexual molestation

27. The offence of sexual molestation (and child pornography, see below) falls within the domain of public prosecution, in which the principle of objectivity is applied whereby no prosecution should be brought if the prosecutor deems that the conditions for a conviction are lacking. The provision on sexual molestation can be found in the Penal Code (*Brottsbalken*, 1962:700) which, before 1 April 2005, provided:

Chapter 6 on sexual crimes, Article 7

"1. If a person sexually touches a child under 15 years of age otherwise than as previously provided for in this Chapter, or induces the child to undertake or participate in an act with sexual implications, a fine or imprisonment of a maximum period of two years shall be imposed for sexual molestation.

2. A sentence for sexual molestation shall also be imposed on a person who by coercion, seduction or other improper influence induces a person who has attained the age of 15 but not 18 to undertake or participate in an act with sexual implications if the act is an element in the production of pornographic pictures or constitutes pornographic posing in circumstances other than those relating to the production of a picture.

3. This shall also apply if a person exposes himself or herself in such a manner that the nature thereof gives offence or otherwise manifestly behaves indecently by word or deed towards a person in a way that flagrantly violates a sense of propriety."

28. On 1 April 2005 that provision was incorporated into Article 10 of Chapter 6 and reads as follows:

"1. A person who, otherwise than as previously provided in this Chapter, sexually touches a child under 15 years of age or induces the child to undertake or participate in an act with sexual implications shall be sentenced for sexual molestation to a fine or to imprisonment of a maximum period of two years.

2. This also applies to a person who exposes himself or herself to another person in a manner that is likely to cause discomfort or who otherwise by word or deed molests a person in a way that is likely to violate that person's sexual integrity."

29. It should be noted that a person cannot be held responsible for an uncompleted act of sexual molestation, such as attempting or preparing to commit such a crime (see, by converse implication, Chapter 23, Article 1, of the Penal Code).

30. Subsequently, based on the statements in the preparatory works to the provision, the 2008 Sexual Offences Commission stated the following.

"In our view, it is ... quite clear that the second paragraph of the provision on sexual molestation should also include actions directed at persons who are unconscious or asleep. The provision therefore belongs to the category of sexual offences, not offences against integrity. Using this as the starting point for how the offence of sexual molestation should be handled, it may also be possible to assess situations in

which a person has covertly filmed or photographed another person in a sexually intrusive way as sexual molestation."

B. Attempted child pornography

31. The relevant provisions of the Penal Code read:

Article 10a of Chapter 16 on crimes against public order

"A person who

1. portrays a child in a pornographic picture;

2. disseminates, transfers, grants use of, exhibits, or in any other way makes such a picture of a child available to some other person;

3. acquires or offers such a picture of a child;

4. brings about contact between a buyer and a seller of such pictures of children or takes any other similar step to facilitate dealing in such pictures; or

5. possesses such a picture of a child

shall be sentenced for the crime of child pornography to imprisonment for a maximum period of two years, or, if it is a petty offence, to a fine or imprisonment for a maximum period of six months.

A child is held to be a person whose pubertal development is not complete or who is under 18 years of age. If a person's pubertal development is complete, liability shall be imposed for deeds committed under points 2 to 5 above only if it is apparent from the picture or its circumstances that the depicted person is under 18 years of age.

..."

32. Before 1 January 2011, the second paragraph of the above Article read:

"A child is held to be a person whose pubertal development is not complete or who, where this is apparent from the picture and its circumstances, is less than 18 years of age ..."

33. The term "pornographic picture" is not defined in the text of the law. In the preparatory works it was stated that the provision about pornographic crimes applied only to pictures, but to pictures of all kinds, such as, *inter alia*, pictures in publications, photographic pictures, including films and pictures distributed by TV-technique or video recordings (Governmental Bill 1978/79:179, p. 9). Moreover it was stated that:

"A certain prudence was called for, so that the criminalised area would not become too wide or difficult to assess. It was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it is a condition that it be pornographic according to common parlance and general values."

34. In a review of the legislation (Law no. 2010:1357), which led to the amendment of the second paragraph of Chapter 16, Article 10a, as from

1 January 2011, as set out above, the following was stated, among other things, as regards the definition (Swedish Government Official Reports, SOU 2007:54, p. 77):

> "A picture may be regarded as pornographic when, without any real scientific or artistic merits, and in a blatant and alluring manner, it displays a sexual motive (Gov. Bill 1970:125, pp. 79 et seq.). Not only do pictures in which children are involved in acts which obviously have a sexual connotation fall within the provision regarding child-pornography crimes, but also pictures in which children appear together with one or several adults who are performing such actions. Pictures in which a child appears in a manner which is designed to appeal to sexual instincts without the child being considered to have participated in sexual behaviour during the picturing may fall within the criminalised area ... A picture may be presented in different ways, *inter alia*, by a real child being pictured, filmed or drawn. By using different techniques, more or less realistic artificial pictures may also be created. For criminal liability to be incurred it is not necessary that the picture depicts a real child; pictures of fictive children are also included."

35. With regard specifically to attempt, the Penal Code reads:

Chapter 16, Article 17

> "A person preparing or conspiring to commit mutiny ... shall be sentenced in accordance with the provisions of Chapter 23. The same shall also apply ... to the crime of attempting to commit the crime of child pornography described in Article 10a, first paragraph ..."

Chapter 23, Article 1

> "A person who has begun to commit a crime without bringing it to completion shall, in cases where specific provisions exist for the purpose, be sentenced for attempting to commit a crime if there was a danger that the act would lead to the completion of the crime or such danger was precluded only because of fortuitous circumstances.
>
> Punishment for attempt shall not exceed the sentence applicable to a completed crime and shall not be less than imprisonment if the least stringent punishment for the completed crime is imprisonment of two years or more."

C. Other relevant legal provisions

36. The Code of Judicial Procedure (*Rättegångsbalken* 1942:740) provides in so far as relevant:

Chapter 17, Article 3

> "A judgment shall not be given for anything other or more than that properly requested by a party. In cases amenable to out-of-court settlement, the judgment shall not be based on circumstances other than those pleaded by a party as the foundation of his or her action."

Chapter 22, Article 7

"If an action for private claims in consequence of an offence is brought in conjunction with the prosecution and it is found that the offence charged is not punishable, the action may nonetheless be adjudicated in the case."

Chapter 29, Article 6

"...Where a private claim is joined to the prosecution, the court's finding of criminal liability shall be binding for the adjudication of the private claim."

Chapter 30, Article 3

"The judgment may relate only to an act for which a prosecution was properly instituted or to a matter referred by statute to the court's criminal jurisdiction. The court is not bound by the legal characterisation of the offence or applicable provisions of law stated in the claim."

37. The Tort Liability Act (*Skadeståndslag* 1972:207) provides in so far as relevant:

Chapter 2, section 1

"Anyone who deliberately or negligently causes personal injury or damage to property shall compensate the injury or damage caused."

Chapter 2, section 3

"Anyone who seriously violates another person through a crime involving an attack against the person or the freedom, serenity or honour of that person shall compensate the damage caused by the violation."

D. Domestic practice concerning covert filming

38. In a Supreme Court judgment of 16 October 1992 (NJA 1992, p. 594) concerning a person who had secretly filmed sexual intercourse between himself and his girlfriend and who had subsequently shown the film to several persons, the Supreme Court noted that it was not prohibited under Swedish law to film another person without his or her consent. This was so, the court continued, even in situations where the deed in question seriously violated the personal integrity of the person concerned. Apart from certain exceptional situations, the only protection available was under the criminal provisions on defamation in conjunction with Chapter 1, section 3, of the Tort Liability Act (now Chapter 2, section 3, of that Act). The Supreme Court found that the accused person had committed defamation by showing the film to others.

39. A further Supreme Court judgment dated 27 June 1996 (NJA 1996, p. 418) concerned a man who had covertly filmed his sleeping girlfriend while he masturbated. The District Court found his acts to constitute, *inter alia*, sexual molestation, but the Court of Appeal and the Supreme Court acquitted him of this offence. The Supreme Court held that the isolated act

of filming was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent.

40. Yet another Supreme Court judgment, dated 23 October 2008 (NJA 2008, p. 946), concerned, *inter alia*, a person who had covertly filmed his ex-girlfriend with another man in an intimate situation and who had subsequently e-mailed the film, together with certain descriptive messages, to others. The Court of Appeal found the filming to constitute molestation and the sending of some of the e-mails to amount to defamation, and awarded the ex-girlfriend damages for violation of personal integrity. The Supreme Court granted leave to appeal in respect of the alleged molestation. The Supreme Court acquitted the person of molestation and reiterated at the same time that Swedish law contained no general prohibition against covert filming. The court also noted that in cases where the covert filming did not constitute a crime, no damages could be awarded. Although the need for a strengthened legal framework in this regard had already been acknowledged in Swedish legislative work in the 1960s, the court noted further that it had so far not led to any concrete results. The court found it highly questionable whether the fact that acts of filming an individual in situations where such filming seriously violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention. Given that finding, the court continued, it was legitimate to examine whether punishment could be imposed by interpreting otherwise non-applicable domestic provisions in a Convention-compliant manner. In that regard, the court referred to domestic case-law concerning compensation for violations of the Convention. However, the court noted, another requirement under the Convention was that no one should be punished for an act which, at the time when it was committed, did not clearly constitute a criminal offence under the law. After finding that the filming in issue did not fall under any applicable criminal provision, it was left unpunished and no damages were awarded.

E. Recent legislative work concerning covert filming

41. In 2004 the Government instructed the Committee on the Protection of Integrity (*Integritetsskyddskommittén*) to investigate the need for general legal provisions for the protection of personal integrity (apart from the legislation on data protection, crimes against individuals, secrecy, and so on). In the meantime, the Penal Code was reviewed and in April 2005 an amendment to the provision on sexual molestation, which was designed to encompass covert filming for sexual purposes, was introduced (see paragraphs 28-30 above).

42. In 2008 the Committee on the Protection of Integrity proposed a general provision in the Penal Code on illicit photography and in January 2011 the Ministry of Justice issued a report on illicit photography

(Ds 2011:1) which proposed the criminalisation of photography and filming in certain situations. On 1 March 2012 the Government approved the referral of a proposal entitled "Intrusive Photography" to the Law Council (*Lagrådet*) for consideration. The latter criticised the proposal, *inter alia*, on account of the potential effects that it could have on the principles laid down in order to protect those who procure information for publication under the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which are part of the Swedish Constitution.

43. Consequently, on 20 December 2012 the Government adopted a new proposal modifying the scope of the criminalisation of intrusive photography. The Law Council did not have any comments on the substance of the proposal and on 7 February 2013 the Government presented the bill to the Swedish Parliament proposing to criminalise intrusive photography in accordance with the proposal referred to the Law Council on 20 December 2012. The Law (SFS 2013:366) was enacted by Parliament on 29 May 2013 and came into force on 1 July 2013. Henceforth, Article 6a of Chapter 4 of the Penal Code, regarding crimes against liberty and peace, reads as follows:

> "A person who, with the aid of technical means, illicitly and covertly records a picture of someone who is inside a home or in a bathroom, in a changing room or other similar space, shall be sentenced for intrusive photography to a fine or imprisonment of a maximum of two years.
>
> No criminal responsibility shall be imposed if the act is justifiable considering its purpose and other circumstances.
>
> The first paragraph does not apply to a person who depicts someone with the aid of technical means in the course of duty on behalf of a public authority."

In concrete terms, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an intrusive-photography offence would also be punishable as preparation to commit such an offence.

F. Domestic practice concerning the crime of child pornography

44. In a judgment of 25 February 2005 (NJA 2005, p. 80), which concerned the photographing and filming of certain young individuals aged over 15 but under 18, the Supreme Court held that the pubertal development of the individuals was clearly complete and that it was impossible, from the pictures alone or their presentation, to determine whether they had attained the age of 18 or not. Their age could not be determined from any text accompanying the pictures or any other circumstances. In such a situation, and regardless of whether the person responsible for the pictures was aware

of the individuals' age or not, the act could not be held to constitute the crime of child pornography.

G. Domestic practice and ongoing legislative work concerning compensation for violations of the Convention

45. In a judgment of 9 June 2005 (NJA 2005, p. 462) concerning a claim for damages brought by an individual against the Swedish State, *inter alia*, on the basis of an alleged violation of Article 6 of the Convention on account of the excessive length of criminal proceedings, the Supreme Court held that the claimant's right under this Article had been violated. Based on this finding, and with reference, *inter alia*, to Articles 6 and 13 and the Court's case-law under these provisions, in particular the case of *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI), the Supreme Court concluded that the claimant was entitled to compensation from the State directly under Swedish legislation on tort liability for pecuniary damage and under Article 13 of the Convention for non-pecuniary damage to the extent that no other remedy was available.

46. Similar decisions followed on 4 May 2007 (NJA 2007, p. 295), concerning length of detention and Article 5 of the Convention, and on 21 September 2007 (NJA 2007, p. 584) regarding Article 8 of the Convention.

47. A Supreme Court decision of 29 October 2007 (NJA 2007, p. 747) concerned a claim for damages brought by an individual against a private insurance company. The claim concerned an alleged violation of Article 8 of the Convention related to secret surveillance undertaken in respect of the claimant. The Supreme Court noted that the Convention did not impose duties on individuals. Even if the State might have positive obligations under the Convention, the court continued, in view of the rule-of-law value enshrined in the principle of predictability, an individual could not be obliged to compensate another individual directly on the basis of the Convention.

48. The right to obtain compensation on the basis of an alleged violation of the Convention was subsequently acknowledged by the Supreme Court in its judgments of December 2009 (NJA 2009, N 70), June 2010 (NJA 2010, p. 363) and April 2012 (NJA 2012, p. 211).

49. Furthermore, the Chancellor of Justice has delivered various decisions concerning compensation to individuals for violations of the Convention.

50. Finally, in May 2009 the Government decided to set up a committee (*en särskild utredare*) on tort liability and the Convention to examine the current legal situation. In December 2010 the committee submitted its report (*Skadestånd och Europakonventionen*, SOU 2010:87) to the Government. It proposed the inclusion of an explicit provision in the Tort Liability Act

allowing natural and legal persons to obtain pecuniary and non-pecuniary damages from the State or a municipality for violations of the Convention. Such an action against public authorities would be examined by an ordinary court which would first need to establish that a right under the Convention had been violated. The aim of the proposal is to fulfil, together with the other already existing legal remedies, Sweden's obligations under Article 13 of the Convention.

III. INTERNATIONAL CONVENTIONS

A. The United Nations Convention on the Rights of the Child 1989

51. The United Nations Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law on the Contracting States, including all of the member States of the Council of Europe. It was ratified by Sweden on 29 June 1990 and its relevant Articles read:

Article 19

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

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

Article 34

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

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

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

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

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

52. This Convention obliges its Parties to take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to criminalise certain intentional conduct, including offences concerning child pornography. It was signed by Sweden on 25 October 2007 and came into force on 1 July 2010. Sweden ratified it on 28 June 2013. The relevant parts of Chapter VI, "Substantive criminal law" read:

Article 18 – Sexual abuse

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

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

b. engaging in sexual activities with a child where:

– use is made of coercion, force or threats; or

– abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or

– abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.

2. For the purpose of paragraph 1 above, each Party shall decide the age below which it is prohibited to engage in sexual activities with a child.

3. The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors."

Article 20 – Offences concerning child pornography

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

a. producing child pornography;

b. offering or making available child pornography;

c. distributing or transmitting child pornography;

d. procuring child pornography for oneself or for another person;

e. possessing child pornography;

f. knowingly obtaining access, through information and communication technologies, to child pornography.

2. For the purpose of the present article, the term 'child pornography' shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material:

– consisting exclusively of simulated representations or realistic images of a non-existent child;

– involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f."

Article 21 – Offences concerning the participation of a child in pornographic performances

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

a. recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b. coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c. knowingly attending pornographic performances involving the participation of children.

2. Each Party may reserve the right to limit the application of paragraph 1.c to cases where children have been recruited or coerced in conformity with paragraph 1.a or b.

..."

IV. COMPARATIVE LAW

53. From the information available to the Court, including a survey of thirty-nine Council of Europe member States, it would appear that child pornography is criminalised in all of those States.

54. The isolated act of covert/non-consensual filming, photographing or portrayal of a child for sexual purposes is criminalised either as child pornography or as a specific offence in thirty-three of the member States studied (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Republic of Moldova, Montenegro, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom), while a conviction in the remaining six member States (Azerbaijan, Denmark, France, Monaco, Lithuania and the former Yugoslav Republic of Macedonia) can only be obtained where an intent to distribute the pornographic material can be proven. In most of the latter countries the conduct in question might still be illegal under other provisions of the Criminal Code relating to sexual offences.

55. The isolated act of covert or non-consensual filming/photographing of an individual (a child or an adult) for non-sexual purposes is considered a criminal offence in twenty-five of the member States studied (Albania, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Georgia,

Germany, Greece, Iceland, Italy, Lithuania, Luxembourg, Monaco, Montenegro, the Netherlands, Poland, Russia, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and Ukraine), namely as a violation of the right to privacy. Eleven of the remaining fourteen member States which do not include privacy crimes in their criminal codes provide for civil remedies against infringements of a person's privacy. Three of the member States examined also do not have a civil-law procedure for claims against covert/non-consensual capturing of one's image.

THE LAW

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

56. The applicant complained that the Swedish State had failed to comply with its obligation under Article 8 to provide her with remedies against her stepfather's violation of her personal integrity when he had attempted secretly to film her naked in their bathroom when she was 14 years old. She also relied on Article 13 of the Convention.

57. The Court reiterates that it is the master of the characterisation to be given in law to the facts of a case (see, for instance, *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 43, ECHR 2012). In the present case, it considers that the applicant's complaint concerns exclusively the remedies available to her against her stepfather, not those available against the State to enforce the substance of a Convention right or freedom at the national level. The complaint is therefore to be examined under Article 8 of the Convention alone, which provides as follows:

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

A. The Chamber judgment

58. In its judgment of 21 June 2012 (see *E.S. v. Sweden*, no. 5786/08, 21 June 2012), the Chamber also considered that the complaint was to be examined under Article 8 of the Convention alone. It was satisfied that, although Swedish law contained no provision relating to covert filming,

laws were in place which could, at least in theory, cover acts such as the one in this case. It pointed out that the public prosecutor, when indicting the applicant's stepfather, and the District Court, when convicting him on 14 February 2006, considered that the impugned act could be covered by the provision on sexual molestation. Accordingly, although at the relevant time a similar outcome had been seen in Swedish case-law (see NJA 1996, p. 418), it was not until delivery of the Court of Appeal's judgment that it became clear that the act could not legally constitute sexual molestation given the applicant's stepfather's lack of the requisite intent that she find out about the filming. The Chamber also reiterated that the Court of Appeal, in its judgment acquitting him of sexual molestation, had pointed out that his acts might, at least theoretically, have constituted the crime of attempted child pornography under the Penal Code. However, since no charge of that kind had been brought by the prosecution against the applicant's stepfather, the Court of Appeal could not examine whether he could be held responsible for that crime. Lastly, the Chamber noted that civil-law remedies were available to the applicant and that she had chosen, represented by counsel, to join her claim for damages to the criminal proceedings. In those circumstances the Chamber concluded that there were no such significant flaws in Swedish legislation and practice as to amount to a breach of Sweden's positive obligations under Article 8.

B. The parties' submissions

1. The applicant

59. The applicant maintained that the Swedish legal system did not provide any remedy to protect her against the concrete actions of her stepfather.

60. Firstly, with regard to the provision on sexual molestation, it was a requirement for a conviction that her stepfather should intend the applicant to know of the filming, the reason being that a person could not be molested unless he or she was aware of it. Accordingly, in the applicant's view, her stepfather had been acquitted of sexual molestation on account of the construction of that provision. It could and should have been construed in such a way that it criminalised the filming, whether or not the applicant became aware of it at the time it was carried out. Accordingly, the applicant found that the construction of the provision on sexual molestation was open to criticism, notably since the act in issue was not covered by other criminal provisions.

61. Secondly, referring, *inter alia*, to the preparatory works to the provision on child pornography and to a legal opinion by Professor Madeleine Leijonhufvud, the applicant contended that her stepfather could not have been convicted of attempted child pornography either, because the

basic requirement for that provision was lacking, namely that the picture in question be pornographic. In the present case images of a 14-year-old girl undressing before taking a shower, in an otherwise everyday situation, could not be regarded as pornographic within the meaning of Chapter 16, Article 10a, of the Penal Code concerning child pornography. In order for the film to be pornographic, her stepfather would have had to manipulate the film, *inter alia*, by making it appear as if the applicant was posing for him, or otherwise placing the film in a pornographic context. When the case was pending before the national courts it was not possible to speculate as to what her stepfather would have done with the film because it had been destroyed. In the applicant's view, it was therefore completely understandable that the prosecutor had not formulated or amended the indictment to include a child-pornography crime, since such a claim would not have had any prospect of success.

62. For the reasons set out above, the applicant did not criticise the prosecution on procedural grounds for not complying with their obligation to indict crimes or their duty to assist her in pursuing claims for damages under Chapter 22 of the Code of Judicial Procedure. Rather, she found that the legislator and the domestic courts had failed in their respective positive obligations in the present case, the legislator on account of the flaw in the law and the courts on account of the failure to award the applicant damages.

63. In respect of the legislator, the applicant observed that the mere filming or depiction of a minor in a situation which upset the essential aspects of the portrayed person's personal integrity was not a criminal offence unless the image could objectively be regarded as pornographic according to common parlance and general values. For adults, no such protection existed at all. The applicant found that the failure for years to criminalise the act of covert or illicit filming amounted to a violation of Article 8. She pointed out that the weak protection in this area had been known and discussed since 1966. In her view it was inadequate to "quantify" this deficiency as a "significant" or "insufficiently significant" flaw in the law, for the purpose of an examination under Article 8. It sufficed to conclude that the protection for the right to respect for private life was – and still is – insufficient in the Swedish legal system and that the applicant was a victim of that deficiency. The applicant pointed out that the legislative proposal regarding covert filming had been initiated after the applicant's case had been communicated and that the ongoing legislative measures seemed to have progressed quite far, especially after the Grand Chamber had accepted her request for referral of her case, which demonstrated the urgent need for such legislative protection.

64. Lastly, referring to the outcome of the criminal proceedings before the domestic courts, the applicant alleged that the Swedish system did not afford her a civil remedy to protect her against the act of her stepfather. She maintained that, despite his acquittal, the courts could have awarded her

compensation on the basis of the Tort Liability Act or the Convention alone. She observed that the domestic courts were the masters of the classification of the law and that therefore it had not been necessary for the parties to invoke any legal provisions at all. Furthermore, since it was a matter of a private claim in consequence of an offence and Chapter 22, Article 7, of the Code of Judicial Procedure applied, the courts were under an obligation to determine the claim, even if it was found that the act was not punishable. Accordingly, in the applicant's view her claim should have been determined by the domestic courts of their own motion, even though she had not invoked any specific legal provisions.

2. The Government

65. The Government contended that Sweden had fulfilled its positive obligations under Article 8 in the present case. The act in issue fell within the scope of the Swedish criminal legislation, notably the provisions concerning sexual molestation and the offence of child pornography, and there were no elements suggesting that the primary investigation and the prosecution had not been conducted effectively or in a manner otherwise incompatible with Swedish law or Article 8. The applicant's stepfather had been prosecuted for the act but could not be convicted on account of the lack of requisite evidence. Nevertheless, deterrent sanctions existed in this case and were backed up by effective law-enforcement machinery.

66. The Government initially pointed out that the Court had repeatedly stated that States enjoyed a wide margin of appreciation with regard to ensuring adequate protection under Article 8, even in cases of very severe offences such as the rape of a minor (see, for example, *M.C. v. Bulgaria*, no. 39272/98, § 154, ECHR 2003-XII), and that only significant flaws in legislation and practice, and their application, would amount to a breach of a State's positive obligations under the said provision.

67. In the present case, the applicant's stepfather was indicted for sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code and both the District Court and the Court of Appeal found that his act corresponded to the objective criteria that constituted this offence, but the latter found that it was not possible to prove the subjective element required for criminal liability under that provision, namely his intent that the applicant find out about the filming. The reason for his acquittal was therefore not the lack of a criminal-law provision covering the relevant act but the public prosecutor's inability to prove that he had the necessary intent and hence that the crime had been committed. The Government pointed out in this context that the Convention did not require a guarantee that a prosecution should result in a conviction (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 96 and 147, ECHR 2004-XII).

68. The Government observed that the provision on sexual molestation had been amended on 1 April 2005 and moved to Chapter 6, Article 10, of

the Penal Code. The crucial factor in criminal liability under the new wording was that the act must have been committed "in a way that is likely to violate that person's sexual integrity". Referring to the statements by the 2008 Sexual Offences Commission on the amended provision, the Government pointed out that after 1 April 2005 the provision on sexual molestation also covered situations like the one in issue, in which a person covertly filmed or photographed another person in a sexually intrusive way.

69. The Court of Appeal held in its judgment of 16 October 2007 that the act could, at least in theory, constitute an attempted child-pornography offence. Both sexual molestation and child pornography fell within the domain of public prosecution, in which the principle of objectivity was applied, whereby no prosecution should be brought if the prosecutor deemed that the conditions for a conviction were lacking. In the present case, there was no documentation as to why the applicant's stepfather was not also charged with attempted child pornography. It was therefore not possible for the Government to draw any conclusions concerning the specific grounds on which the prosecutor had decided to include only the offence of sexual molestation in the indictment. There were several possible reasons, though, why no prosecution for an attempted child pornography offence was brought.

70. One reason for this might have been that some of the necessary conditions for such an offence were not, in the view of the prosecutor, fulfilled. An example of this might have been the criterion that the image could be considered "pornographic" in common parlance. That meant that not all depictions of naked children or pictures in which a child's genitals were visible were liable to punishment, even if such images could stimulate some individuals' sex drive. What was in the picture and how the child was presented in the picture, *inter alia*, through the cutting of the picture, were of relevance to this assessment.

71. Secondly, the wording of the provision at the relevant time could have contributed to a lack of expectation on the prosecutor's part of securing a conviction for this offence, namely, the requirement that the pubertal development of the child was not complete or, if it was complete, that it was apparent from the image and its circumstances that the child was under 18 years of age.

72. Thirdly, the fact that the applicant's mother had destroyed the film immediately after the incident in September 2002, and the applicant and her mother did not report the incident to the police until September 2004, thus a long time after the incident had taken place, might have reduced the possibilities for the prosecution to prove that there had been a "pornographic" picture and that the applicant's pubertal development at the time of the event, in September 2002, had not been complete, or that it was apparent from the circumstances that she had been under 18 years of age.

73. As to the applicant's claim for damages, the Government pointed out that by virtue of Chapter 29, section 6, of the Code of Judicial Procedure, when such a claim was joined to a prosecution, the court's finding as to criminal liability was binding for the adjudication of the private claim. Accordingly, it had not been possible for the Court of Appeal to award damages based on Chapter 2, Article 3, of the Tort Liability Act as no crime within the meaning of the Penal Code had been made out. In the Government's view, however, in the criminal proceedings the applicant, represented by counsel, could have relied on other grounds for her claim for damages against her stepfather than the act cited in the indictment, notably that he had caused her personal injury by acting negligently, under Chapter 2, section 1, of the Tort Liability Act, which would have covered any physical and psychological injury. Under that provision, damages could have been awarded also on the basis that an injury had been caused by non-criminal acts carried out wilfully or negligently.

74. The Government pointed out that the courts could not award damages based on Article 8 of the Convention as a sole legal ground. The reason for this was that, although the Convention had been incorporated into Swedish law, and the Swedish Supreme Court had established the principle whereby an individual could be awarded damages from the State for violations of the Convention without the support of specific provisions in Swedish law, according to the Supreme Court's case NJA 2007 (p. 747) this principle could not be applied to claims between individuals, as it would be difficult for an individual to foresee from the case-law of the Court when he or she could be liable to pay damages.

75. Lastly, the ongoing legislative work concerning covert and illicit filming had so far resulted in the Government's approval on 1 March 2012 of a proposal entitled "Intrusive Photography", which had been modified by a proposal of 20 December 2012, and had in substance been approved by the Law Council on 7 February 2013. It was proposed that the legislation come into force on 1 July 2013. In concrete terms, under the proposal, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an offence of intrusive photography would also be punishable as preparation to commit such an offence.

76. In view of the foregoing, the Government contended that the absence at the relevant time of a specific provision in Swedish legislation concerning acts of covert or illicit filming could not be considered to entail a breach of the applicant's right to respect for private life under Article 8 of the Convention.

3. Third-party observations

77. The Human Rights Centre of Ghent University considered that the "significant flaw" test applied by the Chamber amounted to a lowering of standards in the Court's jurisprudence on positive obligations. In its view, the Grand Chamber should instead endorse the principles of "priority-to-rights" and "effectiveness". The former required that Convention rights be principally accorded greater weight than public interests in the proportionality analysis and that the State bear the burden of proving the proportionality of its inactions. The latter required the existence in practice of a means capable of protecting a Convention right. In the context of the positive obligation to investigate, any deficiency in the investigation that undermined the ability to establish the circumstances of the case or the perpetrator's liability fell foul of the standard of effectiveness.

C. The Court's assessment

1. General principles

78. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *inter alia*, *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32).

79. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue (see, for example, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 104, ECHR 2012; *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; and *Mosley v. the United Kingdom*, no. 48009/08, § 109, 10 May 2011). Where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed (see *Mosley*, cited above, § 109).

80. Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the

authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see, *inter alia*, *Osman v. the United Kingdom*, 28 October 1998, §§ 128-30, *Reports of Judgments and Decisions* 1998-VIII, §§ 128-30; *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 65, 12 June 2008; *Sandra Janković v. Croatia*, no. 38478/05, § 45, 5 March 2009; *A v. Croatia*, no. 55164/08, § 60, 14 October 2010; and *Đorđević v. Croatia*, no. 41526/10, §§141-43, ECHR 2012).

81. In respect of children, who are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 and 8 should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *M.P. and Others v. Bulgaria*, no. 22457/08, § 108, 15 November 2011). Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012, and *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III).

82. Regarding, more specifically, serious acts such as rape and sexual abuse of children, where fundamental values and essential aspects of private life are at stake, it falls upon the member States to ensure that efficient criminal-law provisions are in place (see, for example, *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91, and *M.C. v. Bulgaria*, cited above, § 150). This obligation also stems from other international instruments, such as, *inter alia*, Articles 19 and 34 of the United Nations Convention on the Rights of the Child and Chapter VI, "Substantive criminal law", of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (see paragraphs 51 and 52 above).

83. Concerning such serious acts, the State's positive obligation under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation (see, among other authorities, *C.A.S. and C.S. v. Romania*, cited above, § 72; *M.P. and Others v. Bulgaria*, cited above, §§ 109-10; and *M.C. v. Bulgaria*, cited above, § 152) and to the possibility of obtaining reparation and redress (see, *mutatis mutandis*, *C.A.S. and C.S. v. Romania*, cited above, § 72), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see, for example, *Brecknell v. the United Kingdom*, no. 32457/04, § 64,

27 November 2007, and *Szula v. the United Kingdom* (dec.), no. 18727/06, 4 January 2007).

84. As to acts which do not attain the seriousness of those in issue in *X and Y v. the Netherlands* (cited above) and *M.C. v Bulgaria* (cited above), the Court has examined under Article 8 the State's obligation to protect, for example, a minor against malicious misrepresentation (see *K.U. v. Finland*, no. 2872/02, §§ 45-49, ECHR 2008). The act in that case did not involve any physical violence, but could not be considered trivial as it entailed a potential threat to the minor's physical and mental welfare, brought about by the impugned situation, namely, that he was made the target for approaches by paedophiles. The act constituted a criminal offence under domestic law and the Court considered that practical and effective protection of the applicant required the availability of a remedy enabling the actual offender to be identified and brought to justice.

85. More generally, however, in respect of less serious acts between individuals, which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, §§ 24 and 27, and *K.U. v. Finland*, cited above, § 47). The Court notes, for example, that in some previous cases concerning the protection of a person's picture against abuse by others, the remedies available in the member States have been of a civil-law nature, possibly combined with procedural remedies such as the granting of an injunction (see, *inter alia*, *Von Hannover*, cited above; *Reklos and Davourlis v. Greece*, no. 1234/05, 15 January 2009; and *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

2. Application of the above-mentioned principles to the present case

86. The Court observes that the Court of Appeal found that the applicant's stepfather's act constituted a violation of her personal integrity (see paragraph 23 above). The Court endorses this finding and considers, on the one hand, that the circumstances were aggravated by the fact that the applicant was a minor, that the incident took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. This event affected the applicant in highly intimate aspects of her private life. On the other hand, it observes that the offence in question did not involve any physical violence, abuse or contact. While noting the domestic courts' finding that her stepfather's act was certainly reprehensible, in the Court's view the act in question did not attain the seriousness of the grave acts in the case-law cited above which concerned rape and sexual abuse of children (see paragraph 81

above), considered not only under Article 8 of the Convention but also Article 3.

87. On the latter point, it is worth noting that the applicant, apart from complaining about the lack of a criminal remedy with reference to the construction of the molestation offence and the absence in Swedish legislation of a separate offence of covert or illicit filming, also complained that the Swedish system did not afford her a civil remedy to protect her against her stepfather's act. More specifically, the applicant maintained that the domestic courts had not fulfilled their positive obligations on account of their failure to award her compensation either on the basis of the Tort Liability Act or the Convention. Accordingly, the applicant did not claim that recourse to criminal law was the only way that Sweden could fulfil its obligation under Article 8 to protect her against her stepfather's act.

88. The applicant did not complain about the effectiveness of the criminal investigation carried out by the Swedish authorities. The Court has not found any evidence that the manner in which the investigating authorities and the public prosecution carried out their tasks was ineffective in safeguarding the applicant's physical integrity, or that they failed to comply with their positive obligation to conduct an effective prosecution in order to ensure adequate protection of the applicant's rights under Article 8 of the Convention.

89. In the light of these preliminary observations, the Court will proceed to examine whether, in the specific circumstances of the case before it, Sweden had an adequate legal framework providing the applicant with protection against the concrete actions of her stepfather and will, to this end, assess each of the remedies allegedly available to her.

90. This approach, it should be emphasised, differs from that followed by the Chamber, which affirmed that "only significant flaws in legislation and practice, and their application, would amount to a breach of the State's positive obligations under Article 8". This was with reference to the terms used in *M.C. v. Bulgaria* (cited above, § 167) in relation to the scope of the State's positive obligations under Articles 3 and 8 of the Convention in affording protection against rape and sexual abuse. However, in that judgment the Court had applied the "significant flaw" test to "alleged shortcomings in the *investigation*", pointing out that it "was not concerned with allegations of errors or isolated omissions" (ibid., § 168) and holding that the shortcomings were "significant" (see, for instance, *M.C. v. Bulgaria*, cited above, §§ 179 and 184; see also *M. and C. v. Romania*, no. 29032/04, §§ 112 et seq., 27 September 2011; compare and contrast *Siliadin v. France*, no. 73316/01, § 130, ECHR 2005-VII, where such wording was used in relation to a review of legislation and practice under Article 4 of the Convention).

91. The Grand Chamber considers that such a significant-flaw test, while understandable in the context of investigations, has no meaningful role in an

assessment as to whether the respondent State had in place an *adequate legal framework* in compliance with its positive obligations under Article 8 of the Convention since the issue before the Court concerns the question of whether the law afforded an acceptable level of protection to the applicant in the circumstances.

(a) Child pornography

92. From the outset, the Court notes that a considerable part of the parties' pleadings before it were devoted to the existence under Swedish law of the offence of attempted child pornography and its relevance to the case under consideration. This had its background in the fact that when acquitting the applicant's stepfather of the charge of sexual molestation (under Chapter 6, Article 7 § 3, of the Penal Code) in its judgment of 16 October 2007, the Court of Appeal affirmed in an *obiter dictum* that, considering the applicant's age, the act in question could, at least in theory, have constituted attempted child pornography under Chapter 16, Article 10a, of the Penal Code (see the provisions cited in paragraphs 31-32 above). However, since no charge of that kind had been brought against the applicant's stepfather, it could not examine whether he could be held liable for such a crime (see paragraph 24 above).

93. The Government were of the opinion that the type of act in issue in the applicant's case could, under certain circumstances, fall not only within the provisions on sexual molestation but also within those on attempted child pornography.

94. However, whilst acknowledging that no information was available as to whether at the relevant time the public prosecutor had given any consideration to indicting the applicant's stepfather with attempted child pornography, the Government enumerated a number of possible reasons why the prosecutor might have decided not to do so, notably a series of difficulties in adducing sufficient evidence to show that there had been a "pornographic" picture (see paragraphs 69 to 72 above). For instance, they pointed out that the applicant's mother had destroyed the film immediately after the incident in September 2002 and that the applicant and her mother had not reported the incident to the police until September 2004, thus a long time after the incident had taken place.

95. The Court has further taken note of the fact that, in the applicant's view, expressed with reference, *inter alia*, to the preparatory works to the provision on child pornography and to a legal opinion (see paragraph 61 above), even if the film had existed her stepfather could not have been convicted of attempted child pornography. This was because the basic condition for the offence, namely that the picture in question be "pornographic", was absent. Images of a 14-year-old girl undressing before taking a shower in an otherwise everyday situation could not be regarded as pornographic within the meaning of Chapter 16, Article 10a, of the Penal

Code concerning child pornography. In order for the film to be pornographic, the applicant's stepfather would have had to manipulate the film, for example by making it appear as if she had been posing for him, or otherwise place the film in a pornographic context. Had a charge been brought for the offence of attempted child pornography in the instant case, it would not have had any prospect of success. The applicant requested the Court to disregard the existence of this offence under the relevant national law in its examination of her complaint.

96. The Court observes that the term "pornographic picture" was not defined in the Penal Code and that the preparatory works referred to by the applicant stated that

> "a certain prudence was called for, so that the criminalised area would not become too wide or difficult to assess. It was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it was a condition that it be pornographic according to common parlance and general values" (see paragraph 33 above).

97. Against this background, the possibility that the offence of attempted child pornography might have afforded the applicant protection in respect of the specific act in issue seems rather theoretical. The Court is not convinced that her stepfather's act was covered by the said offence and sees no need in the particular circumstances to speculate on what the implications would have been for the protection of the applicant's right to respect for her private life under Article 8 of the Convention had a charge for such conduct also been brought.

(b) Sexual molestation

98. Another issue is the question whether the offence of sexual molestation provided the applicant with the protection required by Article 8 of the Convention. Before 1 April 2005, the relevant part of the provision on sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code read as follows:

> "[A sentence for sexual molestation shall be imposed] if a person exposes himself or herself in such a manner that the nature thereof gives offence or otherwise manifestly behaves indecently by word or deed towards the latter in a way that flagrantly violates a sense of propriety."

99. The applicant's stepfather was convicted accordingly by the District Court on 14 February 2006. The Court of Appeal acquitted him by a judgment of 16 October 2007 since it considered that, legally, the act could not constitute sexual molestation. The Court of Appeal found it established that his motive had been to film the applicant covertly for a sexual purpose. It was thus regarded as certain that he did not intend the applicant to find out about the filming. Nor, according to the court, was he indifferent to the risk that she would find out about it. The Court of Appeal then referred to a

judgment (NJA 1996, p. 418) in which the Supreme Court had held, among other things, that covert filming was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent. Following that line of reasoning, and although finding that the act in question constituted a violation of personal integrity, notably in the light of the applicant's age and relationship to her stepfather, the Court of Appeal found that he could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. Even if she had indeed obtained knowledge of the filming afterwards, the court reiterated, this knowledge was not covered by her stepfather's intent. The Supreme Court refused leave to appeal on 12 December 2007.

100. In order for the offence of sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code to be made out, it was thus a requirement when carrying out the act that the offender intended that the victim find out about the sexual molestation or that the offender was indifferent to the risk that the victim would find out about it. In other words, the victim could not be considered sexually molested unless he or she was aware of the molestation. It will be recalled that the applicant's stepfather was indeed convicted of sexual molestation under the said provision as regards the two counts of indecent behaviour against the applicant's 16-year-old cousin, namely, for having caressed her thigh and for having expressed his desire to have sex with her (see paragraph 14 above).

101. This interpretation of the provision on sexual molestation by the Court of Appeal was confirmed in another case by the Supreme Court in a judgment of 23 October 2008 (NJA 2008, p. 946) (see paragraph 40 above). The Supreme Court acquitted a person of molestation and reiterated at the same time that Swedish law contained no general prohibition against covert filming. It further noted that although the need for a strengthened legal framework in this regard had been acknowledged in Swedish legislative work as early as the 1960s, it had so far not led to any concrete results. It found it highly questionable whether the fact that acts of filming an individual in situations where such filming seriously violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention.

102. The applicant maintained that the construction of the provision on sexual molestation as worded before 1 April 2005 was open to criticism. In so far as this criticism was not only aimed at the legislators but also aimed at the interpretation by the Court of Appeal in its judgment of 16 October 2007, and subsequently confirmed by the Supreme Court in another case, the Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011).

The Court agrees with the applicant, however, that it was not on account of a lack of requisite evidence, as maintained by the Government, that her stepfather was acquitted of sexual molestation, but rather, as pointed out by the Court of Appeal, because, legally at the relevant time, the act could not constitute sexual molestation.

103. The provision on sexual molestation was amended on 1 April 2005, thus after the act in the present case had been committed in September 2002, and before the acquittal of the applicant's stepfather in the criminal proceedings. Thereafter, the provision on sexual molestation also included acts carried out "in a way that [was] likely to violate that person's sexual integrity". Subsequently, the 2008 Sexual Offences Commission stated that in their view the amended provision included actions directed at persons who were unconscious or asleep and that it could also be used in situations where a person had covertly filmed or photographed another person in a sexually intrusive way.

104. The Court observes that the Government have not pointed to any domestic case-law in which the amended provision on sexual molestation was applied to covert filming carried out after 1 April 2005. In any event, it suffices to conclude that the provision on sexual molestation as worded before 1 April 2005, and interpreted in the present case by the Court of Appeal in their judgment of 16 October 2007, which became final when the Supreme Court refused leave to appeal, could not legally cover the act in issue and thus did not protect the applicant against the lack of respect for her private life under Article 8 of the Convention.

(c) Recent legislation on covert filming

105. Nor does it appear that the above-mentioned gaps in the substantive protection of the applicant's Article 8 rights were in any way remedied by any other existing national provisions at the time. In this connection, the Court cannot but note that the absence of such provisions has long been a matter of concern in Sweden and that many other member States have legislation in place covering the isolated act of covert or non-consensual filming/photographing of an individual (child or adult) for other than sexual purposes, either under criminal or civil law (see paragraph 55 above). According to the Supreme Court judgment of 23 October 2008 (NJA 2008, p. 946 – see paragraph 40 above) the need for a strengthened legal framework against covert filming had already been acknowledged in Swedish legislative work in the 1960s, but had not yet led to any concrete results. The Supreme Court found it highly questionable whether the fact that acts of filming of an individual in situations where such filming deeply violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention (see also paragraph 101 above).

106. The Court notes that the most recent proposal by the Government, of 20 December 2012, entitled "Intrusive Photography", has been adopted by Parliament. In concrete terms, under the new provisions, which came into force on 1 July 2013, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an intrusive photography offence would also be punishable as preparation to commit such an offence (see paragraph 43 above).

107. The Court further observes that the legislation is designed to cover an act such as the one in issue in the present case. It also notes that the principles laid down in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which are part of the Swedish Constitution, notably as regards the protection of procurers of information to the media, were carefully considered before the said bill could be presented to Parliament. However, as was undisputed, the applicant could not rely on the new legislation regarding an incident which took place in 2002 and could not avail herself of any such protection of her right to respect for her private life.

(d) Civil-law remedies

108. In this case recourse to the criminal law was, in the Court's view, not necessarily the only way that the respondent State could fulfil its obligations under Article 8 of the Convention. Accordingly, the question arises whether the applicant had a civil remedy available to her.

109. In this connection, it is to be observed that the applicant joined her civil claim for damages against her stepfather to the criminal proceedings against him. Thus, on 20 January 2006, represented by counsel, the applicant submitted a claim for damages of SEK 25,000, with SEK 15,000 of this sum as compensation for violation of her personal integrity and SEK 10,000 for pain and suffering. As the basis for her claim the applicant referred to "the criminal act for which her stepfather was being prosecuted".

110. According to the Government, the claim was founded partly on section 1 and partly on section 3 of Chapter 2 of the Tort Liability Act (see paragraph 37 above).

111. In its judgment of 14 February 2006 convicting the applicant's stepfather, the District Court ordered him to pay the applicant damages in the amount of SEK 20,000. However, when acquitting him in its judgment of 16 October 2007, because the act could not legally constitute sexual molestation, the Court of Appeal also dismissed the applicant's claim for damages. The Government pointed out in this connection that by virtue of Chapter 29, section 6, of the Code of Judicial Procedure, when a civil claim is joined to a prosecution, the court's finding in the matter of criminal liability is binding for the adjudication of the private claim. Accordingly, it was not possible for the Court of Appeal to award damages based on

Chapter 2, section 3, of the Tort Liability Act as no crime within the meaning of the Penal Code had been made out. This conclusion is consistent with the statement of the Supreme Court in the subsequent judgment, NJA 2008, p. 946 (see paragraph 40 above) of 23 October 2008, that Swedish law contained no general prohibition against covert filming and that in cases where such filming did not constitute a crime, damages could not be awarded.

112. Nevertheless, the Government contended that in the criminal proceedings the applicant could have relied on other grounds in support of the claim for damages directed against her stepfather, namely, that he had caused her personal injury by acting negligently under Chapter 2, section 1, of the Tort Liability Act, which could have covered any physical and psychological injury (see paragraph 73 above).

113. In this regard, it should be borne in mind, however, that the applicant's stepfather had at no time during the investigation or the criminal proceedings alleged that he had left the camera in recording mode in the laundry basket in the bathroom by accident. On the contrary, he acknowledged that it had been a wilful but impulsive act. Therefore, in the Court's view, the applicant and her counsel could not be expected to have invoked negligence just for the sake of ensuring that her claim be dealt with in the event that the act was not deemed to be covered by the offence of sexual molestation.

114. Accordingly, the Court is not convinced that in the specific situation at hand, where the act in issue was not legally covered by the provision on sexual molestation and where covert filming in general did not constitute a crime, the applicant had a civil remedy available to her.

(e) Compensation on the basis of the Convention

115. Lastly, the Court has considered the applicant's contention that the domestic courts in the criminal proceedings could have awarded her compensation on the basis of the Convention alone but had failed do so of their own motion.

116. As pointed out by the Government, although the Supreme Court had established a principle whereby an individual could be awarded damages from the State for violations of the Convention without the support of specific provisions in Swedish law, this could not apply to claims between individuals as it would be difficult for an individual to foresee from the Court's case-law when he or she could be liable to pay damages (NJA 2007, p. 747, see paragraph 47 above). Having regard to the Swedish domestic practice on compensation for violations of the Convention (see paragraphs 45 to 50 above), including the aforementioned Supreme Court ruling, the Court is not persuaded that this alleged avenue of redress really existed or that it could have made up for the absence of a civil remedy in the specific situation at hand as found above.

(f) Conclusion

117. Having regard to the all the above-mentioned considerations, the Court is not satisfied that the relevant Swedish law, as it stood in September 2002 when the specific act of the applicant's stepfather covertly attempting to film the applicant naked in their bathroom for a sexual purpose occurred, ensured protection of her right to respect for her private life in a manner that, notwithstanding the respondent State's margin of appreciation, complied with its positive obligations under Article 8 of the Convention. The act in question violated the applicant's integrity; it was aggravated by the fact that she was a minor, that the incident took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. However, as the Court has found above, neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the said violation of her personal integrity in the concrete circumstances of her case.

Accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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

119. The applicant claimed 20,000 euros (EUR) in compensation for non-pecuniary damage.

120. The Government found that amount excessive. In their view, an amount not exceeding a total of EUR 3,000 would be sufficient to compensate the applicant.

121. The Court considers that the applicant must have suffered non-pecuniary damage that is not sufficiently compensated for by the mere finding of a violation of Article 8. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

122. The applicant claimed 516,410 Swedish kronor (SEK) (corresponding to approximately EUR 60,500) including value-added tax (VAT) for costs and expenses, which comprised:

(i) SEK 146,250 for lawyers' fees incurred in the proceedings before the Chamber, equal to 65 hours at an hourly rate of SEK 1,800 (exclusive of VAT);

(ii) SEK 353,750 for lawyers' fees incurred in the proceedings before the Grand Chamber, equal to 141.50 hours at an hourly rate of SEK 2,000 (exclusive of VAT);

(iii) SEK 11,021 for a legal opinion obtained;

(iv) SEK 5,389 for travel costs and an allowance for expenses incurred by her three counsel in attending the hearing before the Grand Chamber.

In connection with the latter item, the applicant also claimed compensation for expenses amounting to EUR 3,260.60 for flight tickets and accommodation costs incurred by her and her three counsel in attending the hearing before the Grand Chamber.

123. The Government found the lawyers' fees excessive both as to the hours and the hourly rate. They considered a total amount of 80 hours reasonable as well as an hourly rate corresponding to the Swedish hourly legal aid fee, which for 2013 was SEK 1,242 (exclusive of VAT). Regarding the other costs and expenses, the Government found that the cost of the legal opinion had been unnecessarily incurred. They did not object to the remainder of the claims as such.

124. According to the Court's established case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum.

125. In respect of the lawyers' fees, be this before the Chamber or the Grand Chamber, the Court can accept an hourly rate as claimed by the applicant. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 25,000 including VAT (see, for example, *X and Others v. Austria* [GC], no. 19010/07, § 163, ECHR 2013; *Nada v. Switzerland* [GC], no. 10593/08, § 245, ECHR 2012; and *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 117, ECHR 2011).

126. Turning to the other costs and expenses before the Grand Chamber, it appears that the amount included plane tickets for five persons. The Court can only award travel expenses for the applicant and her three counsel. It therefore awards the applicant EUR 4,700 under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;

2. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 29,700 (twenty-nine thousand seven hundred euros) under the head of costs and expenses, plus any tax that may be chargeable to the applicant in this respect;
   (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;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 November 2013.

Erik Fribergh	Josep Casadevall
Registrar	President

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

(a) concurring opinion of Judge Pinto de Albuquerque;
(b) dissenting opinion of Judge Kalaydjieva.

J.C.
E.F.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Söderman* case raises three fundamental legal questions, namely, the international obligation to criminalise non-consensual filming or photography; the limits of an evolutive interpretation of criminal law in accordance with the respondent State's international obligations; and the legal force of the European Convention on Human Rights ("the Convention") as a direct basis for awarding compensation for non-pecuniary damage. I concur with the majority in finding a violation of Article 8, though for different reasons. In addition, I would have addressed separately the complaint under Article 13 taken in conjunction with Article 8 and found a violation thereof.

The international obligation to criminalise non-consensual filming or photography

The Convention guarantees the right to protection of one's image. Filming or photographing a person without her or his consent infringes core personality rights, since a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development[1]. The ambit of protection of this right is defined broadly, to include all situations and events in which a person's image is captured without his or her knowledge and consent and regardless of the private nature of the person's environment. It also covers unauthorised use by the offender, or the offender's permission of use by a third person, of images that have been legally obtained[2].

The protection of a person's image against abuse by others is an obligation of States Parties, which must prevent violations from occurring and provide for remedies for violations that have already occurred[3]. States do not have a discretion when providing for these remedies. Where a

1. See *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 96, ECHR 2012. With regard to minors, the exercise of the right to protection of their image is overseen by their parents (see *Reklos and Davourlis v. Greece*, no. 1234/05, § 41, 15 January 2009).
2. See *Reklos and Davourlis*, cited above, § 40.
3. See, on images of public figures, *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002; *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002; and *Von Hannover*, cited above, § 57; and, on images of non-public persons, *Sciacca v. Italy*, no. 50774/99, § 28, ECHR 2005-I, and *Reklos and Davourlis*, cited above, § 35.

particularly important facet of the individual's personality is at stake, the State's margin of appreciation is narrow[4].

The obligation to criminalise child pornography derives from Articles 16, 19 and 34 (c) of the United Nations Convention on the Rights of the Child[5] and Article 3 of the Optional Protocol to the United Nations Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography[6]. Articles 6 and 7 § 1 of the International Labour Organisation Worst Forms of Child Labour Convention (no. 182) oblige States Parties to take steps to eliminate, with the necessary penal sanctions, the sale of children, child prostitution and child pornography, including the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances[7]. The criminalisation of child pornography is also obligatory under Article 20 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[8] and Article 9 of the Council of Europe Convention on Cybercrime[9]. The Council of the European Union adopted,

4. See *Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45; *Norris v. Ireland*, 26 October 1988, § 46, Series A no. 142; *A.D.T. v. the United Kingdom*, no. 35765/97, § 38, ECHR 2000-IX; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I.

5. The Convention has 193 States Parties and the respondent State ratified it in 1990. For the purpose of this opinion, I will consider any person under the age of 18 to be a child, according to the standard set by the United Nations Convention. This does not prevent States Parties to the European Convention on Human Rights from extending the legal protection of children beyond that age.

6. The Protocol was adopted in 2000 and came into force in 2002. As of October 2013, 166 States are party to the Protocol, including Sweden, which ratified it on 19 January 2007, that is, before the Svea Court of Appeal's judgment of 16 October 2007. Article 3 (c) of the Protocol requires States Parties to criminalise producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography, namely, "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes". The Committee on the Rights of the Child has nevertheless encouraged countries to criminalise mere possession (for example, United Nations Committee on the Rights of the Child, Concluding Observations for Costa Rica of 2 February 2007, §§ 14-15, and for Chile of 1 February 2008, §§ 23-24).

7. The Convention came into force in 2000, and has 174 States Parties. Sweden ratified it in 2001.

8. CETS no. 201. The Convention was approved in 2007, entered into force in 2010, has 25 States Parties and was ratified by Sweden in 2013. It contains obligations to criminalise conduct for which criminalisation is not expressly required by the United Nations Optional Protocol on the sale of children, child prostitution and child pornography, such as the possession of child pornography, that is, any visual depiction of a child engaged in real or simulated sexually explicit conduct, or any representation of a child's sexual organs for primarily sexual purposes.

9. CETS no. 185. The Convention was approved in 2001, came into force in 2004, has 39 States Parties and has been signed, but not ratified, by the respondent State.

in 2003, the Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA) according to which member States are obliged to criminalise the production, distribution, dissemination, transmission, supplying or making available, acquisition and possession of child pornography and provide for a minimum level of maximum penalties incurred for these offences[10]. The European Parliament and the Council approved Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, which replaced the Council Framework Decision of 2004, but maintained the criminalisation obligation[11]. In Europe, forty-one countries have criminalised child pornography, and in the United States both the federal law and the law of all fifty States make provision for the same offence[12]. In

10. Child pornography in the Framework Decision means pornographic material that visually depicts or represents a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or a real person appearing to be a child involved or engaged in the conduct mentioned above; or realistic images of a non-existent child involved or engaged in the conduct mentioned above.

11. Child pornography in the Directive has a broader definition, meaning any material that visually depicts a child engaged in real or simulated sexually explicit conduct; any depiction of the sexual organs of a child for primarily sexual purposes; any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes.

12. In addition to Sweden, these are Albania (Article 117 of the Criminal Code), Austria (Article 207a § 1, no. 1, of the Austrian Criminal Code), Azerbaijan (Article 242 of the Criminal Code), Belgium (Article 383 *bis* of the Criminal Code), Bosnia and Herzegovina (Article 199 of the Criminal Code of Republika Srpska and Article 211 of the Criminal Code of the Federation of Bosnia and Herzegovina), Bulgaria (Article 159 of the Criminal Code), Croatia (Article 163 of the Criminal Code), Czech Republic (Article 192 of the Criminal Code), Denmark (Article 230 of the Criminal Code), Estonia (Article 178 of the Criminal Code), Finland (Articles 18, 18a and 19 of Chapter 17 of the Criminal Code), France (Article 227-23 of the Criminal Code), Georgia (Article 255 of the Criminal Code), Germany (Article 184b § 4 of the Criminal Code), Greece (Article 348 of the Criminal Code), Hungary (Article 204 of the Criminal Code), Iceland (Articles 209 and 210a of the Criminal Code and section 99(3) of the Child Protection Act), Ireland (section 3(2) of the Child Trafficking and Pornography Act), Italy (Article 610 *quater* of the Criminal Code), Latvia (section 1(1) of the Limitation of Pornography Act 2007), Liechtenstein (Article 219 § 1, no. 1, of the Criminal Code), Lithuania (Article 162 of the Criminal Code), Luxembourg (Article 384 of the Criminal Code), Macedonia (Article 193a § 1 of the Criminal Code), Moldova (Article 208 of the Criminal Code), Monaco (Article 294-3 of the Criminal Code), Montenegro (Article 211 of the Criminal Code), the Netherlands (Article 240 b of the Criminal Code), Norway (Article 201 of the Criminal Code, according to the case-law), Poland (Article 202 § 4 of the Criminal Code), Portugal (Article 176 of the Criminal Code), Romania (section 51 of Law no. 161/2003), Russia (Article 242.1 and 2 of the Criminal Code), Slovakia (Articles 368 and 370 of the Criminal Code), Slovenia (Article 176 § 2 of the Criminal Code), Spain (Articles 189 and 197 § 6 of the Criminal Code), Switzerland (Article 197 § 3 of the Criminal Code), Turkey (Article 226 § 3 of the Criminal Code), the United Kingdom (section 1 of the Protection of Children Act

view of this broad consensus and constant practice, the criminalisation of child pornography, namely, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes, is now part of international customary law, binding on all States.

Obligations to criminalise are not new under the Convention. The European Court of Human Rights ("the Court") has already considered that rape[13], forced labour[14], wilful attack on the physical integrity of a person[15], human trafficking[16] and the disclosure of certain confidential items of information[17] must be criminalised[18], but negligent violations of the right to life and physical integrity must not[19]. With regard to children, the Court has established the principle that any wilful offence against the physical and moral welfare of children should be criminalised[20] and punished with a

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1978), United States of America (section 18 USC §§ 2251, 2252 and 2252a) and Ukraine (Article 301 § 4 of the Criminal Code).

13. See *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91, and *M.C. v. Bulgaria*, no. 39272/98, §§ 50, 166, ECHR 2003-XII.

14. *Siliadin v. France*, no. 73316/01, § 112, ECHR 2005-VII, and *C.N. and V. v. France*, no. 67724/09, §§ 105-08, 11 October 2012.

15. *Sandra Janković v. Croatia*, no. 38478/05, § 36, 5 March 2009.

16. *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 284 and 288, ECHR 2010.

17. *Stoll v. Switzerland* [GC], no. 69698/01, § 155, ECHR 2007-V.

18. The Court not only reviews the political decision not to criminalise certain conduct, but also the excessive or disproportionate criminalisation of certain conduct, such as in *Dudgeon*, cited above, § 60; *Norris*, cited above, § 46; *Modinos v. Cyprus*, 22 April 1993, § 24, Series A no. 259; *A.D.T.*, cited above, § 38 (private homosexual acts between consenting adults); *S.L. v. Austria*, no. 45330/99, § 44, ECHR 2003-I (homosexual acts of adult men with consenting adolescents between 14 and 18 years of age); *Vajnai v. Hungary*, no. 33629/06, § 54-56, ECHR 2008 (wearing of red star); *Altug Taner Akçam v. Turkey*, no. 27520/07, §§ 93-95, 25 October 2011 (insulting Turkishness); *Mosley v. the United Kingdom*, no. 48009/08, § 129, 10 May 2011 (non-compliance with pre-notification requirement to publish news on private life); *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011 (participation in an unlawful but peaceful demonstration); *Wizerkaniuk v. Poland*, no. 18990/05, §§ 82-83 and 86, 5 July 2011 (publication of unauthorised verbatim quotations); *Mallah v. France*, no. 29681/08, § 40, 10 November 2011 (assisting illegal entry, circulation or stay of foreigner in the national territory); *Gillberg v. Sweden* [GC], no. 41723/06, §§ 68-71, 3 April 2012 (misuse of office due to refusal of access to research material owned by a public university), *Stübing v. Germany*, no. 43547/08, §§ 63-65, 12 April 2012 (incest); and *Şükran Aydın and Others v. Turkey*, nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, § 55, 22 January 2013 (use of mother tongue in political campaign).

19. See *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, §§ 90-94, ECHR 2004-VIII; *Dodov v. Bulgaria*, no. 59548/00, § 87, 17 January 2008; *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 64, 15 January 2009; and *Maiorano and Others v. Italy*, no. 28634/06, § 128, 15 December 2009.

20. *K.U. v. Finland*, no. 2872/02, § 46, ECHR 2008. The case dealt with a minor of 12 years of age who was the subject of an unauthorised advertisement of a sexual nature on an Internet dating site. In *C.A.S. and C.S. v. Romania* (no. 26692/05, 20 March 2012), the Court clearly recognised that States had an obligation under Articles 3 and 8 to ensure the

deterrent penalty[21]. Child pornography is certainly among these, having regard to its serious ethical censurability and to its reprehensibility under international customary and treaty law. Yet in view of the threshold of explicitness of the acts depicted and the required sexual purpose of the perpetrator, this criminal offence is subject to evidentiary problems. Thus, in order to provide full and effective protection of children, covert filming of children, with or without a sexual purpose on the part of the perpetrator, and in or outside a pornographic setting, should be criminalised. Such criminalisation is in line with the Convention guarantee of the child's right to protection of his or her image and the prevailing international prohibition of any kind of abuse or violation of the various facets of the child's personality, which includes his or her image.

Furthermore, as a matter of principle, adults deserve the same legal protection as children. There is no plausible reason to criminalise the abuse of a child's image and not that of an adult's, or the other way round. It cannot reasonably be argued that the violation of an adult's image has less ethical weight *per se* than that of a child. All are human beings, with the same personality right to protection of their own image. In fact, in some cases it is extremely difficult to distinguish an adult from a minor, and uncertainty about the victim's age should not prevent criminal prosecution. Hence, guaranteeing the Convention right to protection of one's image requires the criminalisation of covert filming and photographing of children and adults[22].

The legal framework in the respondent State

At the relevant time, there were two criminal provisions that could in theory be applied to the facts: sexual molestation (Chapter 6, Article 7, of the Penal Code) and child pornography (Chapter 16, Article 10a § 1, of the same Code)[23].

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effective criminal investigation of cases involving violence against children, referring to the international obligations the respondent State had entered into for the protection of children against any form of abuse.

21. See *Okkalı v. Turkey*, no. 52067/99, § 73, ECHR 2006-XII, and *Darraj v. France*, 34588/07, § 49, 4 November 2010.

22. Evidently, all grounds of justification and exculpation shall apply, such as in the case of undercover photography or filming by journalists when this contributes to a debate of public interest. Domestic courts and prosecutors must take into account fundamental rights, such as freedom of expression, when implementing criminal-law provisions, and specifically the provision criminalising covert filming or photographing of adults and children. In addition, States Parties may provide a defence in respect of conduct related to "pornographic material" having artistic, medical, scientific or similar merit.

23. Other criminal-law provisions invoked by the Government, such as breach of domiciliary peace, unlawful intrusion or defamation (Government observations to the Grand Chamber, paragraph 22), are not applicable, for obvious reasons. No case-law was submitted by the Government to support their contention that these provisions could be

Sexual molestation presupposes a specific action on the part of the offender, namely: (a) touching a child under 15 years of age; (b) inducing a child to undertake or participate in an act with sexual implications; (c) inducing a child of 15 years of age or more, but younger than 18, by coercion, seduction or other improper influence, to undertake or participate in a pornographic act; (d) exposing oneself; (e) behaving indecently. In any case the offence requires both the victim's knowledge of the offender's conduct at the moment it is carried out and the offender's intent that the victim find out about the conduct. That means that the core of the offence lies in the improper conduct of the offender with regard to the victim, with the latter's knowledge.

Child pornography also presupposes a specific action by the offender, such as portraying a child in a pornographic picture; disseminating, transferring, granting use, exhibiting, acquiring or offering such a picture; facilitating dealings with regard to such a picture; or possessing such a picture. The offence requires that the pubertal development of the child be incomplete or that it be apparent from the image or its attendant circumstances that the child is under 18 years of age. This crime is punishable both when brought to its completion and when attempted (Chapter 16, Article 7, and Chapter 23, Article 1). Sweden does not have a detailed legal definition of child pornography, but in the governmental bill containing this provision it was stated that "[i]t was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it is a condition that it be pornographic according to common parlance and general values"[24]. It is obvious that such a restrictive formulation of the criminal provision regarding child pornography does not satisfy the respondent State's international obligations, in so far as these require the criminalisation of any representation of the sexual parts of a child for primarily sexual purposes.

Lastly, Swedish criminal law did not have a criminal offence of covert photography or filming at the relevant time. Application by analogy of the criminal offence of sexual molestation to the detriment of the defendant was evidently ruled out. After the amendment to the Penal Code of April 2005, the Sexual Offences Commission considered that the new Chapter 6, Article 10 § 2 of the Swedish Penal Code included actions directed at persons unconscious or asleep, and therefore could also encompass covert

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applied, and a merely literal interpretation of these provisions shows that they are not applicable. The case did not raise a question of breach of domiciliary peace, simply because the offender lived at the house in question, nor of defamation, since the applicant's stepfather did not intend to release the film to third persons.

24. The Government reiterated and sustained this interpretation in paragraph 45 of their observations to the Grand Chamber.

filming of a person in a sexually intrusive way[25]. Yet this very questionable interpretation did not prevail in judicial practice. The Government did not provide the Court with case-law confirming that interpretation. Furthermore, the Government themselves acknowledged that further amendments to the Penal Code were needed to criminalise the conduct of the defendant. That is why the recent bill on intrusive photography and filming was approved. In fact, this legislative initiative cannot but be read as a confession by the Government of the existence of a legal flaw in the domestic criminal-law system[26]. It remains to be seen whether that shortcoming is relevant in terms of the protection required by the Convention rights.

The application of criminal law by the national authorities

The public prosecutor chose to charge the defendant with sexual molestation. This proved to be the wrong legal avenue, since there was obviously no conduct falling within the offence of sexual molestation: no touching, no inducing, no coercion, no seduction, no improper influence, no exposure or indecent behaviour of the defendant. Furthermore, the relevant criminal intent that the applicant should find out about the filming could not be established. The Government maintained that this was a problem of evidence, but the applicant replied that it was rather a problem of erroneous interpretation of penal law by the public prosecutor. The applicant is right, since the requisite subjective element of the offence of sexual molestation (namely, the perpetrator's intention that the victim be aware of the illegal conduct while it is taking place) is incompatible *per se* with any covert action of filming or photographing.

The public prosecutor did not charge the defendant with child pornography. No reasons were given for that approach. The Government assumed that it was because there was no film, and no physical evidence of the completed crime. As the applicant argued, it is clear that the non-existence of the film did not preclude charges of attempted child pornography, especially in a case where the defendant confessed to the facts, and there were two witnesses: the victim, who discovered the film, and her mother, who destroyed it. The confession was thus supported by sufficient additional evidence. Hence, there was no evidentiary problem with regard to the offence of child pornography either.

Whilst the criminal offence of sexual molestation could not be applied to the facts of the case, the offence of attempted child pornography could have guaranteed the applicant's Convention right to protection of her image, had the Court of Appeal had regard to Sweden's international obligations. Although it admitted that the offence of attempted child pornography was in

25. Government's observations to the Grand Chamber, paragraph 66.
26. Paragraph 76 of the Government's observations to the Grand Chamber.

theory applicable to the facts, the Court of Appeal was not willing to give an evolutive interpretation of the concept of child pornography, and preferred to follow the historical interpretation of the corresponding incriminating provision, based on the preparatory works of the Penal Code referred to above. That construction of the child-pornography offence adopted by the Court of Appeal, which was in line with the practice of the Supreme Court and the Government's own view, could not provide any redress to the applicant.

Indeed, the Court of Appeal had two alternatives for the purposes of guaranteeing the victim's right to protection of her image: either to adopt an evolutive interpretation of the concept of child pornography, correct the erroneous legal characterisation given to the facts by the first-instance court and convict the defendant of the crime of attempted child pornography; or to stick to the historical interpretation of the concept of child pornography and acquit the defendant, but at least award compensation for non-pecuniary damage, as claimed by the applicant on the basis of the violation of her personal integrity by her stepfather's conduct.

The change of legal characterisation of the offence

The first alternative could have been pursued under Chapter 30, Article 3, of the Code of Judicial Procedure: when examining a complaint, the domestic courts are not bound by the legal characterisation of the offence or the applicable provisions of law. In Sweden, as in many European countries, the criminal court is bound by the facts of the indictment, but not by its legal characterisation of the offence[27].

The fact is that the domestic courts did not use the power they had under Chapter 30, Article 3, of the Code of Judicial Procedure. No reasons were given by the domestic courts for not using that alternative, although they could have used it of their own motion. In spite of the restrictive intention of the Swedish legislature when it introduced the criminal offence of child pornography, as reflected in the relevant preparatory works, the domestic courts could, and should, have adopted an evolutive interpretation of the concept of child pornography, in order to include any representation of the sexual parts of a child for primarily sexual purposes. An evolutive interpretation of penal law is acceptable provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. This interpretation would at the same time be in accordance with the international obligations of Sweden and the general

27. The Government said, in their observations to the Grand Chamber, paragraph 54: "In Swedish criminal procedure, the court is not formally bound in its assessment by what offence has been put before it, i.e., the court may examine on its own initiative questions concerning the classification of a criminal offence and the applicable section of law (Chapter 30, Article 3, of the Code of Judicial Procedure)."

principles of interpretation of penal law[28]. The facts imputed to the applicant's stepfather would be sufficient to make out this offence, in its ancillary and preparatory form of attempted child pornography: the images of a 14-year-old girl undressing before taking a shower in an otherwise everyday situation certainly do fall within the concept of "any representation of the sexual parts of a child" and the applicant's stepfather completed all the necessary steps to obtain images of the sexual parts of a child for primarily sexual purposes, which he ultimately did not obtain on account of the fortuitous circumstance that the girl discovered the hidden camera[29]. No additional reference to pornography in the indictment was necessary, since it already included all the relevant elements of the offence of attempted child pornography, interpreted in the light of Sweden's above-mentioned international obligations. It was up to the domestic courts to change the legal characterisation of the offence and adopt an evolutive interpretation of the concept of child pornography compatible with Sweden's international obligations[30]. The domestic courts took neither of those steps, thus leaving unpunished highly reprehensible conduct that should have been punished in the light of the international obligations of the respondent State. To the legislature's long-standing inertia in clarifying the legal situation the courts added their unwillingness to apply the criminal law according to the canon of evolutive interpretation.

The compensation for non-pecuniary damage based directly on the Convention

Assuming, for the sake of argument, that the first alternative was not an available legal avenue in the instant case, in accordance with the historical interpretation of the criminal provision of child pornography, the alternative to guaranteeing the victim's right to protection of her image could have been to award the applicant reparation for non-pecuniary damage. Indeed,

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28. The Court has already stated that "the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-36, Series A no. 335-B, and *C.R. v. the United Kingdom*, 22 November 1995, Series A no. 335-C). Hence, I cannot agree with the Grand Chamber's statement in paragraph 97 of the present judgment.

29. Thus, the applicant's stepfather started to commit the crime without bringing it to its completion and the danger that the act would lead to the completion of the crime was only averted because of unforeseen and unwanted circumstances. All the requisite elements of the attempted offence were fulfilled (Chapter 23, Article 1, of the Penal Code).

30. It goes without saying that, in accordance with the national law and the European standard, the amended criminal charge should be communicated to the defendant, in order to give him the opportunity to contest it.

the applicant referred to the facts set out in the indictment that had caused her pain and suffering and even adduced independent evidence of the nature and extent of the injury that she had suffered.

The legal basis for that award was Chapter 22, Article 7, of the Swedish Code of Judicial Procedure[31]. This provision was not used by the Court of Appeal, although it could have used it of its own motion. The Court of Appeal dismissed the claim for compensation because no crime had been proven, but did not determine the civil action, as it could have done. Even assuming that no crime was made out and therefore damages based on Chapter 2, section 3, of the Tort Liability Act could not be awarded, the Court of Appeal could still have invoked Chapter 2, section 1, of the same Act, which covered both wilful and negligent physical and psychological injury, for the purpose of awarding damages to the applicant. By not doing so, for no plausible reason, it left the applicant's proven personal injury without compensation[32].

Last but not least, the Court of Appeal refrained from awarding compensation based on the Convention. This approach is in line with the case-law of the Swedish Supreme Court according to which in disputes between individuals there is no civil liability based on Convention violations when these are not simultaneously violations of the domestic law. There are two reasons for this: firstly, the Convention does not impose duties on individuals and, secondly, individuals cannot foresee the grounds for compensation when there have been only breaches of the Convention[33].

This line of argument is at odds with the Convention's direct effect in the legal order of the respondent State, the principle of subsidiarity and the principle of interpretation of human rights treaties in a way which is most protective of the rights and freedoms which they foresee[34]. Since the Convention is applied directly in the domestic State, and violations of it must primarily be resolved by the national authorities, there should be provision for compensation for victims of Convention breaches, even when domestic law has not been violated. The argument of unforeseeability does

31. As the applicant argued, the procedural legal situation in Sweden resembles the situation in *Y v. Norway*, no. 56568/00, §§ 23-24, ECHR 2003-II in that a private claim may be upheld in the same proceedings as a criminal case even if the defendant has been acquitted of the offence.

32. The Government argued that, in order to benefit from Chapter 2, section 1, of the Tort Liability Act, the applicant should have claimed "that he had caused her personal injury by acting negligently in respect of her" (Government observations to the Grand Chamber, paragraph 35). This interpretation of the said provision sounds very abstruse, for two reasons. Firstly, the said provision encompasses literally wilful (or deliberate) and negligent injuries. Secondly, the applicant's stepfather acted wilfully and not negligently.

33. Swedish Supreme Court judgment of 29 October 2007 (NJA 2007, p. 747): "in view of the rule-of-law value held by the principle of predictability, an individual could not be obliged to compensate another individual directly on the basis of the Convention."

34. See *Wemhoff v. Germany*, 27 June 1968, § 8, Series A no. 7, and my separate opinion in *Fabris v. France* [GC], no. 16574/08, ECHR 2013.

not stand, in so far as the Convention is part of national law and therefore the grounds for compensation deriving from the Court's case-law are predictable. The Court's interpretation of the Convention regarding grounds for compensation for breaches of Convention rights is as binding for national courts as the rest of the Court's case-law, and should therefore be implemented by the national courts whenever national law fails to provide such compensation. In addition, if damages awarded for a State's violations of the Convention are predictable, even where there are no specific provisions on civil liability in national law, as the Swedish Supreme Court correctly admits, the same applies to awards for violations perpetrated by individuals who are not State agents, such as the one in this case[35]. In such a case, the State would be neglecting its obligations to protect Convention rights if it did not ensure a means of civil redress in circumstances where no criminal sanctions were applicable despite the ethical censurability and the reprehensibility under international customary and treaty law of the conduct. To put it positively, whenever criminal remedies are lacking for such conduct committed by individuals who are not State agents, the Contracting Parties to the Convention should nonetheless provide for civil remedies. An obligation is placed upon the State to provide for an effective civil remedy to deal with the substance of an "arguable complaint" of a breach of the Convention, in accordance with Article 13 in conjunction with Article 8, not upon the individuals themselves. Hence, the domestic courts failed to repair the applicant's injury, in spite of the available civil-law remedy based solely on the Convention.

The application of the European standard to the present case

The applicant had a right to be protected and the State had an obligation to protect that right. The parties accept both points. The dispute between the parties revolves around one point: the existence of effective remedies for this violation in the legal order of the respondent State. Sweden had a child-pornography provision, but that offence was ignored by the courts, which did not apply it in the instant case. Moreover, the offence was insufficient to punish the applicant's stepfather's conduct on account of its strict judicial construction which read into the provision an implied requirement of explicit sexual behaviour of the victim. The 2005 law reforming the criminal offence of sexual molestation, which does not include covert

35. The Court has accepted that damages provide an adequate remedy for violations of Article 8 rights arising from a dispute between private persons (see *Von Hannover v. Germany*, no. 59320/00, §§ 72-74, ECHR 2004-VI, and *Armonienė v. Lithuania*, no. 36919/02, §§ 45-48, 25 November 2008). In addition, in *Kontrová v. Slovakia* (no. 7510/04, 31 May 2007), the Court found a violation of Article 2 on the ground of the authorities' failure to protect the children's lives, and a violation of Article 13 because their mother had been denied the possibility of seeking compensation from the offender.

filming and photography, could not in any case be applied to the facts, owing to the basic principle of prohibition of retroactive application of penal law to the detriment of the defendant. Lastly, the civil remedy was not used, owing to the Court of Appeal's unjustified refusal to apply the Tort Liability Act and the Supreme Court's strict interpretation of the conditions of civil liability based on breaches of the Convention. Thus, no legal avenue was afforded, in practical terms, for guaranteeing the applicant's right to protection of her image[36].

Conclusion

In view of the Convention obligation to criminalise non-consensual filming and photography regardless of any sexual purpose on the part of the perpetrator and to provide compensation based directly on breaches of Article 8, the national legislature's failure to satisfy the first obligation, and the domestic courts' unwillingness to satisfy the second, I find that there has been a violation of Article 8 taken alone and in conjunction with Article 13.

36. As the visionary Supreme Court judgment of 23 October 2008 (NJA 2008, p. 946) concluded, when it stated that the non-criminalisation of covert filming of adults could amount to a breach of Article 8. *A fortiori* the same reasoning has to be applied to covert filming of children.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I fully agree with the majority that the applicant's personal integrity was violated by the acts committed by her stepfather and that her situation was aggravated by the fact that she was a minor, that the covert filming of her undressing took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. The Grand Chamber undertook (see paragraph 89 of the judgment) to examine whether Sweden had an adequate legal framework providing the applicant with an acceptable level of protection (see paragraph 91) and to assess, to this end, each of the remedies available to her (see paragraph 89). To my regret, I fail to understand the logic followed by the majority in finding and providing a legal response to these questions and for this reason I also find myself unable to agree with the conclusions reached.

The applicant did not claim that recourse to criminal law was the only way that Sweden could fulfil its obligation under Article 8 to protect her against her stepfather's act (see paragraph 87) and did not criticise the prosecution for not complying with an obligation to indict crimes, but rather found that the legislator had failed in its positive obligation to criminalise the act of covert filming of a minor in a situation which upset the essential aspects of personal integrity. She pointed out that the "weak protection in this area had been known and discussed since 1966". This, in her view, "sufficed to conclude that the protection for the right to respect for private life was – and still is – insufficient" (see paragraphs 62-63).

In response to this complaint, while noting that the impugned acts "did not attain the seriousness of the grave acts ... considered not only under Article 8 but also Article 3 of the Convention", the majority failed to state clearly whether (similarly to the cases mentioned in paragraphs 83 and 84) positive obligations arose in the present case – as maintained by the applicant – and if so which ones, or whether a criminal-law remedy was nevertheless necessary to achieve the appropriate and acceptable level of protection of the applicant's rights under Article 8, or – alternatively – that the decision whether or not to criminalise and prosecute such acts remained within the Swedish authorities' margin of appreciation. In this connection it is difficult to understand the source of the majority's dissatisfaction with the fact that "notwithstanding the ... margin of appreciation", Swedish law did not provide a criminal remedy for the effective protection of the applicant.

The majority also failed to specify (compare and contrast *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I) whether a civil-law remedy – if available – might in principle have sufficed for the appropriate protection of the applicant and instead addressed the fact that the *criminal* courts did not award any compensation for damage resulting from a crime as the impugned acts did not constitute a crime. In this regard the applicant

insisted that – being the masters of the classification of the law – the criminal courts should have reclassified and determined her claim on other grounds. However, she never complained about the lack of such a remedy in the civil courts (see paragraph 64). I remain unconvinced that the fact that the criminal courts dismissed the applicant's civil claim for damages resulting from a crime suffices to conclude that no other civil remedy existed under Swedish law to redress the substance of her complaints (see paragraph 117).

As a result, noting first that "[t]he choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation" (see paragraph 79), the majority arrived at the conclusion that the proceedings before the criminal courts offered neither criminal nor civil redress – as the applicant had initially complained. This conclusion only reflects the facts of the case, and does not necessarily provide a legal response to the Grand Chamber's undertaking to establish whether Swedish law, as it stood in September 2002, ensured appropriate protection of the applicant's "right to respect for her private life". Indeed, it seems to me that in the absence of criteria defining the required "acceptable level of protection" in specific terms, a comparison between the failed and the undefined remedies will inevitably lead to dissatisfaction "notwithstanding the respondent State's margin of appreciation" in this area (see paragraph 117).