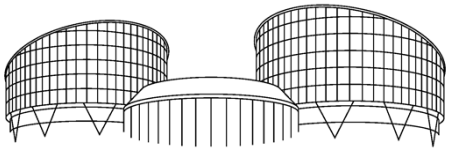

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SABALIĆ v. CROATIA

(Application no. 50231/13)

JUDGMENT

Art 14 (+ 3) • Discrimination • Conviction for minor offence and EUR 40 fine for violent homophobic attack, without investigating hate motives, and subsequent discontinuation of criminal proceedings on *ne bis in idem* grounds • Sentence manifestly disproportionate to the gravity of ill-treatment • Unnecessary recourse to ineffective minor offence proceedings capable of fostering a sense of impunity for the acts of violent hate crime • Failure to investigate and to take into consideration hate motives in determining the punishment amounting to "fundamental defects" in the proceedings within the meaning of Art 4 P 7 • No *de jure* obstacles to offer the defendant the appropriate redress: by terminating or annulling the unwarranted set of proceedings, effacing its effects and re-examining the case

STRASBOURG

14 January 2021

FINAL

14/04/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sabalić v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Linos-Alexandre Sicilianos,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application (no. 50231/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Ms Pavla Sabalić ("the applicant"), on 26 July 2013;

the decision to give notice to the Croatian Government ("the Government") of the complaints concerning Articles 3, 8, 13 and 14 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the non-governmental organisation "Zagreb Pride", and jointly from the non-governmental organisations the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (hereinafter: "ILGA-Europe"), the Advice on International Rights in Europe Centre (hereinafter: "AIRE Centre") and the International Commission of Jurists ("hereinafter: "ICJ"), who were granted leave to intervene by the President of the Section;

Having deliberated in private on 1 December 2020,

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

INTRODUCTION

1. The case concerns the applicant's complaint of a lack of an appropriate response of the domestic authorities to a homophobic act of violence by a private party against her.

THE FACTS

2. The applicant was born in 1982 and lives in Zagreb. She was represented by Ms A. Bandalo and Ms N. Labavić, lawyers practising in Zagreb.

3. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE PHYSICAL ATTACK AGAINST THE APPLICANT

5. On 13 January 2010 the applicant was physically attacked in a nightclub in Zagreb where she was with several of her friends. The attack ceased only after one of the applicant's friends, I.K., used her gas pistol to frighten off the attacker.

6. At about 6.00 a.m. a local police station of the Zagreb Police Department (*Policijska uprava zagrebačka*, hereinafter: the "police") was informed of the incident and two police officers immediately responded at the scene.

7. The relevant part of the police report on the findings at the scene of the incident reads:

> "When we came at the scene ... we found Pavla Sabalić ..., I.K. ..., I.D. ..., K.F. ..., E.N. ... and A.B. ... [personal details omitted].
>
> By interviewing them and observing the scene of the incident we established that the above-mentioned persons had come to [the nightclub] at around 4.00 a.m., where they stayed for about one and a half hours. While they were in the nightclub [the applicant] was approached by an unidentified man who started flirting with her but she was constantly refusing him. After the nightclub closed they were all standing in front of it and the man continued pressing [the applicant] to be with him. When she said that she was a 'lesbian' he grabbed her with both of his arms and pushed her against a wall. He then started hitting her all over her body and when she fell to the ground he continued kicking her. ..."

8. The police soon identified the man as M.M. through the licence plates of a car he had used for fleeing from the scene. He was immediately apprehended and interviewed.

9. According to a police report of 13 January 2010, M.M. confirmed having met the applicant but then he had learned that she was in the nightclub with her girlfriend. When the nightclub closed he had seen several girls having some dispute with his friend and as he tried to calm them all down he pushed them with his hands. M.M. did not provide any further details, alleging that he could not remember them as he had been drunk at the time of the incident. The police also established that at the time of the incident M.M. had been in the nightclub with his friends, J.V. and A.K.

10. On the same day, at around 7.00 a.m., the applicant was examined in the accident and emergency department. The examination indicated a contusion on the head, a haematoma on the forehead, abrasions of the face, forehead and area around the lips, neck strain, contusion on the chest and abrasions of both palms and knees. The injuries were qualified as minor bodily injuries.

II. MINOR OFFENCES PROCEEDINGS AGAINST M.M.

11. Following the incident the police interviewed the applicant and M.M. and the other participants in the event in connection with M.M.'s physical attack.

12. On 14 January 2010 the police instituted minor offences proceedings in the Minor Offences Court (*Prekršajni sud u Zagrebu*) against M.M. for breach of public peace and order. The relevant part of the indictment reads:

> "On 13 January 2010, at around 5.45 a.m., in Zagreb ..., on the street in front of [the nightclub], according to the statements of the victim Pavla Sabalić ... and the witnesses I.K. ..., E.N. ..., K.F. ..., A.B. ... and I.D. [personal details omitted], the accused physically attacked Pavla Sabalić by grabbing her with his both arms and throwing her against a wall.
>
> The accused then started hitting Pavla Sabalić with his fists all over her body and afterwards he knocked her to the ground and continued to kick her. His further actions were constrained by I.K. and then he left the scene by using the car ...
>
> The victim Pavla Sabalić sustained visible injuries on her head, which were qualified by a doctor [in the emergency] as minor bodily injuries.
>
> Thereby, a minor offence under section 13 §§ 1 and 2 of the Minor Offences against Public Order and Peace Act was committed."

13. At a hearing on 20 April 2010 before the Minor Offences Court, M.M. confessed to the charges against him. No further evidence was taken and the applicant was not informed of the proceedings.

14. On the same day the Minor Offences Court found M.M. guilty as charged of breach of public peace and order and fined him 300 Croatian kunas (approximately 40 Euros (EUR)).

15. No appeal was lodged against the judgment and it became final on 15 May 2010.

III. CRIMINAL INVESTIGATION INTO THE APPLICANT'S ILL-TREATMENT

16. After having realised that the police had failed to institute a criminal investigation, on 29 December 2010 the applicant lodged a criminal complaint with the Zagreb Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Zagrebu*; hereinafter "the State Attorney's Office") against M.M. for the offences of attempted grave bodily injury (Article 99 §§ 1 and 4 of the Criminal Code) and violent behaviour (Article 331 § 2 of the Criminal Code), motivated by the hate crime element (Article 89(36) of the Criminal Code), and the criminal offence of discrimination (Article 174 § 1 of the Criminal Code). The relevant part of the applicant's criminal complaint reads:

> "On 13 January 2010, after he was flirting with Pavla Sabalić and after she had refused him saying that she had a girlfriend, around 5.45 a.m., in Zagreb [in front of

> the nightclub] [M.M.] physically attacked Pavla Sabalić by grabbing her with both his hands and throwing her against a wall ... and then hit her with his fists all over her body and afterwards he knocked her to the ground and kicked her. At the same time he was shouting: 'You lesbian!', 'All of you should be killed!', 'I will f... you lesbian!' and so on. E.N. attempted to restrain his attack by saying: 'How can you beat a girl', after which M.M. attacked E.N. by head-butting her, and then I.K. shot him with her gas pistol which made him cease the attack ..."

17. On the basis of the applicant's criminal complaint, the State Attorney's Office ordered the police to investigate the applicant's allegations.

18. An unauthorised note of the applicant's police interview, dated 14 January 2011, indicates that the applicant confirmed her allegations as to the course of the events leading up to her attack, and stressed that she could no longer remember all the details but that she believed that the attack was motivated by her sexual orientation.

19. In the further course of the police inquiry, the police interviewed the applicant's friends I.K., I.D. and K.F., who confirmed the applicant's version of the events. The police also interviewed A.K. and V.J., friends of M.M., who only confirmed that there was some commotion but they did not know any particular details.

20. On 28 April 2011 the State Attorney's Office asked an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*; hereinafter "the County Court") to conduct a further investigation into the applicant's complaints in connection with a reasonable suspicion that M.M. had committed the offences of attempted grave bodily injury and violent behaviour, motivated by the hate crime element, and the criminal offence of discrimination against the applicant.

21. During the investigation, the investigating judge commissioned a medical expert report and the report qualified the applicant's injuries in the forensic sense as minor bodily injuries. The investigating judge further questioned the applicant, who reiterated her version of the events.

22. The investigating judge also questioned M.M., who denied any deliberate attack on the applicant although he no longer remembered all the details of his discussion with her. During the questioning, M.M.'s defence lawyer informed the investigating judge that M.M. had been convicted by the Minor Offences Court on 20 April 2010 (see paragraphs 14-15 above).

23. On the basis of the findings of the investigating judge, on 19 July 2011 the State Attorney's Office rejected the applicant's criminal complaint on the ground that M.M. had already been prosecuted in the minor offences proceedings and that his criminal prosecution would contravene the *ne bis in idem* principle. The relevant part of the decision reads:

> "During the investigation the victim Pavla Sabalić was questioned as a witness and she provided a detailed and comprehensive account of the events as described in her criminal complaint against M.M.
>
> ...

> The description of the offences in the criminal complaint against M.M. lodged by the victim Pavla Sabalić ... shows that these offences have been consumed by the judgment of the Zagreb Minor Offences Court ... of 20 April 2010. By that judgment M.M. was found guilty of the minor offence under section 13 of the Minor Offences against Public Order and Peace Act and the judgment became final. It follows that M.M. has already been found guilty for the event, which has been, as such, adjudicated by the judgment of the Zagreb Minor Offences Court and therefore there is a negative procedural condition, that is to say a procedural impediment, to further criminal proceedings, since the matter is so-called 'res judicata'.
>
> Comparing the description of the event, and in view of the incriminations contained in the victim's criminal complaint, with the judgment of the Zagreb Minor Offences Court, by which the defendant has been found guilty in the minor offences proceedings, it is obvious that it concerns the same event and the same acts of M.M. It follows that the facts constituting the minor offence for which the defendant has been found guilty are essentially the same as those which form the incrimination in the victim's criminal complaint. In these circumstances, the criminal proceedings would be conducted for the same offence, that is to say the same event, for which the defendant has already been finally convicted.
>
> In the concrete case the matter has been finally adjudicated, which follows from the interpretation of Article 31 § 2 of the Constitution, providing that 'nobody can be tried or convicted twice in criminal proceedings for the same criminal offence for which he or she has been finally acquitted or convicted in accordance with the law', as well as from the provisions of Article 4 of Protocol No. 7 [to the Convention] and Article 11 of the Code of Criminal Procedure which proclaim the *ne bis in idem* principle.
>
> It therefore follows that the matter has been finally adjudicated, which is a negative procedural condition, that is to say a procedural impediment, for further criminal proceedings and as such excludes further criminal prosecution."

24. The State Attorney's Office informed the applicant that she could take over the criminal prosecution as a subsidiary prosecutor by lodging an indictment in the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*; hereinafter "the Criminal Court").

25. On 26 October 2011 the applicant took over the prosecution as a subsidiary prosecutor in the Criminal Court against M.M. on charges of attempted grave bodily injury (Article 99 §§ 1 and 4 of the Criminal Code) and violent behaviour (Article 331 § 2 of the Criminal Code), motivated by the hate crime element (Article 89(36) of the Criminal Code), and the criminal offence of discrimination (Article 174 § 1 of the Criminal Code). She contended that the State Attorney's Office had misinterpreted the law on the *ne bis in idem* principle and that, in the concrete case, the matter had not been finally adjudicated. She also relied on the Court's case-law concerning the authorities' duty to investigate and effectively prosecute hate crime, arguing that the minor offences proceedings had fallen short of those requirements.

26. The Criminal Court rejected the applicant's indictment on 19 July 2012, endorsing the arguments of the State Attorney's Office.

27. The decision of the Criminal Court was upheld on appeal by the County Court on 9 October 2012.

28. On 5 December 2012 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), referring to the Court's case-law concerning the State's procedural obligation to investigate acts of violence and hate crime, and complaining of the ineffectiveness of the domestic authorities in addressing her complaints effectively. She also contended that the lower authorities had misinterpreted the relevant law on the application of the *ne bis in idem* principle and thus erred in their assessment that the matter has been *res judicata*.

29. On 31 January 2013 the Constitutional Court declared the applicant's constitutional complaint inadmissible on the ground that in the impugned decisions the lower courts had not addressed any of the applicant's rights or obligations.

30. The decision of the Constitutional Court was served on the applicant's representative on 22 February 2013.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

A. Constitution

31. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010 and 5/2014) read as follows:

Article 14(1)

"Everyone in the Republic of Croatia shall enjoy rights and freedoms regardless of their race, colour, sex, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics."

Article 23

"No one shall be subjected to any form of ill-treatment ..."

Article 31(2)

"Nobody can be tried or convicted twice in criminal proceedings for the same criminal offence for which he or she has been finally acquitted or convicted in accordance with the law"

Article 35

"Everyone has the right to respect for and legal protection of his or her private ... life ..."

B. Criminal Code

32. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, with further amendments; hereinafter "the 1997 Criminal Code"), applicable at the relevant time, provided:

Article 8

"(1) Criminal proceedings in respect of criminal offences shall be instituted by the State Attorney's Office in the interest of the Republic of Croatia and its citizens.

(2) In exceptional circumstances the law may provide for criminal proceedings in respect of certain criminal offences to be instituted on the basis of a private prosecution or for the State Attorney's Office to institute criminal proceedings following [a private] application."

Article 89(36)

"Hate crime is any criminal offence under this Code, committed as a result of hatred towards a person because of his or her ... sexual orientation ..."

Article 98

"Anyone who inflicts bodily injury on another or impairs another's health shall be fined or sentenced to imprisonment for a term not exceeding one year."

Article 102

"Criminal proceedings for the offence of inflicting bodily injury (Article 98) ... shall be instituted by means of a private prosecution."

Article 99

"(1) Anyone who inflicts grievous bodily harm on another or seriously impairs another's health shall be sentenced to imprisonment for a term of from six months to three years.

...

(4) An attempt to commit the offence under paragraph 1 of this Article shall also be punishable."

Article 174(1)

"Whoever on the basis of differences related to ... other status ... breaches basic human rights and freedoms recognised by the international community shall be sentenced to imprisonment for a term of from six months to five years."

Article 331(1)

"Whoever degrades another person by subjecting them to violent abuse, ill-treatment or particularly offensive behaviour in public shall be sentenced to imprisonment for a term of from three months to three years."

33. On 1 January 2013 a new Criminal Code (Official Gazette no. 125/2011, with further amendments; hereinafter "the 2013 Criminal Code") came into force. Under Article 87(21) it enumerates hatred based on sexual orientation as one of the types of hate crime and provides that the hate crime element of an offence shall be taken as an aggravating circumstance in the sentencing. In addition, violence motivated by hatred is prescribed as an aggravating factor to the offences involving violence (in particular, Article 117 – bodily injury; Article 118 – grave bodily injury; Article 119 – particularly grave bodily injury).

C. Code of Criminal Procedure

34. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette no. 110/1997, with further amendments), as applicable at the relevant time, provided the following:

Article 2

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

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

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

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

Article 11

"Nobody can be tried twice for an offence for which he or she has been tried and in respect of which a final court decision has been adopted."

Article 171(1)

"All state bodies and legal entities are obliged to report any criminal offence subject to official prosecution about which they have been informed or about which they have otherwise learned."

Article 173

"(1) Criminal complaints shall be submitted to the competent State Attorney in writing or orally.

...

(3) If a criminal complaint was submitted before a court, the police or a State Attorney who was not competent in the matter, they shall forward the criminal complaint to the competent State Attorney."

Article 174

"(1) The State Attorney shall reject a criminal complaint by a reasoned decision if the offence in question is not an offence subject to automatic prosecution, if the prosecution is time-barred or an amnesty or pardon has been granted, or other circumstances excluding criminal liability or prosecution exist, or there is no reasonable suspicion that the suspect has committed the offence. The State Attorney shall inform the victim about his decision ... within eight days (Article 55) and if the criminal complaint was submitted by the police, he shall also inform the police.

(2) If the State Attorney is not able to ascertain the reliability of the submissions from the criminal complaint, or if he does not have sufficient information to ask for a judicial investigation, or if he has been otherwise informed that an offence has been committed, and particularly if the perpetrator is unknown, the State Attorney shall, if he is not able to do it himself, ask the police to collect all relevant information and to take other measures concerning the offence (Articles 177 and 179).

..."

Article 201

"(1) The investigation shall be discontinued by a decision of a three-judge panel of the County Court (Article 20 § 2) whenever it decides about an issue:

...

3) if ... there are other circumstances excluding the possibility of criminal prosecution. ..."

Article 437

"(1) The judge [conducting criminal proceedings] shall reject the indictment ... if he or she finds that there is one of the reasons for the discontinuation of the proceedings under Article 201 § 1 (1)-(3) of this Code ..."

D. Minor Offences

35. The Minor Offences Act (*Prekršajni zakon*, Official Gazette no. 107/2007, with further amendments), as applicable at the relevant time, defined minor offences as acts which breach public order, social discipline or other social values and are not considered as criminal offences under the relevant domestic law (Section 1). The same Act regulated the procedure to be followed when trying cases concerning minor offences. In this respect, for matters not regulated by that Act, it envisaged that the Code of Criminal Procedure would accordingly apply (Section 82(3)). In particular, it provided that in the minor offences proceedings the competent prosecutor was the relevant administrative body and in some instances the victim could act as the prosecutor (Section 109). In any event, the victim had the right to participate in the proceedings (Section 116). According to Section

214(1)(4), there was a possibility to reopen the minor offences proceedings in favour of the convicted person if he or she was more times convicted of the same offence.

36. The relevant part of the Minor Offences against Public Order and Peace Act (*Zakon o prekršajima protiv javnog reda i mira*, Official Gazette no. 5/1990, with further amendments) provided that whoever in a public place fights, argues, yells or otherwise breaches public order and peace, would be liable to a fine or to a term of imprisonment not exceeding sixty days (Section 13).

E. Prevention of discrimination

37. The relevant provisions of the Prevention of Discrimination Act (*Zakon o suzbijanju diskriminacije*, Official Gazette no. 85/2008) and the relevant practice under that Act are set out in *Guberina v. Croatia*, no. 23682/13, §§ 27 and 29-31, ECHR 2016.

II. RELEVANT DOMESTIC PRACTICE AND OTHER MATERIALS

A. Relevant practice and materials concerning homophobic violence

38. In September 2008 the Government adopted the "National Programme for Combating Discrimination in the period between 2008 and 2013" (*Nacionalni plan za borbu protiv diskriminacije 2008.-2013.*), where it observed difficulties and inadequate capacities of the law enforcement personnel in recognising the indications of discrimination. It thus coordinated a training programme for police officers on the matter and stressed the need for more effective identification and prosecution of crime related to discrimination.

39. In March/April 2011 the Government adopted the "Hate Crime Protocol" (*Protokol o postupanju u slučaju zločina iz mržnje*) which developed measures of recording and processing hate crime cases. In particular, the prosecution service was required to monitor offences which could be considered as hate crime and the police were required to record the outcome at all stages of the procedure from initial investigation to final judgment.

40. In December 2011 two non-governmental organisations in Croatia, "Lesbian group Kontra" and "Iskorak – Centre for the rights of sexual and gender minorities", issued a publication on the conduct of the domestic authorities in cases of hate crimes against LGBT (lesbian, gay, bisexual, and/or transgender) persons in Croatia. The document identified violent offences as the most common form of crime and criticised the existing practice of the police to prosecute the perpetrator of the crime, but also

sometimes the victim, for the minor offence of breach of public peace and order instead of lodging a criminal complaint against the perpetrator.

41. Further, in December 2011 four non-governmental organisations ("Domino-Queer Zagreb", "Zagreb Pride", "Centre for Peace Studies" and "Lesbian organisation LORI"), with the support of the European Union and the Ministry of Economy, Labour and Entrepreneurship, published a "Manual for the Suppression of Discrimination and Violence against LGBT Persons". They observed that the 1997 Criminal Code as amended provided for the obligation of the criminal justice authorities to elucidate the circumstances of a homophobic hate crime and that in practice the domestic criminal courts generally considered a hate crime element as an aggravating circumstance. However, the provision of Article 89(36) of the 1997 Criminal Code essentially mandated rather for a declaratory than practical protection. This called for further clarifications as to the role of the hate crime element in definition of the offences and determination of penalty, which was done with the 2013 Criminal Code (see paragraph 33 above).

42. The Manual further observed the impact of the Court's judgment in the case of *Maresti v. Croatia* (no. 55759/07, 25 June 2009) on the practice of the domestic authorities concerning the prosecution of hate crime. It noted that the Court's judgment in question excluded the possibility of successive minor offences and criminal proceedings concerning the same facts. However, the practice of the police was to institute minor offences proceedings and to lodge a criminal complaint which, on the basis of the *Maresti* case-law, ordinarily resulted in the discontinuation of the subsequent criminal proceedings due to a previous minor offences conviction. This was particularly problematic in the case of hate crime since the minor offences proceedings could not address the hate crime element and the perpetrators would usually get away with very lenient sentences without ever being punished for hate crime. Although in 2010 the criminal justice authorities undertook measures to coordinate their actions to avoid such occurrences (see paragraphs 45-46 below), there was still a high level of divergence in practice and inadequate prosecutions of hate crime.

43. In November 2013 the non-governmental organisation "Zagreb Pride", in cooperation with the non-governmental organisations "Lesbian organisation LORI" and "Domino and Queer Sport Split", and with the support of the European Union and the Government, published a report on the status of human rights of LGBT persons in Croatia in the period between 2010 and 2013. The report observed that in a number of cases of hate crime against LGBT persons the police instituted minor offences proceedings instead of lodging criminal complaints. This had resulted in very lenient sentences for the perpetrators, which did not reassure a sense of protection to LGBT persons or provide the required deterrent effect. A number of educational activities for police officers had been organised and the report noted a certain progress in the police approach to the matter, in

particular in the Zagreb area, whereas in some other parts of Croatia the inadequate response of the police still remained a recurrent problem. Furthermore, the report stressed that the legislative framework was strengthened in particular by the 2013 Criminal Code and the adoption of the Hate Crime Protocol.

B. The Constitutional Court's case-law

44. The Constitutional Court's case-law concerning the victims' procedural complaints under Articles 2 and 3 of the Convention are outlined in *Kušić and Others v. Croatia* (dec.), no. 71667/17, §§ 41-56, 10 December 2019).

C. Other relevant domestic practice

45. In April 2010 the State Attorney's Office of the Republic of Croatia and the Police Directorate of the Ministry of the Interior issued instructions to the prosecuting authorities (the police and the State Attorneys) on the processing of cases involving minor and criminal offences in light of the *ne bis in idem* principle.

46. As regards the criminal offences concerning bodily injuries and minor offences against the public peace and order, the police were required to institute at the same time the minor offences proceedings and to lodge a criminal complaint with the relevant State Attorney's Office by clearly differentiating the factual scope of the respective charges. Where it was not possible to differentiate the factual scope of the charges, the police were required to consult the State Attorney's Office and to lodge only a criminal complaint.

III. INTERNATIONAL LAW AND PRACTICE

A. United Nations

47. The General Assembly Joint statement on human rights, sexual orientation and gender identity (A/63/635, 18 December 2008), in its relevant parts, provides as follows:

> "4 - We are deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity;
>
> 5 - We are also disturbed that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses;
>
> 6 - We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel,

inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health; ..."

48. In its Report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/HRC/19/41, 17 November 2011), the United Nations High Commissioner for Human Rights stressed the following:

"84. The High Commissioner recommends that Member States:

(a) Investigate promptly all reported killings and other serious incidents of violence perpetrated against individuals because of their actual or perceived sexual orientation or gender identity, whether carried out in public or in private by State or non-State actors, and hold perpetrators accountable, and establish systems for the recording and reporting of such incidents;

(b) Take measures to prevent torture and other forms of cruel, inhuman or degrading treatment on grounds of sexual orientation and gender identity, to investigate thoroughly all reported incidents of torture and ill-treatment, and to prosecute and hold accountable those responsible; ..."

49. In the follow up report (A/HRC/29/23, 4 May 2015) the Commissioner for Human Rights stressed as follows:

"78. The High Commissioner recommends that States address violence by:

(a) Enacting hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing;

(b) Conducting prompt, thorough investigations of incidents of hate-motivated violence against and torture of LGBT persons, holding perpetrators to account, and providing redress to victims;

...

(e) Training law enforcement personnel and judges in gender-sensitive approaches to addressing violations related to sexual orientation and gender identity; ..."

50. On 29 September 2015, 12 United Nations bodies (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO) issued a Joint statement calling for an end to violence and discrimination against the LGBTI people. In the relevant part concerning the protection of individuals from violence, the statement reads as follows:

"States should protect LGBTI persons from violence, torture and ill-treatment, including by:

• Investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, ...

• Strengthening efforts to prevent, monitor and report such violence;

• Incorporating homophobia and transphobia as aggravating factors in laws against hate crime and hate speech; ..."

B. Council of Europe

51. The relevant parts of the Appendix to Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010, provides as follows:

> "1. Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity.
>
> 2. Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. ..."

52. The Explanatory Memorandum of the Steering Committee for Human Rights (CDDH) on Recommendation CM/Rec(2010)5, in its relevant part, provides:

> "1 - 2. Hate crimes are crimes committed on grounds of the victim's actual or assumed membership of a certain group, most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc. For the purpose of this recommendation, the term "*hate-motivated incident"* is used to encompass any incident or act – whether defined by national legislation as criminal or not – against people or property that involves a target selected because of its real or perceived connection or membership of a group. The term is broad enough to cover a range of manifestations of intolerance from low-level incidents motivated by bias to criminal acts. "Hate crimes" and other "hate motivated incidents" are very upsetting for the victims and the community to which they belong, and it is all the more striking that, from the victim's point of view, what matters most is having suffered such a crime because of an immutable fundamental aspect of their identity. But they also threaten the very basis of democratic societies and the rule of law, in that they constitute an attack on the fundamental principle of equality in dignity and rights of all human beings, as inscribed in Article 1 of the Universal Declaration of Human Rights of the United Nations. Lesbian, gay, bisexual and transgender persons are the target of many such crimes or incidents. According to the OSCE/ODIHR report "*Hate Crimes in the OSCE Region: Incidents and Responses",* homophobic crimes or incidents are often characterised by a high degree of cruelty and brutality, often involving severe beatings, torture, mutilation, castration or even sexual assault, and may result in death. They may also take the form of damage to property, insults or verbal attacks, threats or intimidation.
>
> It is understood that the most appropriate measures and procedures to deal with a hate crime or a hate motivated incident will depend on the applicable national regulations and on the circumstances of the case, i.e. whether it concerns a violation of national criminal, civil or administrative law or other regulations (disciplinary procedures etc.). Terms such as "investigation" and "sanctions" should therefore be read, in this respect, in a broad sense, having regard to the circumstances of the case.

Legislative measures to combat these crimes are vital. By condemning discriminatory motives, they send out a signal to offenders that a just and humane society will not tolerate such behaviour. By recognising the harm done to the victims, they give these people and their community the assurance of being protected by the criminal justice system. In addition, the existence of such laws renders hate crimes or other hate-motivated incidents more visible and makes it easier to gather statistical data, which in turn is of importance for the designing of measures to prevent and counteract them.

In legislation, hate crimes will generally be punished by a more severe penalty, as the offence is committed with a discriminatory motive. A failure to take into account such biased motives for a crime may also amount to indirect discrimination under the ECHR. Member states should ensure that when determining sanctions a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. They should furthermore ensure that such motives are recorded when a court decides to hand down a more severe sentence. At least 14 Council of Europe member states have already included sexual orientation as an aggravating circumstance in the committing of an offence in their legislation."

53. The relevant parts of Parliamentary Assembly Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity of 29 April 2010 provide:

"3. ... [L]esbian, gay, bisexual and transgender (LGBT) people, as well as human rights defenders working for the rights of LGBT people, face deeply rooted prejudices, hostility and widespread discrimination all over Europe. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states since it results in an extensive range of human rights violations, affecting the lives of millions of people. Major concerns include physical and verbal violence (hate crimes and hate speech), ...

16. Consequently, the Assembly calls on member states to address these issues and in particular to:

...

16.2. provide legal remedies to victims and put an end to impunity for those who violate the fundamental rights of LGBT people, in particular their right to life and security; ..."

54. The Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations of 30 March 2011 in the relevant part provide the following:

"1. These guidelines address the problem of impunity in respect of serious human rights violations. Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account.

...

3. For the purposes of these guidelines, "serious human rights violations" concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court's case law, to enact criminal law provisions. Such obligations arise in the context of ... the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention) ... Not all violations of these articles will necessarily reach this threshold.

...

1. In order to avoid loopholes or legal gaps contributing to impunity:

- States should take all necessary measures to comply with their obligations under the Convention to adopt criminal law provisions to effectively punish serious human rights violations through adequate penalties. These provisions should be applied by the appropriate executive and judicial authorities in a coherent and non-discriminatory manner.

...

While respecting the independence of the courts, when serious human rights violations have been proven, the imposition of a suitable penalty should follow. The sentences which are handed out should be effective, proportionate and appropriate to the offence committed."

55. In its relevant part Parliamentary Assembly Resolution 1948 (2013) on tackling discrimination on the grounds of sexual orientation and gender identity of 27 June 2013 reads as follows:

"2. ... the Assembly regrets that prejudice, hostility and discrimination on the grounds of sexual orientation and gender identity remain a serious problem, affecting the lives of tens of millions of Europeans. They manifest themselves in hate speech, bullying and violence, often affecting young people. ..."

56. In the 2011 Report titled "Discrimination on grounds of sexual orientation and gender identity in Europe", the Commissioner for Human Rights observed that violence motivated by sexual orientation was a growing, but often not recognised and frequently ignored, problem in the Council of Europe member States. The Commissioner also observed that the majority of member States of the Council of Europe have no explicit legal basis which recognises sexual orientation and gender identity in hate crime legislation.

IV. EUROPEAN UNION LAW AND MATERIALS

57. The relevant provisions of the Charter of Fundamental Rights of the European Union (2000/C 364/01) read as follows:

Article 3(1)
Right to the integrity of the person

"Everyone has the right to respect for his or her physical and mental integrity."

Article 4
Prohibition of torture and inhuman or degrading treatment or punishment

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

Article 20
Equality before the law

"Everyone is equal before the law."

Article 21(1)
Non-discrimination

"Any discrimination based on any ground such as ... sexual orientation shall be prohibited."

58. In 2012 the European Union Agency for Fundamental Rights (hereinafter: the "FRA") published a report on the visibility of hate crime in the European Union entitled "Making hate crime visible in the European Union: acknowledging victims' rights", in which it concluded that making hate crime visible and acknowledging the rights of victims required action at three levels: legislation, policy and practice. In particular, the report pointed out that at the level of legislation, this concerned recognising hate crime, the bias motivations underlying it and its effect on victims in both national legislation and European law. At the policy level, this meant implementing policies that would lead to collecting reliable data on hate crime that would record, at a minimum, the number of incidents of hate crime reported by the public and recorded by the authorities; the number of convictions of offenders; the grounds on which these offences were found to be discriminatory; and the punishments served to offenders. At the practical level, this included putting mechanisms in place to encourage victims and witnesses to report incidents of hate crime as well as mechanisms that would show that authorities were taking hate crime seriously.

59. In the period between April and July 2012 the FRA conducted a survey in the European Union (including Croatia which was not a Member State at the time) on discrimination and victimisation of LGBT persons (see European Union lesbian, gay, bisexual and transgender survey: Main results, Luxembourg, Publications Office of the European Union 2014). The survey indicated, *inter alia*, that 89% of respondents from Croatia avoided holding hands in public with a same-sex partner for fear of being assaulted, threatened or harassed because of being LGBT; and 62% of them for the same reason avoided certain locations. The proportion of the respondents who felt discriminated against or harassed on the grounds of sexual orientation in the preceding year was 60%.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 8 AND 14 OF THE CONVENTION

60. The applicant complained of a lack of an appropriate response of the domestic authorities to the act of violence against her, motivated by her

sexual orientation. She relied on Articles 3, 8 and 14 of the Convention, which, in so far as relevant, read as follows:

Article 3

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

Article 8

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

Article 14

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

A. Admissibility

1. Applicability of Article 3 of the Convention

(a) The parties' arguments

61. The Government contended that the physical attack against the applicant did not reach the minimum level of severity attracting the applicability of Article 3 of the Convention. In particular, the Government submitted that the applicant had been attacked after a verbal altercation between her and M.M. in circumstances in which both of them had been under the influence of alcohol. The injuries she had sustained were qualified as minor bodily injuries by the competent medical experts. The Government also argued that several times before the domestic authorities the applicant had stated that she could not remember all the details of the attack and she had only thought that her sexual orientation had been the motive for the attack.

62. The applicant submitted that there was no doubt that M.M.'s physical attack against her had been motivated by her sexual orientation. It followed from the fact that M.M. had shouted discriminatory remarks while beating her up, which several witnesses had heard. The applicant stressed that she had clearly raised that issue before the competent domestic authorities and explained in detail the circumstances of the attack. The applicant also pointed out that she had been severely beaten up by M.M., who had hit and kicked her all over her head and body while she was lying on the ground. In the applicant's view, the qualification of the injuries at the domestic level was not relevant since the overall circumstances of the attack had made her feel humiliated and debased, which she could never forget.

(b) The Court's assessment

63. In general, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *M.C. and A.C. v. Romania*, no. 12060/12, § 107, 12 April 2016). Further factors include the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it. Regard must also be had to the context in which the ill-treatment was inflicted (see *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015, and cases cited therein).

64. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (see, in the context of private violence, *M.C. and A.C.*, cited above, § 108; see also in general *Bouyid*, cited above, § 87).

65. A discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3, where it attains a level of severity such as to constitute an affront to human dignity (see *Cyprus v. Turkey* [GC], no. 25781/94, §§ 305-311, ECHR 2001-IV; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 121, ECHR 1999-VI; *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, §§ 111 and 113, ECHR 2005-VII (extracts); and *Begheluri v. Georgia*, no. 28490/02, § 101, 7 October 2014). Discriminatory remarks and racist insults must in any event be considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3 (see *B.S. v. Spain*, no. 47159/08, § 40, 24 July 2012; *Abdu v. Bulgaria*, no. 26827/08, § 23, 11 March 2014; and *Identoba and Others v. Georgia*, no. 73235/12, § 65, 12 May 2015).

66. This is particularly true for violent hate crime. In this connection it should be remembered that not only acts based solely on a victim's characteristics can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to (see *Balázs v. Hungary*, no. 15529/12, §§ 56-57 and 70, 20 October 2015).

67. The Court notes in the case at issue that according to the version of the events established by the police following their intervention at the scene

on 13 January 2010, the applicant had been attacked by M.M. at the street in front of a nightclub after she had disclosed to him her sexual orientation. The police established that M.M. had first grabbed the applicant with both his hands and pushed her against a wall and then started hitting her all over her body and, when she fell to the ground, he continued kicking her (see paragraph 7 above). The attack only ceased after one of the applicant's friends had used her gas pistol to frighten off the attacker (see paragraphs 5, 12 and 16 above).

68. As a result of the attack the applicant sustained multiple physical injuries, including contusion on the head, a haematoma on the forehead, abrasions of the face, forehead and area around the lips, neck strain, contusion on the chest and abrasions of both palms and knees (see paragraph 10 above). These particular circumstances of the attack were later confirmed in the minor offences proceedings (see paragraphs 12 and 14 above) and they formed the essence of the applicant's criminal complaint and the ensuing criminal investigation (see paragraphs 16 and 20 above).

69. Furthermore, the Court notes that there is sufficient evidence before it to conclude that the attack against the applicant was influenced by her sexual orientation. This follows from the above-noted findings of the police, the applicant's detailed account of the events in her criminal complaint lodged with the State Attorney's Office (see paragraph 16 above), the applicant's and her friends' police interviews (see paragraphs 18-19 above), and the findings of the criminal investigation conducted by an investigating judge of the County Court (see paragraph 23 above).

70. In light of the foregoing, the Court concludes that the treatment, convincingly described by the applicant, to which she was subjected and which was directed at her identity and undermined her integrity and dignity, must necessarily have aroused in her feelings of fear, anguish and insecurity reaching the requisite threshold of severity to fall under Article 3 of the Convention (compare *Identoba and Others*, cited above, § 71; *M.C. and A.C.*, cited above, § 119; and *Balázs*, cited above, § 57; compare also, as regards the injuries themselves, *Beganović v. Croatia*, no. 46423/06, § 66, 25 June 2009; *Milanović v. Serbia*, no. 44614/07, § 87, 14 December 2010; and *Mityaginy v. Russia*, no. 20325/06, § 49, 4 December 2012).

71. The Court therefore rejects the Government's objection and finds Article 3 of the Convention applicable to the applicant's complaints.

2. Exhaustion of domestic remedies

(a) The parties' arguments

72. The Government argued that the applicant had failed to lodge a civil action for damages concerning her discrimination complaint, as provided under the Prevention of Discrimination Act. In particular, had she considered that any of the domestic authorities had discriminated against

her, she could have sought a ruling establishing such discrimination, ordering the taking of measures aimed at removing discrimination or its consequences, compensation for damages, and publication of the court findings. Whereas the Government accepted that a discrimination complaint could have been used alternatively – namely as a separate action under the Prevention of Discrimination Act or as a legal issue in the proceedings concerning the main matter – they considered that the applicant had never raised the alleged discrimination as a preliminary issue in the proceedings she had been pursuing. Lastly, the Government submitted that the applicant could have lodged disciplinary actions against the police officers who had been in charge of her case if she considered that they had not properly investigated her complaints.

73. The applicant submitted that, in view of the two alternative avenues under the Prevention of Discrimination Act, she had sought protection from discrimination through the criminal proceedings instituted against M.M. Moreover, she considered that a separate civil action for damages could have no bearing on her complaints concerning the failures in the domestic authorities' procedural response to the physical attack against her motivated by her sexual orientation. The applicant also submitted that disciplinary action against the police officers could not have had any bearing on their duty to effectively investigate the physical attack against her.

(b) The Court's assessment

74. The Court notes that at the heart of the applicant's complaint is the question of a lack of an appropriate procedural response of the domestic authorities and the alleged impunity for the acts of private violence against her motivated by her sexual orientation. The Court has already held that the possibility of lodging a civil action for damages would not fulfil the State's procedural obligation under Article 3 in case of discriminatory violence. The same is true for a civil action for protection from discrimination, particularly given that the applicant had already raised her discrimination complaint in the criminal complaint she lodged with the relevant State Attorney's Office (see *Škorjanec v. Croatia*, no. 25536/14, § 47, 28 March 2017, with further references; see also paragraphs 16 and 20 above).

75. As regards the Government's argument that the applicant could have lodged disciplinary actions against the police officers in charge of her case, the Court has already considered this not to be a relevant remedy for complaints relating to the domestic authorities' procedural obligation under the Convention concerning acts of private violence (see, for example, *Remetin v. Croatia*, no. 29525/10, § 74, 11 December 2012).

76. Against the above background, the Court rejects the Government's objection of non-exhaustion of domestic remedies.

3. Compliance with the six-month time-limit

(a) The parties' arguments

77. The Government argued that there was no reason for the applicant to lodge a constitutional complaint with the Constitutional Court since it had been a well-established practice of that court to declare constitutional complaints lodged by subsidiary prosecutors inadmissible. In the Government's view, the applicant should have lodged an application with the Court directly against the decision of the Zagreb County Court of 9 October 2012 (see paragraph 27 above). The Government therefore considered, citing the case of *Modrić v. Croatia* ((dec.), no. 21609/06, 4 June 2009), that by lodging a constitutional complaint with the Constitutional Court and awaiting for that court to decide, the applicant had failed to observe the six-month time-limit for lodging her application with the Court.

78. The applicant stressed that it had been necessary for her to lodge a constitutional complaint with the Constitutional Court so as to allow it to rectify the procedural omissions of the lower domestic authorities in processing her case. She therefore considered that she had complied with the six-month time-limit for lodging an application with the Court.

(b) The Court's assessment

79. The Court has already in many cases against Croatia concerning the State's procedural obligations examined and rejected the same objection of the respondent Government concerning the applicants' use of the constitutional complaint before the Constitutional Court (see *Bajić v. Croatia*, no. 41108/10, §§ 68-69, 13 November 2012; *Remetin*, cited above, §§ 83-84; and *Kušić and Others*, cited above, §§ 86-87; see also *Pavlović and Others v. Croatia*, no. 13274/11, §§ 32-38, 2 April 2015). It sees no reason to hold otherwise in the present case.

80. As to the Government's reliance on the *Modrić* case, the Court notes that the applicant in that case improperly used the relevant appeals under the Code of Criminal Procedure. The Court thus found that a constitutional complaint lodged only in respect of the decisions declaring the applicant's appeals inadmissible was not a remedy to be exhausted, and that by lodging such constitutional complaint, the applicant had failed to comply with the six-month time-limit. Nothing of these findings in the *Modrić* case holds true for the case at issue in which the applicant properly used the remedies provided under the Code of Criminal Procedure and then lodged a constitutional complaint with the Constitutional Court (see paragraphs 27-28 above).

81. In these circumstances, the Court rejects the Government's objection.

4. Conclusion

82. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

83. The applicant submitted that the response of the domestic authorities to the violent homophobic attack against her had not been adequate. The applicant pointed out that it had clearly followed from the evidence available before the police that the physical attack against her was a hate crime. However, the police had failed to investigate the motive of the attack and had instead instituted minor offences proceedings for breach of public peace and order. The minor offences proceedings had not addressed the discriminatory motive of the attack and had impeded the possibility of pursuing criminal prosecution against the attacker for hate crime and violence related to the discriminatory motive. Specifically, the competent State Attorney's Office and the competent criminal courts had considered that, due to the minor offences conviction of the attacker, his criminal prosecution had become barred as being *res judicata*.

84. The applicant further stressed that she had not been informed that the minor offences proceedings had been instituted and thus she had been unable to take any action to protect her rights during those proceedings. In the applicant's view, the response of the domestic authorities to the violent attack against her had amounted to impunity since the perpetrator of the attack had been leniently punished in the minor offences proceedings and the application of the criminal-law mechanism had been frustrated by his minor offences conviction, preventing his criminal prosecution on the grounds of the *ne bis in idem* principle. However, the applicant considered that the domestic authorities had misinterpreted the scope of the *ne bis in idem* principle – and had erroneously applied it as a bar to her attacker's prosecution. In particular, she contended that the minor offences proceedings had not addressed the hate crime element to the attack and therefore could not be considered "criminal proceedings" within the meaning of the *ne bis in idem* principle. In any case, the applicant stressed that the minor offences conviction of the attacker undermined the domestic authorities' respect for her rights and had not created the intended effect of restraining and deterring the offender from causing further harm.

(b) The Government

85. The Government submitted that Croatia had taken all necessary measures to implement the mechanisms of protection of LGBT persons in its domestic legal system. In the case at issue, the domestic authorities had conducted a prompt and effective investigation into the applicant's allegations of ill-treatment during which they had identified and prosecuted the attacker. The Government pointed out that following the attack against the applicant the police had immediately responded at the scene and the applicant had been promptly provided with medical assistance. However, the injuries she had sustained had been qualified as minor bodily injuries and therefore the police had instituted minor offences proceedings against her attacker for the breach of public peace and order. In the Government's view there had been no reason for the police to lodge a criminal complaint against him since minor bodily injuries were not prosecuted *ex officio*. The Government also considered that the applicant's attacker had been duly sanctioned in the minor offences proceedings, particularly given that there had been no clear indications of hate crime.

86. Furthermore, the Government contended that the State Attorney's Office had adopted a reasoned decision rejecting the applicant's criminal complaint and this decision had later been upheld by the relevant courts. In the Government's view, these decisions were in compliance with the Court's case-law concerning the *ne bis in idem* principle set out in *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009) and *Maresti* (cited above), while the case-law in *A and B v. Norway* ([GC], nos. 24130/11 and 29758/11, 15 November 2016) was still not applicable at the relevant time. In these circumstances, the Government considered that the fact that an otherwise effective criminal investigation had not resulted in further prosecution due to the *ne bis in idem* principle could not be considered contrary to the procedural obligation under Article 3 of the Convention.

(c) The third-party intervention

(i) The Zagreb Pride

87. The Zagreb Pride stressed that there was institutionalised and social violence against LGBT persons in Croatia which was principally a result of the authorities' neglectful approach towards combating homophobia and transphobia. Consequently, LGBT persons were pushed to the margins of social life and faced with growing concerns over the rising number of violent attacks against them. The Zagreb Pride submitted that more than two thirds of LGBT people in Croatia had experienced some form of violence and one third of them had fallen victim to hate crime committed in public places. The prosecutions for such offences were scarce and penalties were ordinarily symbolic. One of the problems identified by the Zagreb Pride was that in a number of cases the authorities had qualified the attack on LGBT

persons as a disturbance of public peace and order rather than a hate crime. Moreover, the minor offences proceedings were ordinarily ineffective and inadequate in responding to such occurrences.

(ii) The joint intervention by the ILGA-Europe, the AIRE Centre and the ICJ

88. The interveners submitted that an effective implementation of legislation targeting hate crimes operated in two ways. The first and most effective method was the creation of qualifications/enhanced penalties for all or specified crimes committed on the basis of a relevant bias. The alternative method was the approach of making a racist/xenophobic motivation an aggravating factor. The interveners further argued that sexual orientation or gender identity or expression should be treated in the same way as categories such as race, ethnicity and religion that are commonly covered by hate crime laws, because sexual orientation or gender identity or expression is a characteristic that is fundamental to a person's sense of self and is used as a marker of group identity.

89. The interveners considered that the Court should emphasise the extent of member States' obligations to put in place effective, robust procedures to deter, detect, investigate, prosecute and punish hate crimes perpetrated wholly or partly because of the victim's real or imputed sexual orientation and/or gender identity. In the interveners' view, in cases involving crimes motivated by sexual orientation and/or gender identity, an effective prosecution mandated a criminal charge and a criminal prosecution. Moreover, the penalty imposed should be commensurate with the gravity of the offence.

2. The Court's assessment

(a) Scope of the case

90. The Court finds that the domestic authorities' obligations related to the incident at issue may arise under all Articles of the Convention relied upon by the applicant. However, in view of the injuries which the applicant sustained and the hate motivated violence against her (see paragraph 70 above), the Court considers that the applicant's complaint should be examined under Article 3 (compare *Abdu v. Bulgaria*, no. 26827/08, § 39, 11 March 2014, and *Škorjanec*, cited above, § 36).

91. Further, the authorities' duty to investigate the existence of a possible link between a discriminatory motive and an act of violence can fall under the procedural aspect of Article 3 of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 to secure the fundamental values enshrined in Article 3 without discrimination. Owing to the interplay of Articles 3 and 14 of the Convention in the context of violence motivated by discrimination, issues

such as those raised by the present case may fall to be examined under Article 3 alone, with no separate issue arising under Article 14, or may require examination of Article 3 in conjunction with Article 14. This is a question to be decided in each case depending on the facts and the nature of the allegations made (see, for example, *B.S. v. Spain*, no. 47159/08, § 59, 24 July 2012, and *Škorjanec*, cited above, § 37).

92. In the present case, in view of the applicant's allegations that the violence against her had homophobic overtones which were not properly addressed by the authorities, the Court finds that the most appropriate way to proceed would be to subject the applicant's complaints to a simultaneous examination under Article 3 taken in conjunction with Article 14 (compare *Abdu*, cited above, § 46; *Identoba and Others*, cited above, § 64; and *Škorjanec*, cited above, § 38).

(b) General principles

93. The established principles of the Court's case-law on Articles 3 and 14 of the Convention concerning the State's procedural obligation when confronted with cases of violent incidents triggered by suspected discriminatory attitudes, including those relating to the victim's actual or perceived sexual orientation or other protected characteristics, are set out in *Identoba and Others*, cited above, §§ 66-67; *M.C. and A.C.*, cited above, §§ 108-115; and *Škorjanec*, cited above, §§ 52-57.

94. In particular, when investigating violent incidents, such as ill−treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives, which the Court concedes is a difficult task. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use best endeavours, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, violence motivated by gender-based discrimination or sexual orientation. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see *Identoba and Others*, cited above, § 67, and *M.C. and A.C.*, cited above, § 113, with further references).

95. Accordingly, where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the

need to reassert continuously society's condemnation of such acts and to maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory motivated violence. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce criminal law against the perpetrators of such violent acts (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII; *Koky and Others v. Slovakia*, no. 13624/03, § 239, 12 June 2012; and *Amadayev v. Russia*, no. 18114/06, § 81, 3 July 2014). Without a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes (see *Identoba and Others*, cited above, § 77, with further references).

96. The Court has also recently in the case of *S.M. v. Croatia* ([GC], no. 60561/14, §§ 311-320, 25 June 2020) summarised its case-law on the procedural obligation under the converging principles of Articles 2, 3 and 4 of the Convention. It noted, in particular, that whereas the general scope of the State's positive obligations might differ between cases where the treatment contrary to the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the procedural requirements are similar. These procedural requirements primarily concern the authorities' duty to institute and conduct an investigation capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible.

97. Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 3 of the Convention (see *M.C. and A.C.*, cited above, § 112). While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishments. The important point for the Court to review, therefore, is whether and to what extent the courts, in reaching their conclusion, might be deemed to have submitted the case to the careful scrutiny, so that the deterrent effect of the judicial system in place and the significance of the role it was required to play in preventing violations of the prohibition of ill-treatment are not undermined (see *Beganović*, cited above, § 77, citing *Ali and Ayşe Duran v. Turkey*, no. 42942/02, §§ 61-62, 8 April 2008; see also *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 285, 30 March 2016).

98. In so far as relevant for the present case, the Court has so far found violations of the States procedural obligation in the following circumstances:

(i) In case of a failure of the domestic authorities to take all reasonable steps to effectively ascertain whether or not a discriminatory attitude might have played a role in the events (see, for instance, *Šečić v. Croatia*, no. 40116/02, §§ 68-69, 31 May 2007; *Cobzaru v. Romania*, no. 48254/99, § 96, 26 July 2007; *Milanović*, cited above, § 100; *Koky and Others v. Slovakia*, no. 13624/03, § 239, 12 June 2012; *B.S. v. Spain*, cited above, § 61; *Makhashevy v. Russia*, no. 20546/07, § 146, 31 July 2012; *Virabyan v. Armenia*, no. 40094/05, § 224, 2 October 2012; *Abdu*, cited above, § 35; *Begheluri*, cited above, § 177; *Identoba and Others*, cited above, § 80; *M.C. and A.C.*, cited above, § 125; and *Lakatošová and Lakatoš v. Slovakia*, no. 655/16, § 96, 11 December 2018);

(ii) Where the criminal proceedings are discontinued on formal grounds, without having the facts of the case established by a competent criminal court, owing to the flaws in the actions of the relevant State authorities (see, for instance, *Turan Cakir v. Belgium*, no. 44256/06, § 80, 10 March 2009; *Beganović*, cited above, § 85; *Muta v. Ukraine,* no. 37246/06, § 63, 31 July 2012; *M.N. v. Bulgaria*, no. 3832/06, § 46, 27 November 2012; *Remetin*, cited above, § 99; *Valiulienė*, cited above, § 85; *Dimitar Shopov v. Bulgaria*, no. 17253/07, § 52, 16 April 2013; *Aleksandr Nikonenko v. Ukraine,* no. 54755/08, § 45, 14 November 2013; *Ceachir v. the Republic of Moldova*, no. 50115/06, § 54, 10 December 2013; and *İbrahim Demirtaş v. Turkey*, no. 25018/10, §§ 34-35, 28 October 2014);

(iii) In cases of manifest disproportion between the gravity of the act and the results obtained at domestic level, fostering sense that acts of ill-treatment remained ignored by the relevant authorities and that there was a lack of effective protection against acts of ill-treatment (see *Beganović*, cited above, §§ 78-79; and *Identoba and Others*, cited above, § 75; see further, for instance, *Atalay v. Turkey*, no. 1249/03, § 44, 18 September 2008; *Kopylov v. Russia*, no. 3933/04, § 141, 29 July 2010; *Darraj v. France*, no. 34588/07, §§ 48-49, 4 November 2010; *Derman v. Turkey*, no. 21789/02, § 28, 31 May 2011; *Zontul v. Greece*, no. 12294/07, §§ 106-109, 17 January 2012; and *Myumyun v. Bulgaria*, no. 67258/13, § 75, 3 November 2015).

99. With respect to the *ne bis in idem* principle, Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters expressly permitting Contracting States to reopen a case where, *inter alia*, a fundamental defect is detected in the proceedings. Under the heading of "fundamental defect" the proceedings may be reopened to the detriment of the accused where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law if there is a serious violation of a procedural rule severely undermining the integrity of the proceedings. The grounds justifying the reopening of proceedings must be such as to affect the outcome of the case (see *Mihalache v. Romania* [GC], no. 54012/10, §§ 129 and 133, 8 July

2019; compare *Taşdemir v. Turkey* (dec.), no. 52538/09, 12 March 2019, where there may be *de jure* obstacles to reopening the investigation).

100. Thus, for instance, the proceedings may be reopened on the grounds that the lower-level court had not followed the relevant instructions given by the higher court as regards the investigative measures to be carried out. However, a mere reassessment of the facts in the light of the applicable law does not constitute a "fundamental defect" in the previous proceedings (Ibid, §§ 133 and 137). Furthermore, for grave breaches of fundamental human rights, an issue under the *ne bis in idem* principle, which purportedly results out of the erroneous termination of the proceedings, cannot even arise (see *Marguš v. Croatia* [GC], no. 4455/10, §§ 124-141, ECHR 2014 (extracts)).

101. In this connection the Court reiterates that it must be possible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level. Otherwise the concept of subsidiarity would lose much of its usefulness. Thus, in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the unwarranted set of proceedings and effacing its effects, the Court may regard the situation as being remedied (see *Sergey Zolotukhin*, cited above, §§ 114-115).

(c) Application of these principles to the present case

102. At the outset, the Court notes that at the relevant time the domestic legal system provided for the criminal law mechanisms protecting individuals from hate motivated violence (compare *Abdu*, cited above, § 47). The 1997 Criminal Code expressly provided for the definition of hate crime, including crime motivated by the victim's sexual orientation (Article 89 (36) of the 1997 Criminal Code, see paragraph 32 above). Although it appears that there was a lack of clarity with regard to the nature of the requirement under that provision, the material available to the Court suggests that it provided for an obligation of the criminal justice authorities to elucidate the circumstances of a homophobic hate crime. Moreover, the domestic courts generally considered a hate crime element as an aggravating factor for the offences involving violence (see paragraph 41 above).

103. However, the Court need not examine the domestic legal framework further since the applicant did not complain specifically in that respect. Her complaint is rather of a procedural nature relating to a lack of an appropriate response of the domestic authorities to the violent hate crime against her. The Court will thus limit its assessment to this procedural aspect of the State's obligations under the Convention concerning hate crime (compare *S.M. v. Croatia*, cited above, § 333).

104. The Court observes that following the physical attack against the applicant in the nightclub on 13 January 2010 the police immediately

responded at the scene. Their initial findings showed that the applicant had sustained multiple physical injuries as a result of a violent attack by a man whose outburst of anger against the applicant had taken place after she had disclosed her sexual orientation to him (see paragraphs 7 above). These initial findings of the police were never put into doubt during the proceedings at the domestic level. Indeed, after the submission of the applicant's criminal complaint providing details of the violent attack against her allegedly motivated by her sexual orientation, the State Attorney's Office noted that in her statement to the investigating judge she had provided a detailed and comprehensive account of the events (see paragraphs 16 and 23 above), which was also confirmed by several witnesses interviewed by the police (see paragraph 19 above).

105. In these circumstances, the Court finds that already at the initial stages of the proceedings, immediately after the physical attack against the applicant had taken place, the domestic authorities were confronted with prima facie indications of violence motivated or at least influenced by the applicant's sexual orientation (compare *Šečić*, cited above, § 69; *Milanović*, cited above, § 99; *Abdu*, cited above, § 35; and *Begheluri*, cited above, § 176). According to the Court's case-law, this mandated for an effective application of domestic criminal-law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible (see paragraphs 94-95 above; see also *S.M. v. Croatia*, cited above, § 324).

106. In this connection, the Court notes that according to the domestic procedures, the police were required to lodge a criminal complaint with the State Attorney's Office, which was competent to conduct further official investigations into the indications of violent hate crime against the applicant even in cases of only minor bodily injuries (see paragraphs 32 and 46 above). The Court further notes that the relevant Criminal Code prescribed that attempted grave bodily injury and violent behaviour as well as acts of discriminatory breach of human rights required an *ex officio* investigation and prosecution even without a hate crime element (see paragraph 32 above). Although it is not for the Court to classify the circumstances of the attack against the applicant under the relevant provisions of domestic criminal law, it observes that on the basis of these provisions the State Attorney's Office instituted an official investigation before an investigating judge of the County Court (see paragraphs 16 and 20 above). There is therefore no doubt that even in terms of the domestic law the police were under a duty to report the matter to the State Attorney's Office, which, however, they failed to do.

107. Instead of lodging a criminal complaint before the State Attorney's Office concerning the hate motivated violent attack against the applicant or conducting any further actions to elucidate the possible hate crime element

of the events, as required by the relevant instructions (see paragraph 46 above), the police instituted minor offences proceedings in the Minor Offences Court indicting M.M. on charges of breach of public peace and order. These proceedings ended with M.M.'s conviction for the minor offence and his punishment by a fine of approximately EUR 40 without addressing or taking into account the hate motive at all. As there was no appeal by M.M. or the police, and since the applicant was not informed of the proceedings, M.M.'s minor offences conviction became final (see paragraphs 13-15 above).

108. Although it goes without saying that it is not for the Court to address such issues of domestic law concerning individual responsibility, that being a matter for assessment by the national courts, or to deliver guilty or not guilty verdicts in that regard, the Court observes that the minor offences proceedings did not in any manner address the hate crime element to the physical attack against the applicant nor was M.M. indicted or convicted of any charges related to violence motivated by discrimination (see *Angelova and Iliev v. Bulgaria*, no. 55523/00, § 116, 26 July 2007; *B.S. v. Spain*, cited above, § 61; and *Virabyan*, cited above, § 224; compare also *Öneryıldız v. Turkey* [GC], no. 48939/99, § 116, ECHR 2004-XII).

109. Moreover, the Court notes that in the minor offences proceedings M.M. was sentenced to a derisory fine of approximately EUR 40. While the Court acknowledges the role of the national courts to determine the appropriate sentence for an offender, its task is to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged, which means that it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed (see *Gäfgen v. Germany* [GC], no. 22978/05, § 123, ECHR 2010; see also, for instance, *Zontul*, cited above, §§ 106-109, and further references in paragraph 98(iii) above).

110. The Court cannot therefore overlook the fact that M.M.'s sentence in the minor offences proceedings was manifestly disproportionate to the gravity of the ill-treatment suffered by the applicant (compare *Identoba and Others*, cited above, § 75). Indeed, this conclusion is confirmed by comparing the prescribed sanctions for the offences as subsequently classified by the State Attorney's Office – which were publishable by imprisonment (see paragraphs 16, 20 and 32 above) – and the nature of the sanction actually imposed on M.M. in the minor offences proceedings. That said, the Court would reiterate that it is concerned with the respondent State's responsibility under the Convention and that this finding does not call into question M.M.'s individual criminal responsibility under the domestic criminal law, that being a matter for assessment by the national courts (see *Beganović*, cited above, § 78).

111. In overall, the Court finds that such a response of the domestic authorities through the minor offences proceedings was not capable of

demonstrating the State's Convention commitment to ensuring that homophobic ill-treatment does not remain ignored by the relevant authorities and to providing effective protection against acts of ill-treatment motivated by the applicant's sexual orientation. The sole recourse to the minor offences proceedings against M.M. could be considered rather as a response that fosters a sense of impunity for the acts of violent hate crime, than as a procedural mechanism showing that such acts could in no way be tolerated (compare *Milanović*, cited above, § 100; and also *Kopylov*, cited above, § 141; *Darraj*, cited above, §§ 48-49; *Zontul*, cited above, §§ 106-109; and *Pulfer v. Albania*, no. 31959/13, § 88 *in fine*, 20 November 2018).

112. However, as explained in the Government's submissions, the State Attorney's Office and the criminal courts found, on the basis of their interpretation of the *Sergey Zolotukhin* and *Maresti* case-law (both cited above) that M.M.'s final conviction in the minor offences proceedings for a breach of public peace and order created a formal impediment to his criminal prosecution for the violent hate crime on the grounds of the *ne bis in idem* principle (see paragraphs 23 and 26-27 above). The Government accordingly suggested in their submissions, that given that it was necessary to secure compliance with the *ne bis in idem* principle, the domestic authorities had a justified reason for not implementing the effective criminal-law mechanisms (that is to say, criminal law *stricto sensu*) in the present case (see paragraph 86 above).

113. In this connection the Court emphasises that, as demonstrated above, the domestic authorities themselves brought about the situation in which they, by unnecessarily instituting the ineffective minor offences proceedings, undermined the possibility to put properly into practice the relevant provisions and requirements of the domestic criminal law (compare *Turan Cakir*, cited above, § 80; *Dimitar Shopov*, cited above, § 52; and *M.C. and A.C.*, cited above, § 123)

114. In the Court's view, both failure to investigate hate motives behind a violent attack and failure to take into consideration such motives in determining the punishment for violent hate crimes, amounted to "fundamental defects" in the proceedings under Article 4 § 2 of Protocol No. 7. In the present case the domestic authorities failed to remedy the impugned situation, although it could not be said that there were *de jure* obstacles to do so (see paragraph 99 above). In particular, they failed to offer the defendant the appropriate redress, for instance, by terminating or annulling the unwarranted set of proceedings and effacing its effects, and to re-examine the case. The domestic authorities therefore failed to fulfil their duty to combat impunity of hate crimes in compliance with the Convention standards (see *Sergey Zolotukhin*, cited above, §§ 114-115; see paragraphs 99-101 above).

115. In sum, in view of the above considerations, the Court finds that by instituting the ineffective minor offences proceedings and as a result

erroneously discontinuing the criminal proceedings on formal grounds the domestic authorities failed to discharge adequately and effectively their procedural obligation under the Convention concerning the violent attack against the applicant motivated by her sexual orientation. Such conduct of the authorities is contrary to their duty to combat impunity for hate crimes which are particularly destructive of fundamental human rights (see paragraph 95 above).

116. There has therefore been a violation of Article 3 under its procedural aspect in conjunction with Article 14 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

117. The applicant complained about the lack of an effective domestic remedy. She relied on Article 13 of the Convention, which provides:

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

118. Having regard to the grounds on which it has found a violation of Article 3 under its procedural aspect in conjunction with Article 14 of the Convention (see paragraph 115 above), the Court considers that, while this complaint is admissible, no separate issue arises under Article 13 of the Convention (see *Šečić*, cited above, § 61; see also *Kušić and Others*, cited above, § 108).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. 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

120. The applicant claimed EUR 10,000 in respect of non-pecuniary damage.

121. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

122. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant the sum claimed in respect of non-pecuniary damage, plus any tax that may be chargeable to her.

B. Costs and expenses

123. The applicant also claimed EUR 5,719.17 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

124. The Government considered this claim unfounded and unsubstantiated.

125. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. 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 5,200 covering costs under all heads plus any tax that may be chargeable to the applicant.

C. Default interest

126. 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of the procedural aspect of Article 3 taken in conjunction with Article 14 of the Convention;

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas (HRK) 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 5,200 (five thousand two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 14 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Deputy Registrar	Krzysztof Wojtyczek President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.W.O
R.D.

PARTLY CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I have reservations concerning the approach adopted by my colleagues in paragraph 110. The reasoning therein states as follows:

> "The Court cannot therefore overlook the fact that M.M.'s sentence in the minor offences proceedings was manifestly disproportionate to the gravity of the ill-treatment suffered by the applicant (compare *Identoba and Others*, cited above, § 75)."

2. It is important to add that this statement is made in the context of the Court's finding that it was not possible to provide an adequate response in the instant case by way of minor offences proceedings in general (see paragraph 111 of the judgment).

In declaring the sentence manifestly disproportionate, the Court implicitly establishes – whether or not it so intended – the following elements: (i) M.M. committed an act which may be characterised as a criminal offence; (ii) M.M. is guilty of this offence; and (iii) a much more severe punishment should have been imposed upon him by the domestic courts.

3. This approach raises several objections. Firstly, the Court's judgment directly affects M.M.'s fundamental rights, whereas this person has never been heard in the proceedings before the Court (on this issue, see my separate opinions appended to the judgments in the following cases: *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015; *Kosmas and Others v. Greece*, no. 20086/13, 29 June 2017; *A and B v. Croatia*, no. 7144/15, 20 June 2019; and *Liamberi and Others v. Greece*, no. 18312/12, 8 October 2020).

Secondly, in the domestic proceedings M.M.'s presumption of innocence was rebutted only in respect of a minor offence, but not in respect of a criminal offence. In criminal proceedings, M.M. has the right to be presumed innocent, as guaranteed by Article 6 § 2. This provision shields the suspect and the accused from, in particular, prejudicial statements, issued by public authorities, which may impact upon the course of criminal proceedings. The statement quoted above conflicts with the presumption of innocence and prejudges the issue of M.M.'s criminal responsibility.

Thirdly, the Court rightly highlights that some essential factual elements have not been correctly investigated in the instant case and, in particular, that the authorities did "not in any manner address the hate crime element to the physical attack against the applicant" (see paragraph 108). If essential factual elements in a criminal case have not been investigated at all, it is difficult to issue categorical pronouncements concerning the severity of the punishment to be imposed.

Fourthly, the proportionality of punishment is determined by several factors, including, *inter alia*, the gravity (social dangerousness) of the offence, the level of individual guilt, the risk of reoffending, resocialisation purposes, criminal policy considerations etc. All these factors must be very carefully assessed in the individual circumstances of a specific case.

Fifthly, the reasoning rightly states in paragraph 108 that "it goes without saying that it is not for the Court to address such issues of domestic law concerning individual responsibility, that being a matter for assessment by the national courts, or to deliver guilty or not guilty verdicts in that regard". The opinion expresses further, in paragraph 110 *in fine,* the view that that the finding with regard to the manifestly disproportionate nature of the punishment "does not call into question M.M.'s individual criminal responsibility under the domestic criminal law". In my view, for the reasons explained above, it does not appear possible to characterise a punishment imposed in a specific case as manifestly disproportionate without simultaneously making assumptions as to the suspect's individual criminal responsibility. There is a contradiction between, on the one hand, the first sentence of paragraph 110 and, on the other, the above-quoted views, expressed in paragraph 108 and in the last sentence of paragraph 110.