



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

FIFTH SECTION

**CASE OF ASSOCIATION INNOCENCE EN DANGER
AND ASSOCIATION ENFANCE ET PARTAGE
v. FRANCE**

(Applications nos. 15343/15 and 16806/15)

JUDGMENT

Art 3 (substantive) • Positive obligations • Lack of necessary and appropriate measures by the State to protect child from fatal ill-treatment by parents • Failure to question the child's teachers who had reported the suspected ill-treatment • Failure to investigate the family environment, in the context of their numerous changes of address • Interview with the child without the presence of a psychologist • Decision to discontinue the investigation without measures to ensure that increased monitoring of the child would continue • Lack of any mechanism to centralise the information • Absence of meaningful action by the social services to identify the child's actual situation

Art 13 (+ Art 3) • Effective remedy • Requirement, not unreasonable, to establish gross negligence to engage the State's responsibility for the defective operation of the justice system • "Gross negligence" could result from an aggregate of more minor acts of negligence

STRASBOURG

4 June 2020

FINAL

04/09/2020

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

**In the case of Association Innocence en Danger and Association
Enfance et Partage v. France,**

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

Síofra O’Leary, *President*,
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
André Potocki,
Yonko Grozev,
Lətif Hüseyinov,
Anja Seibert-Fohr, *judges*,

and Victor Soloveytschik, *Deputy Section Registrar*

Having regard to:

the applications (nos. 15343/15 and 16806/15) lodged with the Court
against the French Republic by two French associations, Innocence en
Danger and Enfance et Partage (“the applicant associations”), under
Article 34 of the Convention for the Protection of Human Rights and
Fundamental Freedoms (“the Convention”) on 26 March 2015 and 7 April
2015 respectively,

the parties’ observations.

Noting that on 27 September 2017 the Government were given notice of
the complaints under Articles 2, 3 and 13 of the Convention and the remainder
of application no. 15343/15 was declared inadmissible pursuant to Rule 54
§ 3 of the Rules of Court.

Noting that on 4 June 2019, the President of the Section decided, pursuant
to Rule 54 § 2 (c), to invite the Government and Association Innocence en
Danger to submit further written observations.

Having deliberated in private on 15 April 2020,

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

INTRODUCTION

1. The applications were submitted by two associations which work for
child protection. The case concerns, essentially under Articles 2 and 3 of the
Convention, the issue of whether the French authorities fulfilled their positive
obligations to protect a child from fatal ill-treatment inflicted by her parents.
Under Article 13 of the Convention, it also concerns the question of the right
to an effective remedy in order to engage the French State’s civil liability for
defective operation of the public justice system.

THE FACTS

2. The applicants are two associations, both of which have their
headquarters in Paris. They were represented by Mr G. Thuan Dit Dieudonné,

a lawyer practising in Strasbourg, and by Mr R. Costantino, a lawyer practising in Paris.

3. The French Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry for Europe and Foreign Affairs.

THE CIRCUMSTANCES OF THE CASE

4. The applications are linked to the death in 2009 of an eight-year-old girl, M., following ill-treatment at the hands of her parents.

5. Some of the factual information provided in the account below is taken from the report of 30 June 2014 by the *Défenseur des droits* (“Defender of Rights”, see paragraphs 90 et seq. below).

A. Measures taken while M. was alive

1. Events prior to June 2008

6. In 2000 M.’s parents lived together for almost a year. Her mother – who already had a son, A., born in 1999 from a previous relationship – quickly became pregnant with M. The couple married in October 2000 but separated shortly thereafter, when the mother was six months pregnant. The mother gave birth to M. anonymously (that is, without revealing her own identity) on 27 February 2001.

7. A month later the mother changed her mind and collected M. The child subsequently lived with both of her parents and her half-brother A.; the couple had a further three children, born in 2003 (a sister, O.), 2004 (a brother, R.) and 2008 (a brother, D.) respectively. M.’s health liaison book – a document containing medical information which is used to monitor a child’s health from birth until the age of 18 – was said to have been lost in the family’s numerous ensuing changes of address.

8. M. began attending school for the first time in April 2007 at the age of six, the mandatory school attendance age at the relevant time. However, the various schools in which she was enrolled on account of her family’s changes of address noted that she was frequently absent.

9. During M.’s first school year in 2007-2008, her teachers reported, in writing, various injuries that were regularly observed, mostly on the child’s face, but also on her body.

In September 2007 one of M.’s two primary-school teachers telephoned Dr A., the doctor responsible for health issues in the school, to report the presence of bruises on M. and inform him about her concerns. On 18 October 2007 M. and her father met Dr A., who recorded on that occasion traces of old injuries, which in his view were “nothing to worry about”. Dr A. subsequently stated, in the course of proceedings following a complaint for “failure to assist a person in danger” after the parents’ conviction by the assize

court (see paragraphs 47 and 57 below), “[w]e were not in an emergency context... If I had received something tangible, an injury to note, an emergency situation, I would have gone there (immediately)”.

Following a meeting between M. and the school nurse, scheduled for November 2007, Dr A. opened a school medical file and met at least one of the child’s two teachers. He stated that nothing conclusive had been observed, but nonetheless asked the school to be vigilant and that, from then on, anything that could be considered suspicious was to be recorded.

Tests to ascertain whether M. had a squint were recommended but did not occur on account of her frequent absences from school. After a meeting between Dr A. and M., in her father’s presence, on 15 February 2008, Dr A. contacted the doctor named by the family as being their general practitioner. Dr A. informed him about the suspicions of ill-treatment, but the GP knew the family only a little, as they had arrived in the area only one year previously.

10. On 31 May 2008 the family moved to a neighbouring municipality and M. was enrolled in a new school on 16 June.

2. Child-protection alert of 19 June 2008

11. On 19 June 2008 the headteacher of this new school sent a “child-protection alert” (“*signalement au titre de la protection de l’enfance*”, see paragraph 64 below) to the Le Mans public prosecutor and to the president of the *département* council. The report did not mention the need for an immediate protection measure. The headteacher was concerned about the fact that, following a change of address by the family, M. had still not turned up at her new school, unlike her brothers and sister. She was troubled by this absence, given that the headteacher of M.’s previous school had informed her about suspected ill-treatment and she had received a school file referring to physical marks observed on M.’s body by her teachers throughout the year. She attached to her letter, which was headed “child-protection alert (suspected ill-treatment)”, copies of four hand-written pages by these teachers, recording various marks found on the child’s body throughout the 2007-2008 academic year. These pages read, in particular, as follows:

“- 14 September 2007, 3 bruises on the right shoulder-blade, 3 bruises on the stomach and traces of bruising on the arms and pelvis;

- 18 September 2007, a 2cm pink mark in the small of the back, a haematoma on the right elbow and small bruises on the arm;

- 1 October 2007 (after a week’s absence on account of flu), a bruise on the left forehead;

- 11 October 2007, 3 bruises on the face: 2 on the cheek (jaw and cheekbone) and one on the ear;

- 21 January 2008 (when M. was summoned to school with her parents, during a period when M. was absent), “following a severe episode of conjunctivitis, [M.]’s face

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was swollen and bruised and she could not open her eyes. Her face was partly covered by cream”;

- 25 January 2008 (after 3 weeks of absence), a bruise under the entire right eye; a scratch on the side of the eye, a large crust, about 2cm across, and a large bruise around it;

- 29 January 2008, 2 hematomas on the left ankle, 4 bruises all along the right leg;

- 25 March 2008, cut on the thumb;

- 3 April 2008, a bruise on the right cheek;

- 28 April 2008, very grazed knee;

- 6 May 2008, a bruise on the forehead, “[M.] told me that she had sore fingers because she had caught her fingers at home”;

- 23 May 2008 (at the swimming pool), several small bruises on the upper back, a large mark on the left thigh.”

12. On the same date the deputy prosecutor with responsibility for minors at the Le Mans public prosecutor’s office sent written instructions (“*soit-transmis*”) to the commanding office of the gendarmerie, requesting an investigation into “possible ill-treatment inflicted on the child”.

The deputy prosecutor gave instructions that the investigation was to begin with a forensic medical examination of the child and a videotaped interview with her, and that real-time processing was to be used (“*traitement en temps réel*” (“TTR”), a procedure by which the public prosecutor’s office replies by telephone, rather than by letter as in standard preliminary investigations, to police requests for guidance in handling such cases and takes immediate decisions on the next steps).

However, it transpires from the subsequent report by the *Defenseur des droits* that the TTR procedure was not ultimately used in the investigation.

13. Twelve days later, that is, on 1 July 2008, the social services informed the public prosecutor by email that M.’s new school doctor, Dr D., had noted recent bruising. The email stated that a medical certificate was available in the premises of the academic inspectorate.

14. On 2 July 2008 the investigation was assigned to a police officer, under the supervision of a warrant officer, a senior police officer.

15. On 10 July 2008 (three weeks after the headteacher’s report and the prosecutor’s written instructions, a forensic doctor was assigned to the case. The gendarmes contacted M.’s parents to inform them that an investigation was being conducted and that the child was to be presented to the forensic doctor five days later.

16. On 15 July 2008 M. was examined by the forensic doctor, Dr. B., in her father’s presence. In his report Dr. B. described M. as a child who spoke little and was very withdrawn. He noted that she did not appear to be upset by the consultation. He was “immediately struck by M.’s very short height and very unusual way of walking”. He noted “numerous seemingly non-

recent lesions across her entire body”. In concluding his report, which was submitted to the gendarmerie on 17 July 2008, Dr B. stated:

“Examination [of the child] reveals a very large number of seemingly old injuries, each of which, taken individually, may be the result of everyday accidents, but the number of which is highly suspicious... Despite the consistent explanations given by the father ... we cannot rule out acts of violence or ill-treatment.”

17. On 23 July 2008, in spite of her age (eight years), M. was questioned in the premises of the juvenile delinquency prevention brigade, in a room containing video equipment that was located two rooms away from the waiting area in which her father had been placed. M. and her parents had consented to the interview being recorded.

The transcript of the audiovisual recording contains the following description:

“As soon as she arrived in the premises ..., [M.] was taken charge of and prepared [for the interview]. She expresses herself normally, using vocabulary appropriate to her age. She shows no particular apprehension towards the investigator.

[M.], whose measurements seem [closer to those] of a younger child, appears relatively calm. She has clearly been prepared and is relaxed. We did not note any unusual behaviour on her part, such as twitches, mimics or hand gestures. ...’

During the interview, M. did not allege that she had been subjected to violence by her parents or anyone else, but did state that “her brothers and sister [would] hit her, either with their hands or fists”. The gendarme pointed to each injury and M. provided an explanation (accident at home, fight with her siblings). When asked, “Does anyone hit you?” M. replied, “Only my mum and dad”, before correcting herself and saying, “Dad doesn’t hit me, and my mum doesn’t hit me.”

18. The family moved again on 15 August 2008, to a municipality not far from their previous home. The parents went to enrol their children in a new school, but failed to mention M.’s existence. However, M. turned up at school on the first day of the new school year. The school doctor, Dr D. (who had examined M. in her previous school and was also responsible for this school’s catchment area) spotted her in the school bus and informed the headteacher of the new school about the need to be vigilant with regard to this child.

19. On 17 September 2008 the police officer responsible for the investigation visited the family home. He was received by the mother, who confirmed that the lesions found on M.’s body had been caused by accidents and stated that there was no violence within the adults’ relationship or against the children. Following that visit, the police officer prepared a report on the questioning of a witness.

20. On 18 September 2008 the police officer drew up and signed the summary report of the investigation.

He noted as follows: “[M.] did not strike us as being at risk within her family. She was smiling all the time and even began laughing in front of us. She did not mention any problems, either with her parents or with her brothers

and sisters. The interview indicated that her various injuries were due to minor accidents, for which she gave clear and precise explanations, or to bickering with her brothers and sisters.” When he had visited the family home on 17 September 2008, the mother had “been unable to give any other explanation concerning [M.’s] injuries” and had “stated that everything was going well with her husband and that there had never been any instances of domestic violence or violence against her children”. The police officer stated that “the [two] houses [visited] were well maintained and clean” and that “the children ... always appeared healthy and polite, and lacked for nothing”. He concluded: “... the investigation has not brought to light any evidence for presuming that [M.] has been or is the victim of abuse”.

Accordingly, he closed the investigation as it stood.

21. On 26 September 2008 the Child Welfare Service (“the ASE”; see paragraph 65 below) – which had also received the child-protection report on 19 June 2008 – sent a letter to the public prosecutor informing him, in the context of the investigation, that M.’s family had again changed address.

22. On 27 September 2008 the gendarmerie forwarded the file on the preliminary investigation to the public prosecutor’s office. It was received at that office on 1 October 2008.

23. On 6 October 2008 the public prosecutor’s office closed the case, on the grounds that the alleged offence was “not sufficiently made out”.

3. Events after the proceedings were discontinued on 6 October 2008

24. In October and November 2008 M.’s situation was raised by her new teacher in discussions with an inspector from the Ministry of Education. They referred to the lack of information and action following the child-protection report that had been submitted in June.

25. On 5 March 2009 (that is, five months after the investigation was closed), the ASE examined its pending files and noted that the prosecutor’s office had not informed it of the follow-up taken in response to the child-protection report of 19 June 2008. The ASE made telephone enquiries and the prosecutor’s office informed it that the investigation had been discontinued.

26. On 27 April 2009 – following M.’s failure to return to school after the Easter holidays, justified by “corns on her feet” – the headteacher of the school that she had attended since September 2008 noted the poor condition of M.’s feet. He alerted the school doctor, Dr D., who already knew M. well. When questioned in the course of the parents’ trial before the assize court (see paragraph 47 below), Dr D. stated that he had been “horrified by the condition of the sores” and that “the father’s explanations as to the cause of the injuries [had] not seemed in the least convincing”.

(a) Report of concern (child-protection) of 27 April 2009

27. Also on 27 April 2009, the headteacher submitted a “report of concern (child-protection)” (“*information préoccupante (protection de l’enfance)*”), see paragraph 63 below) to the president of the *département* council (rather than to the prosecutor).

He stated that M. had been absent for a total of 33 days since the beginning of the school year; these absences had not been systematically reported by her family and no medical certificates had been submitted. M. had often come to school with small injuries for which it was difficult to have a specific explanation. He also reported that, despite her father’s promises to that effect, M. had not been taken to see an ophthalmologist or a paediatrician, as requested by the school doctor in view of her regular complaints of headaches and a sore stomach, and her bulimic approach to food. Lastly, he reported the physical violence which M. had referred to; on 16 March 2009 she had stated “I don’t know what was wrong with my Mum this morning, but she hit me again” and on 17 March 2009, “Mum hit me again this morning.”

The headteacher attached to the report-of-concern form a three-page document listing the absences from school and the various marks observed on M.’s body since the start of the school year in September 2008, such as bruising to the eyes and chin, scratches to the face, as well as cuts on the top of her skull, including a deep cut to the scalp.

(b) M.’s hospitalisation from 27 April 2009 to 26 May 2009

28. On 27 April 2009 M.’s admission to hospital – resulting from the observations about the condition of her feet (see paragraph 26 above), and decided on in parallel with the child-protection alert – prompted the preparation of numerous medical opinions, several meetings of the care team and two meetings with M.’s father. One specialist stated that the child’s X-rays did not indicate any underlying bone disease, but that the possibility of ill-treatment could not be ruled out.

29. On 26 May 2009 the hospital’s paediatric department sent a memorandum to the ASE, reporting on M.’s hospital stay and inquiring about the family’s living conditions. The social worker in the paediatric department had previously informed the ASE by telephone about M.’s situation and of the outstanding issues. The ASE had advised her to submit an official report of concern, but the memorandum received on 26 May was not considered by the ASE to constitute such a report. In the ASE’s view, the hospital’s memorandum merely supplemented the information that had been transmitted to the ASE in the report of concern of 27 April 2009.

30. On the same day (26 May 2009) M. was discharged from hospital and an appointment was arranged for 2 July. She rejoined her family in a new municipality, following a fourth change of address since their arrival in the Sarthe *département* in February 2007.

(c) The follow-up given to the report of concern of 27 April 2009

31. On 4 May 2009 the Sarthe *Département* Council received the report of concern. It was dealt with successively by two ASE staff members, each attached to a different territorial sector in view of the family's change of address between the date on which the report of concern was sent and the point at which it was dealt with. At the relevant time no centralised unit existed in the Sarthe for gathering and processing reports of concern in child-protection cases (see paragraph 69 below).

32. Between 25 May 2009 and 11 June 2009 the two ASE officials took partly overlapping measures. In the subsequent proceedings in respect of the complaint alleging "failure to assist a person in danger" (see paragraph 57 below), the second official testified that, following a careful examination of the case, the memorandum submitted by the hospital (see paragraph 29 above) had not been sent to the public prosecutor's office "given that the case [concerned] a *suspicion* of ill-treatment, [that the public prosecutor's office] had discontinued the investigation in 2008, and that there were no new established acts of ill-treatment or negligence".

i. Home visit of 17 June 2009

33. On 17 June 2009 two social workers made a home visit, which had been notified in a letter from the *département* council five days previously. The property was visited in full, and the assessing social workers spoke to each of the children, including M.

34. Each of the two social workers prepared their own visit report, on 1 and 29 July 2009 respectively. There was nothing in those reports that could give rise to any particular concern.

35. In addition to the home visit itself, the first assessor mentioned a chance encounter with M. and her older brother the next day in the village street. She noted that, although they had not seemed upset by the encounter or by the previous day's visit, the two children's appearance had been considerably less well-groomed than the day before.

36. The second social worker reviewed the previous reports about the family. She also stated that M., who was smiling and spoke fluently and spontaneously, said that she was happy in school and had made friends.

37. The ASE filed the two reports pending further visits by the two social workers, scheduled for August and September.

ii. Steps taken after the visit of 17 June 2009

38. The second social worker did not find anyone at the family home when she visited for a follow-up appointment, scheduled for 24 June 2009. She returned the following day without informing the family, and again found no one at home. She called the father at the end of July to confirm that a meeting was scheduled for 27 August 2009.

39. It would appear that M. died during the night of 6 to 7 August as a result of multiple acts of torture and barbarity by her parents; her death was not immediately discovered.

40. According to the report by the *Défenseur des droits*, the assessment of the report of concern continued in August and September, through visits by the two social workers; on each occasion the parents gave an explanation for M.'s absence.

iii. Discovery of M.'s death

41. On 9 September 2009 the father informed the gendarmes that M. had disappeared in the car park of a fast-food restaurant. An extensive search operation was launched to find the child. However, discrepancies were quickly noted between the responses provided by M.'s parents to police questions and those given by her half-brother. In addition, several persons informed the investigators that they had doubts about the alleged disappearance. Eventually, on 10 September 2009, the father led the investigators to premises where they discovered the child's body.

B. Proceedings after M.'s death

42. M.'s parents were immediately placed in police custody. The couple's three other children (O., R., and D.), and M.'s half-brother (A., the mother's son), were entrusted to the ASE, before being placed together in a foster family in February 2014.

43. On an application by the public prosecutor dated 11 September 2009, a judicial investigation was opened against the parents, who were placed in pre-trial detention from 12 September 2009. An autopsy of the child's body was carried out, as were anatomical pathology analyses and other tests, but these yielded no conclusive results. The judicial investigation provided M.'s brothers and sister with an opportunity to comment on her life. It revealed that, in addition to the events of 6 August 2009 which had led to M.'s death, the child's sufferings had begun when she was aged about two and a half. An educational worker responsible for monitoring M.'s brothers and sister would later state that they were finding it difficult to find their bearings outside the family setting, which exemplified "normal life" for them.

1. The parents' trial

44. In an order of 17 June 2011, the investigating judges of the Le Mans *tribunal de grande instance* ordered that the parents be indicted and committed for trial before the Sarthe Assize Court on charges of torture and barbaric acts resulting in death, committed against a minor aged under 15 years by a parent, and of making a fanciful accusation.

45. M.'s father appealed against that order. In a judgment of 5 October 2011, the Indictment Division of the Angers Court of Appeal upheld the order against him.

46. Various associations (including the two applicant associations) and the *ad hoc* administrator representing M.'s brothers and sister were listed as civil parties in the order of 17 June 2011 and in the judgment of 5 October 2011. Their civil-party claims thus conferred on them the status of parties to the criminal proceedings (see paragraph 84 below). M.'s paternal aunt was also listed as a civil party in both decisions but the judgment of 5 October 2011 states that she was "neither present nor represented".

47. The trial before the Sarthe Assize Court took place from 11 to 26 June 2012. By a judgment of 26 June 2012, the parents were each sentenced to thirty years' imprisonment. No appeal was lodged against that judgment.

48. In a civil judgment delivered on the same day, the Sarthe Assize Court ordered each of the parents to pay the two applicant associations, in their capacity as civil parties, a token euro in damages. In its judgment the Assize Court referred, *inter alia*, to Article 2 of the Code of Criminal Procedure (see paragraph 84 below) and specified that the facts which had given rise to the criminal conviction constituted negligence on the part of the parents which had caused damage to the civil parties.

2. Proceedings to establish the State's civil liability

49. On 5 October 2012 the two applicant associations brought proceedings against the State to establish its civil liability for the defective operation of the justice system. In particular, they argued that between June and October 2008 the investigation and prosecution services had committed gross negligence, consisting in a series of negligent failings which amounted to gross negligence within the meaning of Article L. 141-1 of the Code of Judicial Organisation (COJ). They submitted that if the criminal investigation had been conducted correctly, the child could have been saved. They requested that the State be ordered to pay them one token euro.

(a) The Paris District Court's judgment of 6 June 2013

50. On 6 June 2013 the Paris District Court (13th Administrative District) delivered its judgment, against which no ordinary appeal was possible.

51. It ruled first on the legal standing of the two applicant associations. It pointed out that the applicant associations had each already received a token one-euro award as civil parties (see paragraph 48 above). Noting further that their standing had not been challenged by the Government Law Officer (*agent judiciaire de l'État*), it declared the action for damages admissible.

52. On the merits, it dismissed all of the claims made by the applicant associations.

Firstly, it described the elements characterising the concept of gross negligence:

“Gross negligence is defined as any deficiency established by a fact or a series of facts resulting in the inability of the public justice system to fulfil its mission, which also concerns the police and gendarmerie services which are involved in the tasks of the judicial service under the authority and supervision of judges or prosecutors.

Gross negligence is an act which entails a manifest or gross error in assessing legal or factual aspects and which results from abnormally deficient conduct, error established by a fact or series of facts resulting from this incapacity, and which must be assessed not in the light of subsequent events that could not be foreseen at the date of the impugned decisions, but in the context submitted to the judges, prosecutors and investigators.

Although taken separately none of these possible negligent acts amounts to gross negligence, taken in the aggregate they may give rise to defective functioning of the justice system, and thus amount to gross negligence such as to engage the State’s liability...”

The court then examined each point raised by the applicant associations.

It found, in particular, that the deputy prosecutor’s response – on the same date that the child-protection alert of 19 June 2008 was received – had been appropriate.

It considered that the applicant associations were wrong to criticise the prosecutor for failing to question various individuals. Thus, it noted that the teachers had not witnessed the events which resulted in the marks observed on the child and had alleged that the parents were responsible for them. The headteacher of the previous school had not submitted a child-protection alert and the headteacher of the new school had only reported M.’s first two days of absence. It considered that the forensic doctor (Dr B.) had issued a detailed opinion, which did not require any additional investigation, and noted that the medical certificate drawn up by the school doctor (Dr D.) on 1 July 2008, referring to the presence of bruises, pre-dated the expert report and could have made no difference to its conclusions, since it did not mention the cause of these bruises.

The court considered that the filmed interview with M., without the presence of a psychologist, had not been procedurally flawed, in that the gendarme who conducted the interview was an investigator who specialised in taking children’s testimony.

Setting out the material in the summary record of the preliminary investigation, the court concluded that the prosecutor’s office could not be blamed for having discontinued the investigation without ordering additional measures.

Lastly, the district court ruled on an argument which had not been raised in the original writ. In its pleadings, the association Enfance et Partage had added to the case file the letter from the *département* council dated 26 September 2008, informing the prosecutor about M.’s family’s change of address (see paragraph 21 above), and the new indication of a report of

concern, registered on 4 May 2009 by the President of the *Département* Council (paragraphs 27 and 31 above). The court dismissed the argument by which the association criticised the prosecutor's office for failing to reopen its investigation when this new information was received; the court noted that the report in question had not been addressed to the prosecutor's office and that the president of the *département* council who had ordered a social-services report had never transmitted that report to it.

The court concluded that the associations had failed to produce sufficient evidence of gross negligence or of numerous minor acts amounting to gross negligence on the part of the prosecutor's office or the police investigators.

53. The two associations appealed on points of law against the judgment of 6 June 2013; on that occasion, the association Innocence en Danger submitted a request for review of the constitutionality of a national law ("QPC").

(b) Judgment refusing to refer the QPC

54. The association Innocence en Danger raised the question whether the legal regime governing civil liability for gross negligence was compatible with the principle of the right to an effective judicial remedy. It considered that, where the matter concerned children about whom ill-treatment reports had been received, the requirement that victims of wrongful acts committed by persons in the justice system establish gross negligence was too strict a criterion.

55. On 12 February 2014 the Court of Cassation decided that there was no cause to refer the above-mentioned QPC to the Constitutional Council. It considered that the question was not new and that it had no serious merit.

(c) Judgment dismissing the appeals on points of law

56. In a judgment of 8 October 2014, the Court of Cassation joined the appeals on points of law submitted by the two associations and dismissed them. It endorsed the findings of the judgment of 6 June 2013, holding that the Paris District Court had been entitled to infer that no gross negligence, within the meaning of Article L. 141-1 of the COJ, had been made out.

3. Complaint alleging failure by the Sarthe Département Council to assist a person in danger

57. On an unspecified date La Voix de l'enfant, another child-protection association (not an applicant in the present case) lodged a complaint against the Sarthe *Département* Council, alleging failure to assist a person in danger. The complainant submitted that the *département* council had been aware of the danger to which M. was exposed and had had an opportunity to help her, but that it had refused to react.

58. This complaint was discontinued on 31 May 2013, after a new investigation which included interviews with fifteen witnesses, including employees of the *département* council and staff from the paediatric ward in which M. had been hospitalised. The investigation had not established that the individuals questioned were aware of the seriousness of M.'s situation, and it was noted that none of them had refused to take action in response to that situation.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CHILD PROTECTION

59. The French legislation on child protection is based on a two-part system of protection: (i) administrative, under the responsibility of the *département* councils (*conseils départementaux* in French, *conseils généraux* at the relevant time), and (ii) judicial, under the responsibility of the public prosecutor and of the children's judge.

60. This legislation was consolidated by the Child Protection (Reform) Act (Law no. 2007-293 of 5 March 2007, "the 2007 Act"), which was further amended on 14 March 2016.

A. The main concepts in this area

1. *The endangered minor*

61. It follows from Article 375 of the Civil Code that a minor is endangered when his or her health, security or morality are imperilled, or where the conditions of his or her education are seriously endangered or his or her physical, emotional, intellectual and social development are seriously compromised.

2. *Reports of concern (child-protection) and child-protection alerts*

62. There is a difference between a "report of concern (child-protection)" (*information préoccupante (protection de l'enfance)*) and a "child-protection alert" (*signalement au titre de la protection de l'enfance*), in that they are transmitted to the administrative and judicial authorities respectively.

63. More specifically, a report of concern about a minor who is endangered or likely to become so within the meaning of Article 375 of the Civil Code is transmitted to the president of the *département* council, for the purpose of enabling the minor's situation to be assessed and determining which protection and assistance measures might be available to the minor and his or her family.

64. A child-protection alert informs the public prosecutor about serious facts and risk factors that are likely to compromise the minor's development within the meaning of Article 375 of the Civil Code.

B. Administrative protection, under the responsibility of the *département* councils

65. Within each *département*, the Child Welfare Service (the ASE) is placed under the authority of the *département* council.

66. The *département* council is the cornerstone of the system for gathering reports of concern, which it centralises in a single circuit. Any reports of concern ought, in principle, to pass through it.

67. After assessment of each report of concern, the president of the *département* council must decide on the administrative measures that it could usefully be suggested to the families and must, where appropriate, take responsibility for notifying the judicial authorities.

68. In line with the principle of subsidiarity in respect of judicial intervention, the involvement of the judicial authorities is required only if the *département* council's intervention is insufficient to resolve a situation where a child is in danger.

69. Since the 2007 Act, in accordance with Article L. 226-3 of the Social Action and Family Code (CASF), protocols have been drawn up, at *département* level, with a view to centralising the collection of reports of concern within a unit for gathering, processing and assessing such reports ("a CRIP"). This unit receives all the reports concerning endangered or potentially endangered minors and ensures that they are dealt with by a specialised department. Thus, it carries out an initial assessment prior to possible additional analysis or notification to the prosecutor's office. It then monitors progress on the file, especially by ensuring compliance with the relevant time-limits.

C. Judicial protection, under the responsibility of the prosecutor and the children's judge

70. The public services, and also private and public bodies which might become aware of situations where minors are or might be endangered, may, where this is justified by the seriousness of the situation, inform the public prosecutor directly, provided that they also send a copy of this information to the president of the corresponding *département* council.

71. Where a matter is referred directly to the public prosecutor in this way, he or she must transmit to the President of the *Département* Council the information necessary for the latter to conduct his or her mission of child protection and, at the same time, inform the person who submitted the alert about the follow-up given to it.

72. Where the public prosecutor receives an alert alleging that an offence has been committed against a minor, he or she orders a criminal investigation. Under Article 40 of the Code of Criminal Procedure:

“The public prosecutor receives complaints and denunciations and assesses how they are to be dealt with, in accordance with the provisions of Article 40-1.

Every constituted authority, every State agent or civil servant who, in the performance of his or her duties, has gained knowledge of the existence of an offence or of a crime is obliged to notify forthwith the public prosecutor about the offence and to transmit to this prosecutor any relevant information, official reports or documents.”

73. In parallel to the criminal investigation, the public prosecutor may take steps for the protection of minors through various measures, depending on the seriousness and urgency of the situation identified.

74. Thus, he or she may request that the administrative authorities carry out a social inquiry.

75. Where the information contained in the alert, the nature and the circumstances of the offence indicate that the minor is in a situation of risk within the meaning of Article 375 of the Civil Code, the public prosecutor may refer the matter to the children’s judge, with a view to initiating the procedure for educative assistance measures.

76. Lastly, in the event of a serious risk to the child (such as serious and substantiated violence), he or she may order the child’s temporary placement in care, subject to the condition that the case is referred to the children’s judge within eight days (the latter can then, if appropriate, impose a placement measure).

D. Cooperation between those involved in child protection

1. The machinery provided for by the CASF

77. The CASF lays down a co-operation system, applicable to all of the parties involved in child protection, in order to identify and assess at-risk situations, based on the principle of complementarity between the administrative and judicial measures.

78. Article L. 226-4 of the CASF specifies, *inter alia*, the cases in which the president of the *département* council must notify the public prosecutor of at-risk situations. In the version in force at the relevant time, this article was worded as follows:

“I. – The president of the *département* council shall immediately inform the public prosecutor where a minor is at risk within the meaning of Article 375 of the Civil Code and ... [where] one or several measures have already been taken in this regard, but these have not made it possible to improve the situation; ...

He or she shall also inform the public prosecutor immediately where a minor is presumed to be in a situation of risk within the meaning of Article 375 of the Civil Code but where it has proved impossible to assess this situation.

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The president of the *département* council shall inform the public prosecutor about the action already taken, if necessary, with regard to the minor and the family in question.

The public prosecutor shall inform the president of the *département* council as soon as possible of the measures taken in response to his or her communication.

II. – Any person working within the [public services, and public or private establishments likely to come across situations in which minors are or are likely to be at risk] who, on account of the seriousness of the situation, notifies the public prosecutor directly about the situation of a minor who is at risk shall send a copy of this notification to the president of the *département* council. Where the prosecutor is informed by another person, he or she shall transmit to the president of the *département* council the information necessary for the latter individual to carry out the child-protection tasks entrusted to him or her, and shall notify the person who communicated the information about the follow-up given to it, as provided for in Articles 40-1 and 40-2 of the Code of Criminal Procedure.”

79. Article 40-1 of the Code of Criminal Procedure, as worded at the relevant time, read as follows:

“Where he or she considers that facts brought to his or her attention in accordance with the provisions of Article 40 constitute an offence ..., the district prosecutor with territorial jurisdiction decides if it is appropriate:

1. to press charges;
2. to put in place an alternative procedure to prosecution, ... or
3. to discontinue the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this.”

80. Article 40-2 of this Code provides as follows:

“The public prosecutor shall inform the complainants and the victims, if these have been identified, and also the persons or authorities mentioned in the second paragraph of Article 40, of any prosecution, or alternative procedure to prosecution, which have been decided upon in consequence of their complaint or notification.

Where he or she decides to close the investigation without taking further action, he or she shall also inform these persons of this decision, indicating the legal or policy reasons justifying this course of action.”

*2. Protocol signed by the various entities involved in child protection
in the Sarthe département*

81. A “*département* protocol for the coordination of child protection in the Sarthe” was agreed in March 2010 by the various professionals in the Sarthe *département* who, in the course of their functions or their duties, were required to deal with reports of concern regarding the situation of at-risk minors; in particular, this concerned the *département* council, the Ministry of Education, the prosecutor’s office, the police and gendarmerie and the main local hospital. The protocol, which was not in place when M. died, was nonetheless the culmination of work which had begun in 2006. It was updated on 31 January 2013.

82. In its updated version, the protocol lists several measures, such as the establishment of a paediatric forensic-medical unit, which is responsible, in particular, for conducting interviews with child victims. It also provides that the investigations must have regard both to the context of the disclosures (which includes an interview with the individuals who reported the factual elements and/or had observed them), and to the victim's family setting (in every case, an interview with the parents is to be conducted, subject to the proper safeguards). Lastly, among other points the protocol provides that the *département* council's services are to transmit, immediately and without assessment, information about situations of actual or suspected ill-treatment to the public prosecutor.

II. THE ASSOCIATIONS' *LOCUS STANDI*

A. In general terms

83. In accordance with section 6 of the Associations Act of 1 July 1901, "any association which is properly registered may, without requesting special permission, take part in legal proceedings ...".

B. In the context of civil proceedings brought before the criminal courts

84. Where an offence causes harm to a victim, her or she may claim compensation through civil proceedings, which may be conducted concurrently and in conjunction with the criminal proceedings before the criminal courts. The fact of submitting a civil-party claim has the effect of making the victim a party to the criminal proceedings. Under Article 2 of the Code of Criminal Procedure, such civil proceedings are reserved for persons who have personally suffered from the damage directly caused by the criminal offence. However, in certain situations, set out in specific provisions, the legislature permits associations to exercise the rights conferred on civil parties, on account of the harm to the particular collective interest that they defend. Thus, with regard to the prevention of child abuse, Article 2-3 of the Code of Criminal Procedure provides as follows:

"Any association which has been lawfully registered for at least five years at the relevant time, where its articles of association include protection of or assistance to children who are at risk and victims of all forms of ill-treatment, may exercise the rights conferred on civil parties in respect with intentional offences against life or limb [or] assault... committed against ... a minor and offences in which minors are endangered ... where criminal proceedings have been brought by the public prosecutor's office"

III. STATE LIABILITY INCURRED AS A RESULT OF THE ACTIONS OF ITS SERVICES

A. The possibility of bringing proceedings in the ordinary courts to establish State liability for the defective operation of the justice system

85. Article L. 141-1 of the COJ provides that the State's civil liability may be engaged on account of the defective operation of the justice system in the event of gross negligence or a denial of justice.

86. The development of the domestic case-law as regards proceedings to establish State liability for the defective operation of the justice system is set out in *Benmouna and Others v. France* ((dec.), no. 51097/13, §§ 35-39, 15 September 2015). As described in that decision, the concept of gross negligence has also gradually been interpreted in a more extensive manner in the case-law of the ordinary courts. In a judgment by the Paris Court of Appeal of 25 October 2000 (CA Paris, 25 October 2000, no. 155, Gaz. Pal. 8-9 Dec. 2000, p. 17), for example, concerning the decision by a family affairs judge to grant residence rights to a mother whose mental health was impaired, that court held as follows: "... although, taken individually, none of the instances of negligence observed amounts to gross negligence, in contrast, taken in the aggregate, they give rise to defective functioning of the justice system which can amount to gross negligence." The legal literature has emphasised that it is the aggregate of abnormal shortcomings, negligent acts or mere negligence, excusable when taken individually, which has been held to amount to gross negligence.

87. More recently, the State was found liable for gross negligence in respect of the death in his cell of an individual being held in police custody (CA Paris, 19 May 2015, RG no. 13/13107) and the suicide of an individual during police custody (TGI Bastia, 22 March 2016, RG no. 15/00427), and in a case where a woman was killed by her partner, where she had filed a complaint against him nine months previously but no criminal-law proceedings had ensued (CA Paris, 17 January 2017, RG no. 15/19415).

B. The possibility of bringing proceedings before the administrative courts to establish the liability of a public authority

88. The possibility of bringing proceedings to establish a public authority's liability has been developed through the case-law.

89. The public authorities' liability was established with regard to shortcomings in the manner in which a minor was placed in care by the social services in the relevant *département* (CAA Bordeaux, 7 March 2001, no. 10BX00189), and in the context of abuse of children placed in foster families (CE, 13 October 2003, no. 244419, and TA, 13 July 2012,

no. 1005941). A *département*'s liability was also engaged with regard to shortcomings in the way it dealt with a report of concern that had been transmitted to it (CAA Nantes, 5 July 2012, no. 11NT00456). In that case, the headteacher of a lower secondary-school had sent the social services a document stating that the children in question, accompanied by their mother, had spoken about the difficulties encountered by them when visiting their father. The family affairs judge had withdrawn all of the father's visiting and residence rights on the basis of a report prepared by the social services. In proceedings to establish the public authorities' liability, the administrative courts held that it had been negligent to draw up the report without hearing the father or carrying out additional investigations, which were essential to establish the veracity of the children's statements, given the conflictual context of the pending divorce.

IV. THE REPORT ON M.'S CASE, ISSUED ON 30 JUNE 2014 BY THE *DÉFENSEUR DES DROITS*

90. Under the Institutional Act of 29 March 2011, the *Défenseur des droits* is responsible for defending and promoting the best interests and rights of the child.

91. In the preamble to his report of 30 June 2014, he explained that he had been asked on numerous occasions to comment on M.'s death. His research had resulted in a finding about what, in his view, had led to a failing by the child-protection system.

92. Thus, he noted that the parental couple exerted complete control over M., a circumstance which had hidden her ordeal and distorted the ability of all those who had been in contact with the child to see and hear what was going on. He noted that it had become possible to understand the child's real situation only after her death.

93. He then noted that the various forms of institutional involvement in the present case had been fragmented, and that all those who intervened had become locked in their own logic. He also referred to the scope of the investigations and assessments, which, in his view, had been too rigid.

94. With regard to the child-protection alert which resulted in a decision to discontinue the investigation, he noted, among other points, that there had been no discussion between the prosecutor and the investigator about the discrepancies between the investigation's findings, the teachers' observations and the forensic doctor's hypotheses. He added that the decision to discontinue the investigation had "placed an excessive psychological burden on all those involved in [child] protection" and that his review had "brought home [to him] the decisive importance – for all the actors in the welfare, education and health sectors – of the decisions taken by the prosecutor's office (or its failure to take decisions)".

95. With regard to the report of concern of 27 April 2009, he found that the ASE had assessed M.'s family environment "blindly", with the result that there had been "very little chance of breaking through the protective wall of her parents' control".

96. The *Défenseur des droits* concluded that M.'s death had triggered closer collaboration between the prosecutor's office and the *Conseil général*, the creation of a CRIP, responsible for centralising reports (see paragraph 69 above), and the release of considerable additional resources, as a result of updating of the *département* protocol (see paragraph 81 above).

V. RELEVANT INTERNATIONAL LAW

97. The Court summarised a series of instruments on child protection adopted by the Council of Europe and the United Nations in its judgment in the case of *O'Keeffe v. Ireland* ([GC], no. 35810/09, §§ 91 to 96, ECHR 2014 (extracts)).

98. In the *Bălșan v. Romania* judgment (no. 49645/09, § 42, 23 May 2017), which concerned violence against a woman by her husband, the Court referred to the Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention"). This Convention – which was ratified by France on 4 July 2014 and entered into force in that country on 1 November 2014 – defines, in Article 3 (b), "domestic violence" as "all acts of physical, ..., psychological ... violence that occur within the family". In this connection, the "Explanatory Report" on this Convention specifies that "Domestic violence includes ... inter-generational violence which typically occurs between parents and children... Inter-generational domestic violence includes physical, ... psychological ... violence by a person against her or his child..."

THE LAW

I. JOINDER OF THE APPLICATIONS

99. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. LOCUS STANDI

A. The parties' submissions

1. The Government

100. The Government considered that the applicant associations did not have standing to act on M.'s behalf and to lodge applications with the Court.

101. In their view, it was indisputable that M. alone was the direct victim of the alleged violations of the Convention. They argued that the applicant associations had not put forward sufficiently relevant grounds to be considered as indirect victims from the standpoint of the Court's case-law. The Government concluded that, since the two association did not have standing as either direct or indirect victims, it remained to be determined whether "exceptional circumstances" should lead to their applications being declared admissible in the light of the criteria adopted by the Court.

102. The Government disputed neither the vulnerability of the direct victim (M.) nor the seriousness of the alleged violations of the Convention.

103. Equally, they did not deny that the applicant associations had taken part in the domestic proceedings, initially as civil parties during the judicial investigation which resulted in the criminal conviction of M.'s parents, then when they brought civil proceedings to establish State liability for the defective operation of the justice system.

104. The Government argued that the associations had not shown any link to M. during her lifetime, or any significant contact with her relatives after her death; nor had they received any authority or instructions from those relatives.

105. They added that M. had not been without family members.

106. In this connection, they stated that M. had had three brothers and a sister, who had themselves witnessed the violence inflicted on their sister. The siblings had joined the proceedings before the assize court as civil parties, through the *ad hoc* statutory representative appointed for that purpose, and that since M.'s older brother had come of age on 28 March 2017 he had also been entitled to bring proceedings to establish the State's liability. With regard to the remaining siblings, the Government pointed out that the minor children were still being supervised by the children's judge and were living with a foster family; the children's judge could at any point appoint an *ad hoc* representative with *locus standi* to intervene on behalf of the minor children, who could take any decision likely to serve their best interests, including where this involved bringing proceedings to establish the liability of the French State.

107. The Government then indicated that M.'s paternal aunt had joined, as a civil party, the proceedings which resulted in the conviction of her brother (M.'s father).

108. They considered that these members of M.'s family had *locus standi*, unlike the applicant associations. Thus, in the Government's view, the purpose of the present applications was not to bring before the Court complaints in respect of a victim who had no relatives, so as to ensure that a situation did not arise whereby serious allegations of a violation of the Convention could not be examined at international level.

2. The applicant associations

(a) The association Innocence en Danger

109. The association Innocence en Danger acknowledged that, since the direct victim of the alleged violations was the deceased child, it could not claim to be a direct victim.

110. On the other hand, it considered that there were “exceptional circumstances” which meant that it could be granted status to act as M.’s representative, even in the absence of an authority to act and although she had died, aged eight, before the application was lodged.

111. The applicant association stated that it had raised serious complaints that the direct victim – who had been extremely vulnerable and had died as a result of particularly brutal ill-treatment at the hands of her parents – was obviously unable to bring before the Court.

112. With regard to the existence of M.’s relatives, the applicant association considered that M.’s brothers and sister – all of whom had been minors at the relevant time and were placed in care as soon as their parents were taken into custody – were not in a position to bring the case before the Court. It considered that this was also the case with regard to M.’s paternal aunt, who had not apparently had any particular relationship with the child and had joined the proceedings as a civil party at the last moment in order to be able to attend the assize court’s deliberations, which were held *in camera* (a fact which prevented any persons other than parties to the proceedings from attending).

113. The applicant association pointed out that its standing and interest in taking part in the proceedings at national level had never been called into question under domestic law.

114. Lastly, the applicant association stressed that an examination of the merits of the case was clearly in the public interest, given the seriousness of the alleged violations.

(b) The association Enfance et Partage

115. The association Enfance et Partage pointed out that it had capacity to bring legal proceedings in defence of its own interest, defined in its statutes and recognised by law, specifically the fight against child abuse (see paragraph 84 above). It concluded that it was entitled to bring proceedings for protection of the interests that it defended, given that these had been breached, and that it ought to be considered as a “victim” of the acts in question, in that it was directly and/or indirectly affected by the State’s wrongful omissions. It added that there were “exceptional circumstances” within the meaning of the Court’s case-law which justified its capacity to take part in legal proceedings.

116. With regard to M.'s siblings, the applicant association found it hard to imagine that an *ad hoc* representative, appointed to that role by the State, would challenge the State for its failings and actively lodge an application with the Court against his or her "contractor" on behalf of the deceased child's brothers and sister. It stated that the task of an *ad hoc* representative with responsibility for defending minors' interests was very strictly circumscribed and limited to representing the latter in the context of the investigation stage and criminal proceedings, and that he or she could not go beyond that role.

117. The applicant association also stated that although M.'s paternal aunt (the father's sister) had joined the proceedings as a civil party in order to be able to attend the trial hearings before the assize court in their entirety, she had never considered it necessary to be assisted by a lawyer or to submit a single claim for compensation in respect of any damage, having decided that there was no reason for her to do so.

118. Arguing that the alleged violations of the Convention were serious ones, and that it had taken part in all of the domestic proceedings, it concluded that only child-protection associations were in a position to take effective action to ensure respect for the child victim's rights.

B. The Court's assessment

119. The Court has reiterated its case-law concerning "direct victims" and "indirect victims", and the principles deriving from it, in the judgment *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, §§ 96- 100, ECHR 2014).

120. In the present case, it considers that the applicant associations cannot claim to be direct victims of the alleged violations, since the direct victim was M., or indirect victims, given the absence of a "sufficiently close link" with the direct victim or a "personal interest" in pursuing the complaints, within the meaning of the Court's case-law (see, *mutatis mutandis*, *ibid.*, §§ 106-109, and *Bulgarian Helsinki Committee v. Bulgaria* (dec.), nos. 35653/12 and 66172/12, § 51, 28 June 2016).

121. The issue to be examined is thus whether it can be considered that "exceptional circumstances" enable the Court to recognise that the applicant associations have *locus standi* as the child's representatives, even in the absence of a power of attorney and although she died before the applications were lodged (*ibid.*, § 51, with further references, and *Kondrulin v. Russia*, no. 12987/15, § 31, 20 September 2016).

122. The Court reiterates the "exceptional circumstances" identified by it in the above-cited *Centre for Legal Resources on behalf of Valentin Câmpeanu* judgment to justify granting an applicant association standing as a *de facto* representative, namely: the vulnerability of the direct victim, making it impossible for him to initiate a complaint while he was alive; the seriousness of the allegations made before the Court; the absence of heirs or

legal representatives to bring Convention proceedings on his behalf; the contacts which the applicant had with the victim and its involvement in the domestic proceedings following his death, and the domestic authorities' acknowledgement that it had standing to act on his behalf (see *Bulgarian Helsinki Committee* (dec), cited above, § 52). Taking into account the exceptional nature of this application of the concept of *locus standi*, the Court considers that the above criteria are decisive for the examination of the present applications.

123. With regard to the vulnerability of the direct victim, there can be no doubt that, during her life and given her young age, the child was incapable of initiating any proceedings to complain about the outcome of the investigation conducted following the child-welfare report (see, *mutatis mutandis*, *ibid.*, § 53).

124. Equally, it is not disputed that the present applications raise serious allegations of violations of the Convention concerning the rights protected by Articles 2 and 3 (*ibid.*). The Court also notes that the violence inflicted on M. and the alleged inability or failure to detect her suffering on the part of the services responsible for protecting her are particularly serious.

125. With regard to the absence of heirs or legal representatives capable of applying to the Court on her behalf, the present case differs from the other situations examined by the Court hitherto.

126. Thus, M. did not die in an institution, but as a result of ill-treatment inflicted by her parents in the family setting. Her parents cannot therefore represent the victim in their capacity as legal representatives, given that they are the very individuals serving thirty-year prison sentences for the offences in question. In such a scenario, only the heirs remain entitled to lodge, if appropriate, an application with the Court.

127. With regard to her siblings, M. admittedly had three brothers (A., R., and D.) and one sister (O.), unlike the victims in the cases of *Centre for Legal Resources on behalf of Valentin Câmpeanu* (cited above, § 111) and *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania* (no. 2959/11, § 43, 24 March 2015). However, M.'s brothers and sister were all minors when she died (they were aged between one and ten years at the relevant time), and they were still minors when the present applications were lodged. In this connection, the Government cannot usefully rely on the argument that A., M.'s older brother, reached the age of majority almost two years after the expiry of the six-month deadline within the meaning of Article 35 § 1 of the Convention, and eight years after M.'s death. In addition, as noted above, the ill-treatment at the centre of the present application was inflicted in the family setting. Thus, quite apart from the young age of M.'s brothers and sister, their familial and emotional proximity to the victim, and to the perpetrators of the violence – their parents –, made it particularly difficult if not impossible for

them to bring action against the State to secure compliance with its positive obligations towards their sister, M.

128. Admittedly, the Government were correct in pointing out that the minors had witnessed the violence inflicted on M., and that they joined the proceedings before the assize court as civil parties, through an *ad hoc* representative appointed for that purpose. However, the Court agrees with the applicant associations in finding that the role of this *ad hoc* representative was limited to representing the minors in the criminal proceedings led to the parents' conviction; indeed, the term used by the Government, namely "appointed for that purpose", confirms this. Equally, the Court is unable to subscribe to the Government's argument that the children's judge could at any point appoint an *ad hoc* representative, who could take any decisions likely to serve the minor's best interests, including where this involved bringing liability proceedings against the French State. This argument remains a purely abstract one, especially taking into account the fact that M.'s brothers and sister were placed in a foster family immediately after their parents were arrested and that, according to an educational assistant, they had difficulty in adapting to life outside their family context, which they viewed as being "normal" (see paragraph 43 above). Bringing civil liability proceedings against the State (and, *a fortiori*, the lodging of an application with the Court) would thus not necessarily have been in their best interests, given the very vulnerable situation in which they already found themselves. In those circumstances, the Court considers that M.'s three brothers and her sister cannot be regarded as persons in a position to lodge an application with the Court.

129. As to M.'s paternal aunt, the Court notes, firstly, that the Government have not provided any information as to any relationship forged by her with M. during the latter's life. It notes that the association Innocence en Danger has submitted that this aunt had no particular relationship with the child. In addition, the applicant associations indicated – and this is not disputed by the Government – that she joined the proceedings as a civil party solely in order to be able to attend the deliberations before the assize court, which were held in private. Indeed, this allegation appears to be corroborated by the fact that M.'s parental aunt is listed as "neither present nor represented" in the judgment of 5 October 2011 (see paragraph 46 above). In those circumstances, and given that, in any event, the paternal aunt was neither the deceased child's heir nor her representative, the Court considers, on the basis of the material available to it, that M.'s paternal aunt too cannot be regarded as a relative who was in a position to lodge an application with the Court.

130. Lastly, the Court notes that the associations, which admittedly had not had any contact with M. before her death, have demonstrated their "attempts to raise the questions with the national authorities before doing so before the Court" (see, *a contrario*, *Nencheva and Others v. Bulgaria*, no. 48609/06, § 93, 18 June 2013). They were civil parties throughout the

criminal proceedings which took place after M.'s death, that is, in the context of the parents' indictment and then during the trial before the assize court (see paragraph 46 above). They also brought proceedings against the State in respect of civil liability, which ended before the Court of Cassation (see the proceedings described in paragraphs 49 et seq.). Throughout those proceedings, they had a "procedural status encompassing all the rights enjoyed by parties" (see paragraphs 83-84 above), unlike the applicant association in the case of *Bulgarian Helsinki Committee* (dec.), cited above, § 59).

131. In view of all the foregoing considerations, the Court considers that there are "exceptional circumstances" enabling it to grant standing as M.'s *de facto* representatives to the two applicant associations, whose aim is precisely to work for child protection and which actively participated in the national proceedings with genuine procedural status under domestic law (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 112 and 114).

132. Accordingly, the Court dismisses the Government's objection concerning the applicant associations' lack of *locus standi*.

III. SCOPE OF THE CASE

133. Relying on Article 2 of the Convention under its substantive limb, both applicant associations complained of failings by the State bodies. They complained, in particular, about the decision to discontinue the case, taken by the prosecutor's office on 6 October 2008 after a police investigation that had, in their view, been ineffective. The association Enfance et Partage relied on Article 6 of the Convention in this connection. Relying on Article 3 of the Convention under its substantive limb, the association Innocence en Danger considered that the system had failed to protect M. from the ill-treatment inflicted by her parents, resulting in her death. Under Article 13 read in conjunction with Article 2 of the Convention, the same association further complained about the need to establish gross negligence in order to be able to bring civil liability proceedings against the State in respect of the defective operation of the public justice system.

134. The Court considers, as regards the complaints submitted by the applicant associations under Articles 2, 3 and 6 of the Convention, that the scope of the case relates to whether the domestic authorities ought to have detected the ill-treatment to which the child was being subjected and protected her from the acts which ultimately led to her death. The Court, being master of the characterisation to be given in law to the facts of the case, considers it appropriate to examine these complaints under Article 3 of the Convention. Following this approach, it considers it appropriate to examine the complaint under Article 13 in conjunction with Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

135. Relying on the substantive aspect of Article 3 of the Convention, the association Innocence en Danger considered that the system had failed to protect M. from the extremely severe parental abuse to which she was subjected, and which had resulted in her death. It considered that the authorities, which at a certain point ought to have recognised the danger to which the child was exposed, had been under an obligation to protect her more effectively.

Article 3 of the Convention reads as follows :

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

A. Admissibility

136. The Government considered that the complaint alleging a violation of the State’s positive obligations in respect of the facts which occurred after the decision of 6 October 2008 to discontinue the proceedings was inadmissible, for failure to exhaust the domestic remedies. In this connection, they stated that the applicant associations ought to have brought proceedings against the *département* for negligence; complained about the wrongful failure to act of the service or services which they considered responsible; and submitted a compensation claim to the administrative courts for the damage they had sustained. Referring to the judgment in the case of *Bozano v. France* (18 December 1986, § 49, Series A no. 111) and to examples from the existing case-law in this area (see paragraph 89 above), the Government concluded that a claim for damages (*recours indemnitaire*) – available at the time that the application was lodged with the Court – amounted to a remedy capable of providing financial redress and offered reasonable prospects of success.

137. The association Innocence en Danger challenged the argument that the *Bozano* judgment – given its age and the relative character of the Court’s finding therein – amounted to evidence that liability proceedings against the public authorities were effective. Further, it considered that the cited examples of domestic case-law also failed to demonstrate the effectiveness of those remedies, as the first three cases relied on were not, in its view, comparable to the present case and the last – dating from 2012 – did not show that a remedy had been available at the time of the events in question, which dated back to 2009.

138. The Court refers to the applicable principles concerning the requirement to exhaust domestic remedies under Article 35 § 1 of the Convention, as set out in particular in the *Vučković and Others v. Serbia* judgment ([GC], no. 17153/11, §§ 69-77, 25 March 2014). It notes that in the *Bozano* judgment (cited above, § 49), which concerned the possibility of

submitting a claim to the administrative courts in respect of the liability of the public authorities, the Court found that such a remedy had proved illusory for the purposes of the Convention in the circumstances of that case.

139. In the present case, the Court considers that neither its finding in the above-cited *Bozano* judgment, nor the case-law relied on by the Government, suggest that the applicant association ought to have brought proceedings for liability against the public authorities for the period after the investigation was discontinued. The first three cases referred to by the Government concerned minors who were under the direct responsibility of the Child Welfare Service (the ASE), unlike the situation in the present case. Equally, although it originated in a report of concern, the last of the decisions cited above by the Government is also not comparable to the present case. That decision the suspension of a father's access rights following a report by the social services, without verification of the truthfulness of the children's statements or an interview with the father, while the present case concerns the issue of whether the authorities detected a child's ill-treatment by her parents, with whom she lived.

140. In any event, the Court notes that in the present case the period after the investigation was discontinued had indeed been the subject of discussion. In the context of the action used by the applicant association to establish civil liability for the defective operation of the justice system – which gave rise to two decisions, at first instance and on an appeal on points of law –, the judgment of 6 June 2013 had ruled on the argument about the report of concern received after the investigation had been discontinued (see paragraph 52 above). Further, a complaint alleging failure to assist a person in danger was more specifically targeted at the Sarthe *Département* Council (see paragraph 57 above). Admittedly, this complaint had been lodged by another association for child protection (which is not an applicant party to the current case) and the relevant proceedings differed, by their nature, from an action in respect of the public authorities' liability. It remains the case that the prosecutor, after an investigation, decided to take no further action on this complaint, on the grounds that it had not been established that the persons heard had been aware of the seriousness of M.'s situation. The Court considers that, given such conclusions, and in the specific circumstances of the present case, the Government cannot criticise the applicant association for not having brought an action in respect of the public authorities' liability for the period after the decision to discontinue the case.

141. In these circumstances, the objection raised by the Government to in that respect must be dismissed.

142. Further noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds, the Court declares it admissible.

B. Merits

1. The parties' submissions

(a) The association Innocence en Danger

143. The applicant association considered it undeniable that the neglect, abuse and ill-treatment suffered by M. had reached a threshold of severity that could be classified as torture.

144. It stated that warning signs had existed from 2003 onwards – late entry to the school system, poor school attendance, and the family's successive and hasty changes of address – and that the alert of 19 June 2008 had not been based solely on M.'s absence, but rather on the transmitted school file, which referred to injuries.

145. It considered that up until the point when the case was discontinued, the preliminary investigation stage had been characterised by slowness and passivity, regard being had to the low number of investigative measures taken. On this last point, it repeated the arguments already submitted in the context of the proceedings to establish the State's civil liability (see paragraphs 49 and 52 above). It also argued that the video of the interview with M.'s interview showed (i) inconsistencies in certain replies, and (ii) that the child had used stereotypical expressions – as though they were phrases learned by heart – about her injuries.

146. The applicant association also complained about the failings on the part of the judicial and welfare authorities after the preliminary investigation stage and until M.'s death. It regretted the lack of follow-up given to the case by the prosecution service, inefficiency on the part of the social services and inadequate communication between the various entities involved in child protection.

In particular, it criticised the prosecutor's office for failing to inform the professionals who were in contact with M. about the decision to discontinue the case or the need to remain vigilant with regard to the child.

It also criticised the ASE's inappropriate reaction to the report of concern of 27 April 2009 and to the memorandum prepared by the paediatric ward in which M. was treated for a month.

(b) The Government

147. The Government disputed that there had been a violation of Article 3 of the Convention. They stressed that the authorities' positive obligations could not be assessed *a posteriori* in the light of the events which had occurred, however tragic these were, given that, in spite of the authorities' vigilance, they had been unforeseeable.

148. At the outset, the Government considered it necessary to place the child-protection alert of 19 June 2008 – which did not refer to the necessity of an immediate protection measure – in context. Thus, for example, the

school doctor had noticed “nothing alarming” and only handwritten notes had been drawn up by the staff in the previous school, who had made no mention of the marks noted by the school doctor on a medical certificate. According to the Government, this child-protection alert had thus been submitted in a context of mild concern about M.

149. The Government then endorsed the reasoning given by the Paris District Court in its judgment on the civil liability proceedings against the State, to which they referred (see paragraph 52 above).

150. They added that the investigation had not identified grounds for suspecting that M. was being subjected to ill-treatment, as the investigators and the forensic doctor had been unable to confirm the reality of violence against the child, and she herself had made no complaints.

151. With regard to the interview with M., the Government stated that the sentence “Clearly prepared, she is relaxed” implied only that the child had been warned by police officers that she would be questioned, so that she would not be frightened. They considered that, during this interview, M. had given plausible and spontaneous explanations for each of the bruises. Although subsequent events had shown that the child had probably prepared explanations in advance, on instructions from her parents, the Government stressed that it had been impossible to detect this at the time of the investigation.

152. The Government submitted that it would be incorrect to state that the parents had not been questioned. In this connection, they noted that M.’s father had been questioned by the forensic doctor, in that he had attended the medical examination in his capacity as her legal representative. For her part, M.’s mother had given plausible explanations for M.’s injuries during the visit to the family home on 17 September 2008. On this point too, the Government argued that it was only subsequent events which had shown that the consistency between the mother’s explanations and those of the child was the result of steps taken by the parents to prepare these interviews.

153. For these reasons, the Government concluded that there had been no negligence on the part of the investigators and the prosecutor.

154. As to the phase following the decision to take no further action, the Government stated that although the judicial authority, when discontinuing the case on 6 October 2008, had admittedly failed to notify the Sarthe child protection department with a view to having M.’s situation assessed, another public service had raised its concerns. They pointed out that the school principal had sent a report of concern to the ASE on 27 April 2009, and that this report had given rise to home visits by two members of staff. Those persons had each written a report on the visit, which did not note any specific matters of concern, and had continued their assessment of the report of concern, in particular through further visits.

155. Thus, for the period after (as well as before) the decision to discontinue the case, the Government repeated that a real and immediate

danger had not been discernible, although M.'s situation had, in their submission, been monitored carefully by the ASE. As evidence, they pointed to the comments by the *Défenseur des droits*, to the effect that the reality of the child's situation had become clear only after her death.

2. The Court's assessment

(a) General principles

156. The Court reiterates that 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 is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Opuz v. Turkey*, no. 33401/02, § 158, ECHR 2009).

157. As regards the question whether the State could be held responsible, under Article 3, for ill-treatment inflicted on persons by non-State entities, the Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V; *E. and Others v. the United Kingdom*, no. 33218/96, § 88, 26 November 2002; *M.C. and A.C. v. Romania*, no. 12060/12, §§ 109-110, 12 April 2016; and *D.M.D. v. Romania*, no. 23022/13, §§ 40-41, 3 October 2017). With particular reference to children, having regard to the fundamental nature of the rights guaranteed by Article 3 and the latter group's particularly vulnerable nature, it is an inherent obligation of government to ensure their protection from ill-treatment, (see, for example, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 145, ECHR 2014 (extracts), concerning the primary education context).

158. The Court has previously stated that it is not its task to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Article 3 of the Convention (see *Opuz*, cited above, § 165). However, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged.

The question of the appropriateness of the authorities' response may raise a problem under the Convention (see *Talpis v. Italy*, no. 41237/14, § 103, 2 March 2017, with the references mentioned therein).

(b) Application to the present case

159. The Court considers that M. can be regarded as belonging to the category of "vulnerable persons" entitled to State protection (see *Talpis*, cited above, § 126) and that the ill-treatment to which she was subjected by her parents fell within the scope of Article 3 of the Convention (see, *mutatis mutandis*, *C.A.S. and C.S. v. Romania*, no. 26692/05, § 73, 20 March 2012).

160. The present case does not directly address the issue of the responsibility of M.'s parents for the acts of ill-treatment in question, but rather that of the State's responsibility. The Court must examine whether, at the relevant time, the respondent State ought to have been aware of the risk that M. might be subjected to ill-treatment and whether it provided adequate protection in that regard. In this connection, the Court considers that the Government rightly stress the importance of analysing the facts and evidence available to the national authorities at the relevant time, rather than in the light of the events which have in the meantime revealed the full seriousness of the acts committed by the parents.

161. The Court considers that the "child-protection alert (suspected ill-treatment)", submitted by the headteacher and dated 19 June 2008 (see paragraph 11 above) drew the authorities' attention to the possibility that M. had been subjected to ill-treatment and that there was a potential risk that this might reoccur. This alert thus triggered the State's positive obligation to conduct an investigation in order to assess the possibility of ill-treatment and, if necessary, to identify the perpetrator and to protect the child from future ill-treatment (see, *mutatis mutandis*, *M. and M. v. Croatia*, no. 10161/13, §§ 140-142, ECHR 2015 (extracts)).

162. The Court acknowledges at the outset the difficult nature of the task faced by the national authorities when they are required, in a sensitive area, to strike a balance between the need not to miss a dangerous situation and the wish to respect and preserve family life.

163. The Court then notes, with the Government, the prosecutor's immediate responsiveness, in that, on the same day as he received the alert (which, after all, did not indicate the necessity of an immediate protection measure), he sent written instructions to the gendarmerie, ordering an investigation into "possible instances of ill-treatment to which the child may be subjected" (see paragraph 12 above). The Court also notes that, in the context of this investigation, worthwhile and relevant measures were taken, such as the filmed interview with the child and her examination by a forensic doctor.

164. However, the Court considers that several factors temper the scope of these findings, for the reasons set out below.

165. It notes firstly that, in response to the prosecution service's prompt reaction, it was not until only thirteen days later that a police officer was assigned to the case and that the recommendations about real-time processing of the case were ultimately not complied with (see paragraphs 12 and 14 above).

166. It further notes that various signs and indications had been brought to the authorities' attention following the child-protection alert of 19 June 2008. For example, copies of four hand-written pages prepared by M.'s teachers, noting the presence of numerous marks on the child's body, had been attached to this alert (see paragraph 11 above).

167. The Court consider that, although the teachers had admittedly not witnessed the events which led to the marks in question, it would nonetheless have been useful to question them, in order to gather information about the context and the child's reaction when the injuries were discovered. This was especially true in that the forensic doctor was unable to exclude violence or ill-treatment (see paragraph 16 above) and that the ASE had also informed the prosecutor that fresh bruising had been observed after the alert was sent (see paragraph 13 above). In this connection, the Court notes that, where signs of ill-treatment of a child are observed, teachers can play a primordial role in the system to combat violence, as indeed is illustrated by the preceding events in the present case. Teachers, who are sometimes the only people in whom a child can confide, and who are responsible for observing him or her closely on a daily basis, are thus well-placed to have a global overview of his or her development.

168. The Court considers that it would have been useful to carry out investigative measures to shed light on M.'s family environment. This was all the more relevant in view of the family's successive changes of address, about which the authorities had also been informed, in particular through the child-protection alert of 19 June 2008 and the letter of 26 September 2008.

169. Thus, the Court notes that M.'s mother was questioned by the police officer responsible for the investigation, in a summary manner, at her home, and not within the gendarmerie premises.

170. In addition, the father's presence at M.'s forensic examination cannot usefully be relied upon by the Government. A statement made as the child's legal representative before a medical expert cannot be equated with a genuine interview in the context of an investigation, in the course of which specific questions are asked. The Court also notes in this respect that the Sarthe *département* protocol (see paragraph 81 above) now provides that the forensic medical examination is to be carried out by the forensic doctor alone with the child, and that the judge responsible for the investigation will be able to request that the doctor refrain from contacting the child's parents or relatives.

171. On this point, the Court notes that a list of best practice, recommended in this type of sensitive situation, has now been formally set

out in the Sarthe *département* protocol (see paragraphs 81 et seq. above). However, given that the protocol did not exist at the relevant time, these examples of good practice were not implemented in the present case.

172. Admittedly, M. made no complaints when she was questioned. However, the relevant interview was conducted without the involvement of a psychologist. Although not mandatory, the presence of such an expert could have been appropriate in the presence case, in order to dispel any doubt as to the questions raised by the child-protection alert and the forensic medical report. In this connection, the Court notes that the Sarthe *département* protocol, which now states that the child's testimony must be taken in the premises of the paediatric forensic unit (that is, within the paediatrics department), also recommends that steps be taken to help the child express himself or herself, particularly through the presence (alongside the investigator or the investigating judge) of a third party, appointed by the judicial authority, such as an *ad hoc* representative, a social worker, a psychologist or a specialised nurse.

173. The Court reiterates that it is not its task to replace the national authorities and to choose in their stead from among the possible measures that could be taken. Thus, it is not its function to call into question, in itself, the decision to take no further action. On the other hand, it considers that, having regard to the information available to them – such as the “highly suspicious ... number [of injuries] ... very large number of ... injuries” reported by the forensic doctor (see paragraph 16 above), and a further change of address by the family at the same time as the investigation was closed (see paragraph 21 above) –, the authorities ought to have ensured that the decision to discontinue the case was accompanied by certain precautions, and not simply to regard it as the end of the matter.

Thus, if the prosecution service, through written instructions or any other form of communication, even an informal one, had informed the ASE of its decision, while drawing the latter's attention to the need for a social welfare report or, at the least, for supervision of the child, this would have increased the likelihood of an appropriate reaction on the part of the social services after the discontinuance decision. There is every indication that, had this occurred, the ASE would have redoubled its vigilance in the period after the discontinuance decision and, in any event, at the latest when the report of concern was transmitted to it. This finding is supported by the report of the *Défenseur des droits*, who considered that the decision to discontinue the investigation had placed an “excessive psychological burden” on all the bodies involved in child protection, who had not raised with the prosecution service the new information received in the spring of 2009 (see paragraph 94 above).

In addition to the failure by the prosecutor's office to transmit information to the ASE, at the relevant time there existed no system in the region for centralising reports of concern, such as a unit for gathering, processing and

assessing such reports (see paragraphs 31 and 69 above). Such an information-gathering unit – tasked with bringing together in a single location all reports about children who are at risk or likely to be so, in such a way as to ensure that this information is dealt with by a specialised service – could have acted as an interlocutor for the social services in the *département* and the prosecution service. It could thus have informed the professionals who had sent the alert of 19 June 2008 about the follow-up given to their action, then monitored the file.

Taken together, these factors – a mere discontinuance decision, and the lack of a mechanism to centralise information – significantly reduced the chances of increased supervision of the child or of a useful exchange of information between the judicial authorities and social services.

174. The social services, which eventually learned about the discontinuance decision, admittedly then took measures, in particular through home visits, conducted in response to the report of concern of 27 April 2009 (see paragraph 27 above). However, it is important to point out that this report coincided with M.'s hospitalisation for an entire month, which had led the paediatric department to make contact with the ASE – motivated by persistent questions about the child's situation – and even to submit an additional memorandum to the ASE (see paragraph 29 above). The Court considers that this latter fact was an additional element which spoke for itself, and that the social services could not reasonably disregard it. Given these combined factors – a report of concern and concomitant hospitalisation – they ought to have been much more vigilant in assessing M.'s situation. The fact is, however, that in the wake of the decision to discontinue the investigation, they did not take the meaningful action which would have enabled them to identify the child's actual situation.

175. In the light of the above findings, the Court concludes that the system failed to protect M. from the serious abuse inflicted on her by her parents, which ultimately led to her death.

176. It follows that there has been a violation of Article 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

177. The Association Innocence en Danger complained about the need to establish gross negligence within the meaning of Article L. 141-1 of the Code of Judicial Organisation (COJ) in order to be able to bring civil liability proceedings against the State for shortcomings in the public service of justice. It considered that this requirement was disproportionate in the light of the absolute necessity of protecting children and was contrary to the right to an effective remedy. It 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.”

A. Admissibility

178. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds, the Court declares it admissible.

B. Merits

1. The parties' submissions

(a) The association Innocence en Danger

179. The applicant association emphasised the absolute necessity of protecting the best interests of the child, as guaranteed by all relevant international texts, and particularly by Article 3.1 of the International Convention on the Rights of the Child. While it accepted that it was legitimate that the conditions for bring civil liability proceedings against the State in respect of its task of ensuring the public justice system could derogate from the provisions of ordinary law, with a view to protecting judges in their function of adjudicating, it considered that these derogations could not be at the cost of protecting children, who were especially vulnerable.

180. It added that the requirement to establish ordinary negligence (and no longer of gross negligence) would have the effect of rendering State protection for young children and victims of ill-treatment more effective and compatible with the requirements of international law. It also argued that, under the Court's case-law, an applicant was required only to demonstrate a failure to implement reasonable measures, which, in its view, corresponded to the definition of ordinary negligence. It concluded that the requirement under French law to establish gross negligence was inconsistent with the Court's case-law.

181. The applicant association argued that the majority of the case-law precedents cited by the Government (see paragraph 87 above) concerned individuals in police custody or pre-trial detention and that the solutions provided by them were not transposable to the present case. It considered that the Paris Court of Appeal's recent judgment, delivered on 17 January 2017 in a case concerning domestic violence, in fact demonstrated the unpredictability of the judicial remedy and, *a fortiori*, its ineffectiveness, since, in spite of similar and therefore transposable facts, the solution provided by the judicial authority in that case had been diametrically opposed to that in the present case.

(b) The Government

182. The Government considered that the concept of gross negligence within the meaning of the provisions of Article L. 141-1 of the COJ did not undermine the right to an effective judicial remedy for the purposes of Article 13 of the Convention.

183. They argued that the legislature's decision to opt for a system of civil liability against the State, in the limited context of gross negligence or of denial of justice, reflected an approach that took account of the complexity of the operations of the justice system and of the guarantees inherent in the justice system, which included the independence of sitting judges and the authority of *res judicata* attached to final decisions. They considered that the task of judging should not be subject to condemnation by individuals who were unhappy with judicial decisions, and noted that the judicial function of legal interpretation and factual assessment contained an element of uncertainty and thus a possibility of error, which was not, as such, sufficient to demonstrate a failing.

184. Noting that the conditions for engaging the liability procedure had been eased by the case-law since 2001, the Government referred to examples from the case-law (see paragraphs 86 and 87 above) which, in their view, showed that a case-by-case assessment of the concept of gross negligence within the meaning of the provisions of Article L. 141-1 of the COJ by the domestic courts enabled victims to maintain access to an effective judicial remedy.

2. The Court's assessment

(a) General principles

185. Article 13 of the Convention requires domestic legal systems to make available an effective remedy empowering the competent national authority to address the substance of an "arguable" complaint under the Convention (see *Z and Others*, cited above, § 108). Its object is to provide a means whereby individuals can obtain appropriate relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

186. However, the protection afforded by Article 13 does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in conforming to their obligations under this provision (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 146, ECHR 2004-XII).

187. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the

authorities of the State. In certain circumstances, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 218, 25 June 2019).

(b) Application of these principles in the present case

188. In view of its finding of a violation of Article 3 of the Convention in paragraphs 159 to 176 above, the Court considers that the applicant association's complaint concerning the lack of necessary and appropriate measures to protect M. from ill-treatment by her parents, resulting in her death, is arguable for the purposes of Article 13 of the Convention. It is therefore applicable.

189. In the context of its examination of the complaint under Article 13, the Court notes at the outset that the conditions for engaging the State's civil liability have become less stringent by the French courts' case-law (see paragraphs 86-87 above). This is also clear from the judgment of 6 June 2013, in which the national court set out the elements characterising the concept of gross negligence. In particular, this judgment points out that "[although] taken separately none of these possible negligent acts amounts to gross negligence, taken in the aggregate they may give rise to defective functioning of the justice service and thus amount to gross negligence such as to engage the State's liability ..." (see paragraph 52 above).

190. As to the case-law relied on by Government (see paragraphs 86-87 above), the Court notes that the precedents relating to deaths of prisoners or individuals in police custody occurred in contexts that differ from the present circumstances. In the cases in question, the deceased persons had been under the direct responsibility of the State, unlike M., who died from ill-treatment inflicted by her parents at their home.

Admittedly, in one decision the State was found to be liable, in a case in which a woman had been killed by her partner notwithstanding the fact that she had filed a complaint against him, and no criminal-law response had been given to this complaint. The Court considers, however, that this isolated decision cannot be regarded as a relevant precedent. In addition to the fact that it was delivered after the present applications had been lodged, the decision in question concerns a case of domestic violence between partners and not ill-treatment inflicted on a child by her parents.

191. Although the precedents relied on by the Government cannot thus usefully be taken into account in the context of the present case, the Court notes on the other hand that the interpretation of the concept of "gross negligence" by the domestic courts allows them to establish ordinary negligence, particularly in cases of multiple faults resulting in defective functioning of the justice service, and to conclude that, in the aggregate, they amount to serious negligence that engages the State's liability.

192. In particular, the Court emphasises that the Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *Kudla*, cited above, § 152). As is clear from the case-law cited in paragraph 186 above, however, the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint and the States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see also *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 77-78, ECHR 2012). The Court reiterates that the effectiveness of a remedy within the meaning of the Convention does not depend on the certainty of a favourable outcome for the applicant (*ibid.*, § 79, and *Kudla*, cited above, § 157).

193. In the present case, it does not appear unreasonable for the French legislature to have laid down a framework to govern the possibility of establishing the State's civil liability in this particular context, by requiring [the existence of] gross negligence, which could consist of an accrual of instances of ordinary negligence entailing a failure of the justice system, with a view to protecting the independence of the justice system. The Court can accept the Government's argument that this demarcation was intended to protect judicial independence and to guarantee a certain serenity in the tasks of investigating and judging, without fear of condemnation from individuals who were unhappy with judicial decisions. Thus, the Court can accept that establishing a limited context for State civil liability corresponds to a choice by the legislature, in the light of the organisational complexity of the justice system and the specificity of the judicial function, including investigative and police activities. It reiterates, however, that in accordance with the requirements of Article 13, the choice of such a framework must in any event provide a remedy that is "effective" in practice as in law.

194. The Court then notes that the applicant association was able to bring its case before the ordinary courts in order to have its complaints examined as to the failings which it attributed to the police and prosecution services. The ordinary courts had jurisdiction to rule on those complaints and duly examined them, without restricting themselves to a separate examination of gross negligence alone, in the context of proceedings in which the applicant association was able to submit all of its arguments and evidence (see, *a contrario*, *Kontrová v. Slovakia*, no. 7510/04, § 65, 31 May 2007; compare with *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 152, in which the Court had regard to the limited impact of the remedies relied on by the Government and lack of procedural guarantees). The mere fact that the applicant association's claim were dismissed is not in itself sufficient to determine whether or not the remedy in question was

“effective” (see, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, § 89, ECHR 2000-II). As indicated above, the effectiveness of a remedy within the meaning of Article 13 of the Convention does not depend on the certainty or otherwise of a favourable outcome for the applicant.

195. In conclusion, the fact that the applicant association did not satisfy all the requirements laid down in L. 141-1 of the COJ did not, in the Court’s view, suffice to conclude that the remedy, taken as a whole, was contrary to Article 13 of the Convention.

196. It follows that there has been no violation of Article 13 taken together with Article 3 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

197. 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

198. The association Innocence en Danger asked that it be awarded one token euro in respect of the alleged non-pecuniary damage.

199. The Government considered that, were a violation to be found, the amount claimed was not unreasonable.

200. The Court considers it appropriate to award the association Innocence en Danger one token euro in respect of non-pecuniary damage.

201. The association Enfance et Partage did not submit any claim for just satisfaction. In consequence, the Court considers that there is no call to award it any sum under this head.

B. Costs and expenses

202. The association Innocence en Danger claimed EUR 17,769.22 in respect of the costs and expenses incurred in the domestic proceedings, of which EUR 10,000 corresponded to the costs incurred before the Paris District Court (see paragraph 49 above) and EUR 7,762.22 to those incurred before the Court of Cassation (see paragraph 56 above). It claimed a further EUR 6,000 in respect of the costs and expenses incurred in the proceedings before the Court.

203. The Government, while acknowledging that the applicant association had submitted supporting documents in the form of invoices corresponding to the amounts claimed, considered that a total amount of EUR 23,769.22 was excessive. They requested that the sum be reduced to

what they considered a more reasonable level. In this connection, the amount of EUR 6,000 was, in their view, reasonable.

204. 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 were 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 association Innocence en Danger the sum of EUR 15,000, covering costs under all heads.

C. Interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention;
4. *Holds* that there has been no violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention, as regards the association Innocence en Danger;
5. *Holds*
 - (a) that the respondent State is to pay the association Innocence en Danger, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, one token euro in respect of non-pecuniary damage, and EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the association Innocence en Danger on that amount, 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;
6. *Dismisses* the remainder of the claim for just satisfaction submitted by the association Innocence en Danger.

ASSOCIATION INNOCENCE EN DANGER
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Done in French, and notified in writing on 4 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik
Deputy Registrar

Síofra O’Leary
President

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

S.O.L.
V.S.

JOINT CONCURRING OPINION OF JUDGES YUDKIVSKA
AND HÜSEYNOV

We voted together with our esteemed colleagues in favour of all points in the operative part of this judgment. We cannot, however, share the approach expressed in paragraph 134 – despite the acknowledged fact that the 8-year-old child (M.S.) died as a result of severe ill-treatment – that “the Court considers it appropriate to examine these complaints under Article 3 of the Convention”. It is to be stressed that the judgment provides no explanation for this approach.

In our view, the decision not to examine an instance of fatal child abuse under Article 2 of the Convention overlooks, on one hand, the specific nature of domestic violence as a distinctive social phenomenon and, on the other, the particular vulnerability of a child in the context of domestic violence. In *Talpis v. Italy* (no. 41237/14, § 122, 2 March 2017), the Court noted that “the risk of a real and immediate threat [to the life of an individual] must be assessed taking due account of the particular context of domestic violence”, emphasising more specifically the obligation “to take account of successive episodes of violence within the family unit”. Thus, the so-called *Osman* test, which requires that “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual” so that the State’s positive obligations are triggered, cannot be applied without a due assessment of the particular features of domestic violence, in our case – parental violence towards the child which lasted for years. Such violence, as we know from the sad statistics and relevant studies, is usually continuous, that is, it is not related to an isolated incident but is repetitive and – quite often – intensifying in seriousness.

All victims of domestic violence can be regarded as vulnerable (see § 99 of the *Talpis* judgment), but the vulnerability of children in that context is obviously much higher. This is because children are too helpless in a face-to-face situation with the perpetrators and are incapable of defending themselves. Moreover, as the Committee on the Rights of the Child emphasised in its General Comment No. 13 (2011), “babies and young children are at higher risk due to the immaturity of their developing brain and their complete dependency on adults” (§ 72(f)). It is widely recognised that violence against children may potentially have fatal consequences. Given this vulnerability, for a child to be severely abused is life-threatening. Therefore, in this particular context the *Osman* test is fulfilled by the ‘realness’ of the threat, which means that there is a great likelihood that this risk will materialise if the State authorities fail to display the requisite degree of diligence.

In this regard, we deem it important to refer to a study by the French General Inspectorate of Social Affairs¹, indicating that a child is killed by one of his or her parents every five days. A key conclusion from this report (p. 35) finds that “*more than half of the children concerned had been subjected prior to their deaths to serious and repeated violence ..., frequently noted by professionals*. Warning signs existed and had been flagged up. Nonetheless, this had not made it possible to protect the children”.

In the present case, the “child-protection alert (suspected ill-treatment)” (see paragraph 11 of the judgment), received by the prosecutor on 19 June 2008 with a description of the marks found on M.S.’s body in 2007-2008 was clear: it showed that the child had been systematically ill-treated. Twelve instances of ill-treatment, leaving visible traces, occurred within an eight-month period. M.S. was regularly severely beaten by her parents. This clearly meant that her life was in danger. The prosecutor was then informed that the family had moved to another location– for the third time! (see paragraph 21). It looked suspicious; nevertheless, he “closed the case, on the grounds that the alleged offence was “not sufficiently made out” (see paragraph 23).

As a result, the long saga of ill-treatment culminated in tragedy. If, as stated in *D.M.D. v. Romania* (no. 23022/13, § 50, 3 October 2017), children should “have more, not less, protection from violence”, we should be clear – whenever we examine, as we state that we do in paragraph 160 of this judgment, “whether, at the relevant time, the respondent State ought to have been aware of the risk that M. might be subjected to ill-treatment”, we are speaking about a *real risk to life*; therefore the State’s obligations under Article 2 of the Convention are engaged.

The above-mentioned French report (p. 36) stressed that “the death of these children in appalling conditions (head injuries, bites, brain injury, multiple fractures, etc.) *resulted from a continuing escalation of physical and psychological violence that no one was able to detect or stop*”.

It is obvious that if parents regularly beat their child they will continue to do so – unless they are stopped by others. “Whoever wishes to foresee the future must consult the past; ...men have been, and ever will be, animated by the same passions”, as Niccolò Machiavelli teaches us.

Certainly, “family” is an important value; equally, children too are very precious. The contradiction arises when the family becomes a source of danger, and this is the point at which the authorities are obliged to intervene, in a prompt and adequate manner. A child whose life is at risk within his or her family must be rescued, in accordance with relevant legislative provisions and through effective institutional arrangements, which form an integral part of the positive obligations under Article 2 of the Convention.

¹ https://www.justice.gouv.fr/sites/default/files/migrations/portail/art_pix/2018-044%20Rapport_Morts_violentes_enfants.pdf

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Thus, having regard to the fact that specific risks for children in the context of domestic violence must be given due account, we consider that the present case ought to have been examined under Article 2 of the Convention. We regret that this judgment failed to convey a key message: if no adequate and timely measures are taken by the State authorities, severe child abuse in the domestic context is likely to be fatal.