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## **Judiciary and protection of victims**

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<http://www.ja-sr.sk/victimprotection>

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## Vladimár Cehlár: Saturation of the Needs of Victims via Criminal Mediation.

### Abstract

The introductory section of the article presents the field of probation and mediation in Slovakia with emphasis on criminal mediation. In the following section, the author outlines the criminal mediation application options from the viewpoint of the restorative principle. The actual diversion and the criminal mediation process are viewed as determining elements that should primarily saturate the needs of crime victims. A case study is used to explain the various parts of the mediation process as one of the possible approaches. The needs as well as sustainable alternatives from the viewpoint of a possible risk of recidivism are explained more broadly, as the process results in an agreement in the form of a consensus between the victim and the offender.

### Key words:

Mediation. Restorative principle. Crime victim. The accused. The convict. Mediation process. Mediator.

### 1/ Introduction (origins of probation and mediation in Slovakia)

In the second half of the 20<sup>th</sup> century, a quest for new forms of justice was launched both in Europe and in Slovakia to replace some traditional approaches in criminal proceedings. These forms or rather alternative solutions to criminal matters may be characterised: „*As specific approaches used as alternatives to standard criminal proceedings and peculiar forms of crime response presenting and alternative to a traditional prison sentence.*”<sup>1</sup> The alternative approaches intend to tailor the criminal sentence in particular. A positive feature is the effort to motivate crime offenders to get actively involved in the resolution of criminal matters to eliminate damages in favour of the victim. A parallel objective is to reduce the workload of courts and criminal law enforcement bodies, to address the lack of prison capacities and to create effective crime prevention forms.

The Ministry of Justice of the Slovak Republic drafted amendments to criminal law codes in the years 2000 to 2003. The idea of restorative justice became their philosophical background. This view of the prison sentence allows us to impose it in absolutely necessary cases only, unless a different solution to the criminal case can be found. The implementation of the alternatives required the establishment of the Probation and Mediation Service (hereinafter referred to as PMS).

One job position of an expert officer tasked with coordination of preparation and implementation of a PMS pilot project was opened since 1 August 2001 at the Ministry of Justice of the Slovak Republic, Criminal Law Division. It may be stated that PMS in Slovakia was developed as a centralised service taking local specifics into consideration. The intention was ***to promote the rights of crime victims on the one hand, to actively assist in re-socialisation of the offender and their seamless post-crime return into the society, and at the same time play an educational role vis-a-vis the entire society. PMS in Slovakia wished***

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<sup>1</sup> SOTOLÁŘ, A., PÚRY, F., ŠÁMAL, P. Alternativní řešení trestních věcí v praxi (Alternative Resolution of Criminal Matters in Practice). p. 3.

***to rank among institutions that would actively operate as part of crime prevention programmes.<sup>2</sup>***

The institute of conciliation (settlement) was introduced to the Code of Criminal Procedure in Slovakian conditions. This created room allowing the court, or the prosecutor in the pre-trial procedure, as applicable, to decide on approval of settlement and to suspend the prosecution, subject to meeting of conditions set by the law and subject to the consent of the accused and of the victim. One of the conditions the accused has to meet is to compensate the pecuniary damage, if incurred due to the crime, or to take another action to redress damage or to otherwise compensate non-pecuniary damage caused by the crime. Mediation as a dispute resolution form, where the dispute arose between the parties due to the crime, is used in holding deliberations between the offender and the victim. Act no. 550/2003 Coll. on Probation and Mediation Officers, effective since 01 January 2004 was passed upon conclusion and a positive review of the pilot programme.

## **2/ Operation of Probation and Mediation Officers in Slovakia**

A probation and mediation officer assists in having the criminal case heard in one of the special regimes of criminal proceedings, if applicable, or in allowing a non-prison sentence to be imposed and duly enforced, or in allowing custody to be replaced by another suitable measure. For this purpose, the probation and mediation officer shall:

- a) procure supporting documents concerning the person of the accused, on their family, social and work/professional background;
- b) create conditions for a decision on conditional suspension of prosecution or on approval of settlement;
- c) carry out acts to conclude an agreement between the victim and the accused concerning the pecuniary damage incurred as a result of the crime, or concerning the compensation of non-pecuniary damage incurred as a result of the crime;
- d) supervise the conduct of the accused during the probation period and control the execution of non-prison sentences;
- e) execute other criminal procedure acts in performing probation and mediation.

The probation and mediation officer shall carry out acts falling within their scope of competence in accordance with their job schedule on the basis of a counterpart of a legally effective court decision implying the duty to carry out probation, or on the basis of a written instruction by the presiding judge of the bench, by the single judge or by the prosecutor in the pre-trial procedure. In cases suitable for mediation, the probation and mediation officer shall also carry out acts without such instruction, in particular when prompted by the victim or by the accused, provided that the probation and mediation officer shall notify the competent law enforcement authority thereof in writing without delay; a written consent by the presiding judge of the bench, by the single judge or by the prosecutor in the pre-trial procedure shall be required to carry out mediation.

<sup>2</sup> Vyhodnotenie pilotného projektu PaM na Slovensku (Evaluation of the PaM Pilot Project in Slovakia). 2002. Author: Ministry of Justice of the Slovak Republic



In the execution of probation and mediation, the probation and mediation officer may obtain information and knowledge about the person of the accused and opinions of the victim that is of significance for the court or prosecutor's decision.

Upon passing of the Act on Probation and Mediation Officers, the Ministry of Justice of the Slovak Republic launched a recruitment procedure for the job position of the probation and mediation officer (hereinafter referred to as the „PMO“) via district courts.

The PMO is a court staff member, they may inspect files, review the convict's compliance with the imposed measures, inquire into the family, social, job/professional background of the offender, organise meetings between the offender and the victim, carry out mediations, draft agreements to be concluded between the offender and the victim. The PMO shall at the same time cooperate with governmental and non-governmental entities in addressing particular social issues of both the offender and the victim. The PMO may request the offender's employer and school to provide expert assessments of the offender. The job of the probation and mediation officer focuses on two domains – probation and mediation.<sup>3</sup>

### 3/ Probation

Probation shall be carried out by the PMO of the district court having local jurisdiction over the place of registered residence of the accused or of the convict subject to probation supervision.

#### →How to perceive probation in criminal law?

The word probation is derived from the Latin expression „probare“ – meaning to test, to verify / review (*an alternative preferred to a more severe form of punishment, or having a preventative nature, as applicable, aimed at minimising the consequences of criminal offences via targeted steps, protecting the society and creating room for the accused and for the convict to correct their unlawful conduct, focusing on supervision and review*). In the conditions of the Slovak Republic, probation in criminal proceedings may be defined as a certain form of supervision over the accused / the convict to eliminate reoffending, having a maintenance nature, i.e. to keep the offender in the society and to ensure a review of their compliance with the imposed duties and restrictions.

There are various definitions of the actual term probation, according to Inciardi<sup>4</sup> „ *probation is a conditional form of punishment imposing conditions for staying at liberty, and keeping the court's right to change the terms of punishment or to impose a new punishment, should the offender violate the conditions*“. According to the above author, the term probation is used to describe a status, a system and a process. Probation as a status refers to the unique nature of the conditionally released convict – they are neither a free citizen nor serving an unconditional sentence. Probation as a system refers to an organisational component of administration of justice as represented by the body or organisation exercising oversight over probation. As a process, probation refers to a set of functions, activities and services, such as reporting to courts, supervision over conditionally released convicts and service provision.<sup>5</sup>

<sup>3</sup> 550/2003 Coll. on Probation and Mediation Officers.

<sup>4</sup> INCIARDI, J.: Trestní spravedlnost. Ústavní principy trestního práva, trestního řádu a nápravné výchovy (Criminal Justice. Constitutional Principles of Criminal Law, Criminal Procedure Code and Restorative Education). p. 669.

<sup>5</sup> INCIARDI, J. : Trestní spravedlnost. Ústavní principy trestního práva, trestního řádu a nápravné výchovy. (Criminal Justice. Constitutional Principles of Criminal Law, Criminal Procedure Code and Restorative Education). p. 669.

→**Probation may be divided into:**

- a) Activities in the pre-trial procedure, prior to a court decision;
- b) Activities after the court / prosecutor's office decision (parole).

There is no separate and unequivocal definition of the probation service. In its Manual for Probation Services and in the Guidelines for Probation Managers, Rome – London 1989, the United Nations Interregional Crime & Justice Research Institute („UNICRI“) defines probation as: **„an action by the court, whereby the offender shall be convicted for a term of control and supervision in the society“**. It may therefore be concluded that what falls within probation activities depends to a large degree on the nature and structure of criminal codes. On a general level, probation may be perceived as an action by the court or by the prosecutor's office, where the offender is accused or convicted for a term of control and supervision in the society.

Such definition of probation delivers **three basic areas** relevant for the application practice:

- The first area includes the „mandate“** of the probation and mediation officer whereunder they may carry out probation. The mandate shall be established by a competent and decision-making body that issued the mandate in the form of a **„resolution“** or **„judgment“** ensuring it is clear and unambiguous for both the probation officer and for the accused or the convict, as applicable. This process involves clarification of the probation officer's position, where the probation officer shall explain to (instruct) the accused (convict) what they can expect and what not. This part is important from the viewpoint of position clarification of the accused (convict) and helps both parties to establish a professional relation during probation, which may *last up to 5 years for instance in case of conditional suspension of the prison sentence with probation supervision*, and up to 10 years in case of prohibition of participation in public events. During this time, the probation officer has a mandate to draw up a probation programme including, besides others, cooperation with social security institutions that should participate for instance in searching for a suitable job for the accused (convict), mediate requalification to acquire new job skills, be helpful in arranging pension benefits, etc.
- The probation programme may also include** the application of imposed duties and restrictions as part of the short-term and long-term objective. The mandate in this sense means having a certain **power / control** over the accused (convict), consisting of drawing up reports for the prosecutor or for the judge, which may have a significant impact on the subsequent course of probation. The actual report may be positive if the accused (convict) did well in the probation. Besides the above, its content may include a proposal to reduce the probation measures. In case of negative information on the accused (convict), the probation officer shall draw up a report in the form of a proposal to turn the conditional sentence into unconditional prison sentence, or a proposal to extend the probation measures, the imposed duties and restrictions, etc.
- The second area is specific in being focused on control and supervision**, as the primary assignment of the probation and mediation officer. Thus, in terms of this process, the probation and mediation officer shall supervise the accused (convict) to ensure they accept the duties and restrictions imposed by the „resolution“ or by the „judgment“. The term **„supervision“** in this process shall, under the Tokyo Rules, refer to *„reducing reoffending and assisting the offender's integration into society in a way which minimises*

the likelihood of a return to crime“ (Annex 10.1).<sup>6</sup> In terms of this area, the probation and mediation officer should be able to distinguish the terms „*supervision*“ and „*control*“.

In the European Recommendations for Community Sanctions and Measures, the term „*supervision*“ differs from the term „*control*“. The term „*supervision*“ refers both to assistance activities conducted by or on behalf of an implementing authority which are intended to maintain the offender in the society and to actions taken to ensure that the offender fulfils any conditions or obligations imposed.<sup>7</sup>

☑ ***In the course of „control“***, the probation and mediation officer above all ascertains whether the accused (convict) complies with the imposed duties and restrictions, or participates in their application, as the case may be. For instance there may be a case of an imposed duty involving the order to participate in a social training programme or another educational programme with the assistance of the probation and mediation officer or another professional, etc. In case of non-compliance, besides other measures, the probation and mediation officer, shall notify the accused (convict) in writing in the form of an „official record“ of the possible consequences of repeated non-compliance with the imposed duties and restrictions. This part of probation may be considered demanding, as it involves a process where the accused (convict) should not remain passive, but should be active from several aspects. Another and important part of probation is searching for resources to meet the basic life needs of the accused (convict), to find employment (temporary job), to secure a source of subsistence. The probation and mediation officer should positively steer the accused (convict) towards fulfilment of the various goals under the probation programme to improve the quality of their life in the society and their family life. ***Motivation*** (ongoing) is an important and legitimate feature of these activities, as it is needed to make the accused (convict) satisfied and it helps to cope both with life situations as well as with the imposed duties and restrictions during the probation supervision.

☑ ***Referring to the above***, we could seek a certain kind of balance between ***taking care*** of the offender and ***controlling*** the offender, as the probation and mediation officer has to deal with this issue in their day-to-day job. In the „Manual for Probation Services“ and in the „Guidelines for Probation Professionals and Managers, Rome – London 1998, p.130“, this area is presented as most challenging, as the probation officers face a conflict situation when executing these tasks. **„What virtually matters is the scope of view of probation, whether to perceive it as organisation of social work or as a supervision and control tool.“** This issue is elaborated on in more detail in the UN document, in the Commentaries on the UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), New York 1993, where it is stated, besides others, that on the one hand supervision has a control function to prevent the offender from reoffending. On the other hand, supervision has a social and assistance function helping the offender to integrate into the society. These objectives of supervision are reflected in two cases. ***The more control-oriented approach*** focuses on the offender’s responsibility towards the society. The second, ***more assistance-oriented approach*** focuses on coping with challenges that could lead to another offence, as well as on working with the victim and with the injured party. In exercising probation supervision, the probation and mediation officer should bring balance between these approaches to alleviate the „*tension*“ arising between taking care of the accused (convict) and controlling compliance with the imposed duties and

<sup>6</sup> United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (General Assembly Resolution 45/110, 14 December 1990)

<sup>7</sup> Council of Europe Recommendation no. R(92)16 on the European Rules on Community Sanctions and Measures (Committee of Ministers, 19 October 1992)

restrictions. It is above all the area of providing social support to the accused (convict) that should be more focused on cooperating with the social curator, the social worker, charities, civic associations, etc. In my subjective view and according to my personal experience, such more flexible cooperation could also work with the use of certain mentors. These would be helpful to the accused (convict) for instance in case of conditional suspension of prison sentence (parole), where the court ordered probation supervision and imposed duties to find employment, to pay the child maintenance in arrears, or to pay damages to the victim (injured party), as applicable, etc.

**The third area of probation includes the place of its execution**, where the probation measures or the imposed duties and restrictions, as applicable, are executed. As a matter of fact, the probation activities are only carried out in case of the accused (convict) that is subject to probation supervision at liberty under a conditional or alternative punishment. For instance, for compulsory work sentence, the place of execution can be a town, a municipality, a legal entity engaging in education, charity, etc.

#### →What are the benefits of probation and alternative forms of punishment?

- The convict, the accused becomes active in rectifying the damage/injury caused to the victim;
- Allows working with the victim / the injured party;
- Active approach towards compliance with the imposed duties and restrictions;
- The accused does not lose their job, (societal interest);
- Lower government costs of serving the sentence;
- Sentence carried out at liberty;
- Family and social ties remain untouched;
- Room for redress, compensation of damage;
- Prevention in terms of the imposed duties and restrictions;
- Erasure of the punishment upon compliance, clean criminal record (e.g. home arrest sentence, compulsory work sentence...); ),
- Ability of immediate integration with the society upon conviction, etc.

#### →Probation methods and approaches

We know that the primary function of the probation and mediation officer in the probation process is to supervise and control the accused (convicts) with regard to their compliance with the imposed duties and restrictions. To achieve this main goal of supervision and control in empirical practice, it is necessary to discuss the manner of application of these methods and approaches. Dedicated literature as well as the working document drafted by experts from Belgium refers to the way of achieving the main goal of supervision, what to do to possibly reduce the risk of recidivism, what steps to take in connection with

integration of the offender into the society. To achieve the desired aim, the probation and mediation officer needs a basic methodological framework or a code of ethics. It is further stated that the probation practice remains diverse. Probation officers across Europe use various methods and approaches that they follow in their practice with various offenders. This implies the use of several methods combined rather than the use of a single specific method that would dominate in practice. Probation officers tend to act with differing and often also specific approaches to the methods.<sup>8</sup> Such presentation is identical in certain aspects in the Slovakian conditions, provided that in some cases it would be more appropriate for the social support work to be addressed by experts such as the social curator, social worker, mentor, etc. within their professional and institutional arrangements. The general principles applied by the probation and mediation officer in empirical practice may include: *tailored approach, targeted expression of emotions; control of emotional involvement; unbiased approach; principle of self-determination of the accused (convict); confidentiality (non-disclosure obligation) to ensure protection of information considered confidential by the accused (convict) and which is an ethical obligation of the probation and mediation officer;*

#### 4/ Mediation and Saturation of Victims' Needs

The profession of a civil mediator and of the probation and mediation officer was established in Slovakia in response to the need to resolve conflict situations in an out-of-court manner. What we see at present is an increased interest in out-of-court conflict resolutions. These are situations that concern us either directly or marginally, to which we can also be direct parties. Therefore we look for possible solutions, alternatives to saturate individual needs, interests, opinions, attitudes, or to compensate pecuniary or non-pecuniary damage from the viewpoint of conflict and law. More than ten years of experience in conflict resolution via mediation led us to the need to answer questions either directly or marginally related to this issue. The current knowledge of mediation in the conditions of the Slovak Republic is mostly presented by the expert public from the viewpoint of its legal focus, i.e. via civil and criminal law. The general public perceives mediation as a whole, not splitting it into legal segments, but rather accepting it as a multi-functional conflict (dispute) resolution tool.

#### Case study from practice:

##### § Bodily harm (description of the offence)

*Mr. Peter lives in a common household in a detached house with his daughter Eva, who is divorced, has three children, the oldest is 8 years of age. The wife of Mr. Peter and mother of the daughter Eva died of cancer three years ago. It is very difficult for the family to come to terms with this loss of the wife and the mother. One day, after she opened the fridge, Eva found that the groceries she bought yesterday and put into the fridge are gone and she has nothing to give to her three children for breakfast. She turned to her father who was smoking a cigarette in the garden, asking whether he had eaten those yoghurts and drank the milk from the fridge. He said he did so. In that moment the daughter started swearing at her father in a vulgar way, who physically attacked her, he hit Eva with his hand in her face, breaking her nose and as she was falling to the ground, she also broke her wrist. These injuries necessitated 21 days of treatment, a forensic expert assessed the injuries and determined the payment to compensate the bodily harm in the amount of EUR 986.-. The father Peter was prosecuted for the minor offence of inflicting bodily*

<sup>8</sup> The United Nations Interregional Crime & Justice Research Institute (« UNICRI»), in its Manual for Probation Services and in the Guidelines for Probation Managers, Rome – London 1989, p. 54.

*harm. The prosecutor referred the criminal matter to the district court, to the probation and mediation officer, to approach the accused and the victim to try and possibly resolve the offence of bodily harm via mediation.*

**? Evaluation – conflict perception from the viewpoint of the general and expert public:**

*We may ask the question how we see the conflict, what should we address in connection with mediation. In a case presented as above, we agree that the objective should be the payment of damages in the amount of EUR 986.- as appraised by the forensic expert.*

**? How did mediation proceed in this case?**

*Upon having read the criminal file, the probation and mediation officer (hereinafter referred to as the „mediator“) decided to hold the first meeting with the parties to the mediation in an indirect way. The reason was that the mediator was not familiar with the current state of the conflict, and he wanted to prevent the undesirable escalation of tension that persisted between the accused Peter and his daughter Eva.*

*The mediator summoned the injured Eva as the first party to ascertain the current state of the conflict, should the situation perhaps be settled with regard to payment of damages, what were the requirements of Eva with regard to the accused Peter, her father, etc.*

*The injured Eva appeared at the meeting with the mediator in time, her behaviour and conduct was rather tense, she did not keep eye contact with the mediator, she was mostly looking to the ground, she only sat on the edge of the chair as if she was just about to leave, and she kept pressing the fingers on her hand, etc. Such non-verbal and verbal communication was not in line with what the injured initially presented in relation to the offence that happened, in particular when she was asked to comment on the damages, on her requirements against her father Peter. She only plainly said during the talk that she did not want anything, that she would undersign everything that the mediator presented, that she just wanted this case to be over.*

*The eruditeness and ability of the mediator to read the verbal and non-verbal signals shown by the victim of the criminal offence was a basis for the mediator to apply any possible theoretical as well as practical experience relating to working with crime victims. The mediator was applying the eclecticism method in the various stages of mediation. Following the application of appropriate communication techniques, the victim Eva started talking more about the entire situation. She told, besides others, that her father had only been drinking for two years already after he lost his job, that when drunk, he kept threatening to throw her out with the children to the street, etc. Eva's financial situation is very bad, she only receives the parental benefit, her husband is not paying maintenance for the children, she also filed a criminal notice on him. Those yoghurts that her father Peter ate and the milk he drank was the only food that she had for her children for the entire day. The social allowance should only arrive next day, and her husband once again failed to pay the child maintenance. She commented on her behaviour against her father Peter that she was desperate when she saw the empty fridge and in the room next door three children were crying as they were hungry and wanted to eat. This was the reason why she approached her father Peter in a vulgar way, and she added in one breath that as long as her father does not drink, he is a*

*very good man and that then both she and her children liked him.*

***The mediator summoned the accused Peter as the second party to the mediation.*** *Peter's conduct during the first contact may be assessed as conduct of a person who feels to be innocent. The accused Peter had a different perception of his conduct. He got annoyed that he is prosecuted for slapping his daughter in the face, how come, it was his daughter whom he slapped, not a third party, etc. Following the application of various mediation and communication techniques, the accused relaxed and switched from his offensive attitude that he had towards his daughter and towards the judicial system to appropriate communication. He said, besides others, that he had been unemployed for a long time, that he used to work as a driver for his entire life, he was not able to cope with the situation after his wife's death, and he started to drink. He did not have money, he was only receiving social allowance, and would find a temporary job from time to time, where he earned some money. As for the monetary compensation for bodily harm, he said that he had no money to pay the compensation for bodily harm in the amount of EUR 986.- to his daughter Eva. (It shall be added that the accused is prosecuted for the first time.)*

*This case study shall be interrupted from the viewpoint of presenting mediation, we shall continue after we have looked in more detail at the different areas relevant for the mediator from several aspects. We consider it to be dangerous and risky if the mediator, without subsequent specific knowledge, drafted an agreement in the form as suggested by the victim, so that she can forget about the case and so that the criminal procedure is terminated.*

**Questions to review the current state:**

- ? *Is it important that the mediator is an expert and masters the methods and techniques of his profession?*
- ? *Can we talk about saturation of the victims' needs in such case?*
- ? *Is this not rather a resignation of the victim, which has nothing in common with mediation and with the restorative principle?*
- ? *Is it ethical to terminate such mediation?*
- ? *Is there a threat that the offence would be repeated (risk of recidivism) if the mediator has a superficial approach?*

*To focus on the main objective of this article in the most efficient way, we consider it essential to have sufficient knowledge in communication, conflicts and mediation as such. We consider communication to be a necessary means of passing on and receiving news, expression of our feelings, emotions, needs, etc. We use it as a method of social interaction between the client and the mediator, as well as in other professions. We consider the familiarity with the specifics of verbal and non-verbal communication skills a necessary component of what the mediator should master if their job description is conflict and dispute resolution. The Association of Slovak Mediators describes the mediator as an important entity in mediation, who facilitates the dispute resolution between the parties as a qualified expert in *communication* and dispute resolution. This example also confirms that the field of communication is a necessary competence*

of any professional who should be able to read and distinguish various signals of verbal and non-verbal communication to then be able to address the conflict area in a more efficient way.

*If we think about the term conflict* and reflect on whether we have experienced it at some point in the past, a probable answer will be that each of us had experienced some conflict in every phase of our lives, be it during childhood with another child (peer conflict) or with parents, when our behaviour was not in line with their expectations, etc. Nor can we avoid the word conflict as adult individuals, it is only up to us, up to our skills, capacities and interest whether we want to resolve the conflict and in what way. A common lay approach has its justification, as in such approach we mostly apply the behaviour patterns assumed from our parents, people we know, as well as acquired in the course of our lives. In the preface to his book „Konflikty medzi ľidmi“ („Conflicts among People“), Křivohlavý describes how much right his friend was when he told him that a person’s life actually is a continuous series of conflicts. If two people are unable to agree, where the relationships are disrupted to such extent that mutual communication is impossible (dangerous), there we see room, option for third-party involvement represented by an independent and impartial mediator.<sup>9</sup>

☑ **The term conflict** usually connotes something negative to us, something we try to avoid in common life situations, not to elicit such conflict behaviour by our behaviour, not to become a party to the conflict, but there are also opposite situations. It may be stated in this regard that this is personal knowledge that can also involve common interpersonal relations that generate conflict situations. From this viewpoint and lifestyle, these can be conflicts of social and financial, social and cultural, social and political differences, as well as conflicts of marginalised groups with the majority population, conflicts of the employer and the employee, etc. There is a whole range of possible sources of conflicts originating in everyday life as an interaction of differing ideas, opinions, attitudes and interests. They are mostly presented by at least two differing, mutually excluding options, they usually are of antagonistic nature. A mediator should also master these aspects of a conflict. In the following section, we shall take a closer look at this area in connection with crime and the restorative principle.

#### →Basic principles governing the use of restorative justice programmes in criminal matters.

To strengthen the legal position of criminal mediation, the already *4th Seminar to Facilitate and Enhance Judicial Capacities in Criminal Matters* was held on 26<sup>th</sup>-27<sup>th</sup> November 2008 in Omšenie (Slovak Republic). The project was recorded under number SK/06/IB/JH/02/TL, where Belgian experts such as Hans DOMINICUS – Federal Ministry of Justice of Belgium, Michaël DANTINNE – Liège University, criminology professor, Denis VAN DOOSSELAERE – Liège University, psychologist and criminologist, lecturer of the Faculty of Psychology and of the Criminology Institute, and Leo MULLENDER - Federal Ministry of Justice of Belgium, solicitor, head of the project on behalf of the Belgian side, agreed, besides others, on the definition of criminal mediation. They stated that *„mediation is an alternative and non-authoritative form of out-of-court dispute resolution between the accused and the victim, aimed at joint search for a mutually suitable and satisfactory solution that alleviates or reduces the currently existing conflict via mutual communication“*. (Seminar, 2008). Conclusions and recommendations for mediation were adopted via the final report relating to the conference at issue held on 17 July 2009, which was drawn up by the Ministry of Justice of the Slovak Republic and its partner representing a European Union Member State, the Federal Ministry of Justice of Belgium.

<sup>9</sup> KŘIVOHLAVÝ, J. 2002. *Konflikty medzi ľidmi. (Conflicts between People)*. 2. ed. Portál. 2002. 192 pp ISBN 80-7178-642-X



The alliance of non-governmental organisations operating at the UN in the field of crime prevention and criminal justice formulated a working definition of restorative justice and its possibilities in the following wording: „Restorative justice is a process wherein all parties involved in a certain crime meet for the purpose of a collective assessment of how to address the adverse consequences of the crime and its future consequences.“<sup>10</sup>

☑ Zeher<sup>11</sup> as the author of the book „Úvod do Restoratívni justice“ („Introduction to Restorative Justice“) and the founder of these ideas brings comprehensive and detailed information on the restorative principle from the viewpoint of restorative justice. We shall certainly not find any clear-cut and unambiguous answers therein, which we would expect, but it shall provide us with new insights, stimuli and experience in how we could administer justice. Zehr (2003, p. 8) concludes that: „It is not the purpose of restorative justice to reduce recidivism. In an attempt to acquire recognition, restorative programmes are often presented and evaluated as a means of reducing recidivism. It may be stated that there are good grounds to think that restorative justice programmes do reduce recidivism. To date, research has delivered quite encouraging results, though it focused mainly on juvenile offenders. Although reducing recidivism is not the reason for existence of restorative programmes, it is just their side effect. Restorative justice is a right thing to do that has to be done right. We should deal with the victims and respond to their needs, the offenders should be involved in the process, not considering whether the offender grasps what this is about and whether we achieve a reduced rate of recidivism.“ Such view of conflict events and of the committed crime is specific, and therefore we cannot stipulate a single universal restorative programme or technique.

#### **Continuation of the case study from practice:**

##### **§ Bodily harm (course of mediation meetings with the victim, with the offender, and conclusion)**

The elements of the restorative principle were fully accepted and utilised by the mediator in terms of the mediation process. The conflict was perceived in broader relations, the mediator was able to decipher the expressions of communication presented by the victim Eva and by the offender Peter. What was an important factor was the signal of the victim, where she resigned at the beginning of the mediation. In this position, the mediator should try and respond to the actual needs of the victim, to ensure a permanent state of saturation of needs, and not just a temporary one. This state can only be achieved via appropriately worded open questions to stimulate the victim and to prevent them answering only yes or no. In addition to what is written in the minutes of the investigation file, the victim Eva described the entire atmosphere before, during and after the conflict in more detail. She agreed that at the next meeting the mediator could tell her needs and requirements presented during the interview, and she consented to a joint meeting with the offender Peter.

The victim Eva and the offender Peter met at the second meeting, where the mediator rephrased the information for them that he received from them during individual meetings. Then he presented a recap of the known state, and the parties to the mediation commented on it. The individual positions of the victim and of the offender were respected each, they did not interrupt each other, they took notes while the other was speaking, to be able to subsequently respond to what was said. Their communication always took place

<sup>10</sup> KARABEC, Z. et al. 2003. Probační a mediální služba v ČR. (Probation and Mediation Service in the Czech Republic) (manuscript)

<sup>11</sup> ZEHR, H. 2003. Úvod do restoratívni justice. (Introduction to Restorative Justice) Prague. 2003. Združenie pre probáciu a mediáciu v justícii (Association for Probation and Mediation in Justice).

*via the mediator. The individual stages of the mediation proceeded in this way until the moment when the parties were able and willing to communicate with each other. As the communication between the offender and the victim was bad, they learned the following about each other during the mediation:*

**The victim Eva** learned that her father had a very difficult time coping with the death of his wife. In turn, he was dismissed from his job, he was used to take care of the family financially, but when he failed to do so, he started drinking. She also learned that her father Peter wanted to commit suicide after a year of his unsuccessful search for a job, but a coincidental hiker saved his life. He perceived his inability to find a job and take care of the family as his personal failure.

**The offender Peter** learned during the mediation that his daughter was divorced, that it was not true what she was saying that her husband worked abroad. Moreover, Peter learned for the first time during the mediation what were the circumstances when his daughter swore at him - that he ate the only food she had put aside for the children in the fridge. He did not know either that Eva's husband was not paying maintenance for three children to her, stipulated by the court in the amount of EUR 430.-. He responded very positively to the requirement of the victim Eva to undergo a therapeutic stay to treat alcohol addiction. He added on this note that he needed help in this regard, but did not find enough courage himself to undergo the treatment. He is happy that the daughter still likes him, and he will do everything for her and for his grandchildren to keep them happy.

#### **Mediation conclusion:**

*The outcome of the mediation was a written agreement between the victim Eva and the offender Peter, whereunder the victim did not require the damages in the amount of EUR 986.-, as she knew her father did not have money. In order to saturate her needs, the victim required the offender (father) Peter to undergo an institutional alcohol addiction therapy. Thus, the mediation was focused on the future. According to the victim Eva, her father is a very self-sacrificing and good man, unless he drinks. The requirement of the victim was worded in the agreement that she found it sufficient as a compensation of the damage that the accused (father) Peter underwent an institutional alcohol addiction therapy. The mediation at hand was concluded by conditional suspension of the prosecution with a trial period of 12 months. Before drawing up the final report on the accused Peter upon at the end of the trial period, the victim was summoned as well to comment on the current state, whether Peter accepted the requirement, whether he drank alcohol, or whether situations involving him causing her bodily harm were repeated. The victim stated that she was very glad that the outcome of the mediation was a conditional suspension of prosecution, the father underwent the institutional therapy, she was visiting him there with her children. Her father Peter was abstaining from alcohol now, he found a job, he works as a driver at a motorway construction site. The family relations improved, their communication is even better than prior to the offence.*

*The accused Peter, who presented documents on having completed the institutional therapy, was also present during drawing up of the final report. He told he was proud of his daughter that she helped him and that the quality of his life was now much better, he now enjoyed life.*

*This case study suggested one of the options how mediation can proceed, if there is an erudite mediator using the elements of the restorative principle in his work from the viewpoint of saturation of the victims' needs. The saturation does not always have to necessarily involve just pecuniary damages, there*

are many options, there is just a need to correctly set them and apply them in daily practice. For this purpose, the next part shall also discuss the principles of restorativeness that have a justified place in the mediation process.

→The actual direction towards restoration can also be seen via the following principles and values:

- a) **Respect** – is one of the key values expressed both towards the person of the victim (the injured party) and towards other affected persons, as well as towards the offender.
- b) **Liability** – in this case, the offender of the crime assumes liability for the (non-)pecuniary damage incurred and the restorative process facilitates his motivation to restore the disrupted relationships.
- c) **Dialogue** – all restorative justice programmes and techniques are primarily based on various forms of dialogue between the parties to the conflict that arose between the victim and the offender or the community.
- d) **Participation** – restorative justice strives primarily to involve all parties to the crime, and/or their representatives in conflict resolution. The actual resolution of the conflict – event is in the hands of those affected by it, and not in the hands of a formal authority.
- e) **Balance** – achieving balance in the community may be included among the priorities of restorative justice. It actually involves striking a balance between the interests of the stakeholders and searching for a solution acceptable for the stakeholders.
- f) **Voluntarism** – the meaning from the viewpoint of restorative justice is that participation of the stakeholders in a „crime“ conflict resolution is always based on voluntarism, i.e. they cannot be forced to such involvement by any authority.
- g) **Community** (involvement) – the objective of restorative justice always is to involve the members of the community where the victim and the offender live. In this regard, the crime is not perceived as a separated and isolated act that should only be a private matter of the parties to the crime.
- h) **Individuality** – this refers to respecting the uniqueness of every person, which is always balanced in relation to the community from the viewpoint of restorative justice.

The **definition** of the „*restorative principle*“ is in our opinion also determined by empirical practice and many years of experience, as also presented by the experts from Belgium (seminar, 2008), who state the following: *„Our several years of experience with mediation gradually led us to word a draft definition. Restoration is not an identical term with getting back to the starting point.. Restoration is something else than **repair**, return to the situation prior to the crime. In this sense, crimes are actually irreparable. They leave traces, luckily not equally dramatic, however, something still changes in life. It is unfortunate when a person does not understand that this will not change even if the victim turns into an offender. Restoration cannot be reduced to pecuniary damages. In our experience, this approach results in the victim feeling sold, as if their suffering and humiliation was simply expressed as a certain monetary amount usually stipulated by external criteria. When the parties to the crime request restoration, they are expressing the need for a change of their attitudes towards the crime and its consequences, a change in incorporating the resulting*

*experience into their lives.*” These ideas are elaborated on in more detail in Van Garsse, L. (2001) „Op zoek naar herstelrecht. Overwegingen na jaren bemiddelingswer.“

We also described mediation as a communication process with more or less unforeseeable content and outcome, however, this does not mean it is a process without any orientation. The definition of restorative mediation describes that mediation shall be focused on the conditions inducing settlement, i.e. “restoration”. Social interest can be easily revealed in the word “settlement” as well.

When the parties to the crime request “restoration”, they are expressing the need for a change of their attitudes towards the crime and its consequences, a change in incorporating the resulting experiences into their lives.<sup>12</sup>

***We wish to refer to the experience of the Belgian experts (2008) as an example,*** who present restoration via several characteristics that should meet at least the following requirements:

- a) A clear, feasible objective to be attained, a subjective meaningful process.
- b) This process is relatively unforeseeable as for its duration, its content and depth.
- c) Neither the severity of the crime, nor the amount of pecuniary damage incurred are decisive indicators for inclusion of the case into the process. Many times, trivial physical attacks cover up a major personality issue concerning the ability to adapt, whereas some very severe crimes are easy to discuss from the viewpoint of criminal law.
- d) As the process is unforeseeable, restoration cannot be speeded up or organised to attain a pre-agreed objective. The stakeholders will either accept the invitation for a meeting, or not.
- e) It is peculiar that restoration is requested simultaneously both by the victim as well as by the offender. The offender often tries to justify the attack and its consequences, to explain their past and its impact on their personality.
- f) Probably the most empowering element of the positive approach of the entire process are the signals of showing respect for the other person. We definitely don't exaggerate if we claim that showing regard (respect) is the essential driver of everything that happens in the restoration process.

Thus, the main task of the mediator is to create an environment of safety and respect for the stakeholders and to ensure that this feeling is also transferred to the relationships between the parties, thus helping to alleviate their tension and their defensive attitude. We can actually conclude that showing of mutual respect between the stakeholders (or their community) in concrete mediation situations results in unexpected turns in thinking. These are the moments referred to as „healing“ and liberation. Unfortunately, this cannot be organised, all that can be done is to create favourable conditions for the

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<sup>12</sup> Seminar held in Omšenie, Slovak Republic, 2008.

course of this mediation process.<sup>13</sup>

☑ **One of the important aspects is also voluntarism**, while it may seem at the first glance that voluntary participation in mediation is self-evident. Mandatory participation would not only force authenticity out of mutual communication, but it would also infringe the legal right of the parties. This is clear with regard to the victim. And moreover, mandatory participation could result in secondary victimisation (we don't want to let the victim live through the adverse reality of the crime once again). From the offender's viewpoint, forced participation would be outside of the legal framework. If we really want to achieve their honest, genuine remorse, we can hardly get it by force. Therefore, according to international as well as national guidelines, mediators are expected to thoroughly inform their clients about the nature of the invitation to take part in mediation, as well as about the right to reject this offer at the beginning or at any stage of the process. (Council of Europe Recommendation no. (99) 19)

Lawmakers as well as practitioners should ask the question whether an „*alternative choice*“ is really a choice. And balance is again at stake, depending on the context of the crime and on the need of the social environment; sometimes, a certain (moral) pressure on the stakeholders is unavoidable. If sometimes mediation is an open or masked part of the sentence or of imposed conditions, we are barking up the wrong tree. **If participation is not genuinely voluntary, mediation will only become a tool for punishment or moralising of persons**. As the „*perceived freedom of participation*“ is rather a subjective matter, mediators should verify with their clients in each single case, whether they don't just seek an advantage, but rather a genuine option to participate or not.

☑ **Another clear principle directly linked to the definition of restorative mediation in the criminal procedure is confidentiality of information** (observation of the non-disclosure obligation). This is discussed in the „general principles“ of the Council of Europe Recommendations. In our conditions, this principle also found implementation in Act no. 550/2003 Coll. on Probation and Mediation Officers.

Dolanská states the following on this issue: „*Pursuant to the Act on Probation and Mediation Officers, mediation shall refer to an out-of-court mediation of dispute resolution between the victim and the accused. Under the Act, mediation is understood as a specific non-procedural method of addressing the criminal matter, matching the meaning of the restorative justice concept, in cases of those crimes that are the result of a conflict relation between the offender and the victim of a particular crime. Mediation between the victim and the accused is based on the general principles of mediation, however, its specifics are determined by the context of the criminal procedure as the background for its application. Thus, here, mediation is defined in a narrower sense than usually understood, as it is explicitly bound to connection with the criminal procedure. It is thus an activity carried out in connection with the criminal procedure and aimed at settling the conflict state elicited by the crime as well as at alleviation of damages and consequences of the committed crime.*“<sup>14</sup>

To round up the knowledge, we also state the opinion of Tony Marshall, who put emphasis on the important role of mediators in his 1996 article on restorative justice. The need to find a concrete solution

<sup>13</sup> Methodology developed by Belgian mediation experts. 2008.

<sup>14</sup> DOLANSKÁ, R. 2011. *Postavenie a etické aspekty činnosti probačného a mediačného úradníka (Position and Ethical Aspects of Work of the Probation and Mediation Officer)*. In *Restoratívna spravodlivosť ako výzva (Restorative Justice as a Challenge)*. Michančová S. (Ed.) Prešovská univerzita (Prešov University). p. 32 – 41. 2011. 146 pp ISBN 978-80-555-0389-9

to the issues they encountered in their day-to-day practice was more important to these professionals than theoretical knowledge. Looking back at the development of mediation, this really is the right direction. Mediation is above all inspired by practice and by the unceasing effort to understand the motives and needs of people.<sup>15</sup>

☑ **Such insight and own empirical experience** in restorative mediation, as well as the expertise passed on from the knowledge of other criminal mediators during trainings, can be presented in a way that:

- a) **in restorative mediation** it is difficult to predict the duration of the mediation process, the content and the final outcome, but above all, it is a subjective – personal, intimate and by its nature unique process;
- b) **mediation in criminal law** gets into an antagonistic position to the traditional notion of the criminal procedure comprising the qualities of objectivity, transparency, predictability and comparability.

A specific feature of criminal (restorative) mediation is the fact that criminal law is in an antagonistic position to criminal mediation.

☑ **At a first glance, restorativeness and criminal law** are presented as a closed system, based on rational criteria, aimed at reducing crime to a legal category followed by punishment. What we encounter in practice is a certain „odd behaviour“ of judges and prosecutors when assessing the extreme limits of the above mentioned rationality. One prefers morality, while others rather focus on the crime, on the expectations of stakeholders, on the wording of the judgment. What we find in the motivation of the pronounced judgment is a reflection of the (expected) perception of the victim, the (expected) wish and meeting of public opinion expectations. What is appearing in setting the sentence is an ever increasing and clear attempt to follow the ideas of particular persons seeking justice, when references are made to the relative severity of the crime, as well as to specific situational and personality traits of the offender, which come to light during the proceedings. And now we got far from a direct, strictly rational application of law. We can justify this on the basis of principles of the actual judicial system. The basic principle of **legality** restricts the justification of the system to the small part of the society that creates the content of legal regulations in the strict sense of the word. It even restricts the scope and nature of what can be offered as an *ex offio* compensation. The **subsidiarity** principle stipulates punishment as a certain means of force of the society, means of protecting life, an ultimate means of correction. Both of the above principles lead us to the conclusion that criminal law is conceptually connected with self-restriction. It is clear that this system cannot be understood as a hermetically closed vessel or a closed decision-making system. Both of the above mentioned principles automatically result in generation of an “opposite”, the existence of a world escaping justice. **The legality principle** results in the need to direct and handle a variety of issues and conflicts that **are not** governed by any legal regulation. And this is even more true for the subsidiarity principle. If punishment, the exercise of societal pressure, is considered an „ultimate correction“, then the verification of this principle may only take place at the assumption of a large number of „such corrections“ in the given society. (Methodology, 2008)..<sup>16</sup>

<sup>15</sup> MARSHALL, T. F. 1996. *The evolution of Restorative Justice in Britain*. European Journal on Criminal Policy and Research. 1996. 4.4, 21-43

<sup>16</sup> Act no. 550/2003 Coll. on Probation and Mediation Officers.

Mediation in Slovakia is only carried out subject to the consent of the victim and of the accused. If the accused is a young offender, the probation and mediation officer shall obtain consent with mediation from at least one legal guardian. Participation of all stakeholders in the mediation is voluntary

Mediation in the criminal procedure may be carried out on the proposal: of the legal guardian of the accused young offender, the accused, the victim, the investigating officer, the prosecutor, the presiding judge of the bench, the single judge, the attorney. The instruction to (consent with) mediation from the prosecutor, the presiding judge or single judge shall not be directed at the manner and outcome of the mediation.

#### **Mediation in the criminal procedure may have the following outcomes:**

a.) **Conditional suspension of prosecution** – in the procedure on a minor offence, for which the law stipulates a prison sentence of up to five years, the prosecutor may conditionally suspend the prosecution subject to consent of the accused upon pronouncement of the accusation until filing of the criminal charge upon proposal by a policeman and also without a proposal. In this case the accused shall make a declaration that they committed the crime for which they are prosecuted, and there are no justified doubts that their declaration was made in a free, solemn and comprehensible manner. At the same time, the accused shall compensate the damage, if incurred due to the offence, or shall enter into an agreement with the victim concerning its compensation, or shall take other necessary steps to compensate it.

b.) **Settlement** – in the procedure on a minor offence, for which the law stipulates a prison sentence of up to five years, the prosecutor may decide on approval of settlement and suspend the prosecution subject to consent of the accused and of the victim.

*If settlement is the outcome of mediation, the accused shall make a declaration that they committed the crime for which they are prosecuted, and there are no justified doubts that their declaration was made in a free, solemn and definite manner. The accused shall compensate the damage if incurred due to the offence, or shall take other steps to compensate the damage, or shall otherwise redress the damage incurred due to the crime, and shall deposit a monetary amount intended for a particular addressee for generally beneficial purposes to the account of the court or to the account of the prosecutor's office in the pre-trial procedure, unless such monetary amount is apparently inappropriate considering the severity of the committed crime and also considering the property situation of the accused.*

#### **Human dignity and its place in restorative justice**

The philosophy of restorative justice brings forward the ideas of submission and respect for human dignity as certain ethical challenges. In practice, in holding a mediation meeting, there is a continuum of reactions that can more or less come closer to the ideal state. Both the parties immediately affected by the crime as well as professional probation and mediation officers have to cope with inner uncertainty provoked by questions such as:

- Is it mentally possible at all to separate the person from their deeds (to respect the offender while condemning the crime)? Or is this only a theoretical construct?*
- What is the connection of responsibility for one's own deeds with human dignity and what practical consequences does it have?*
- Are the parties really equal from the viewpoint of their human dignity?*

- Does the assumption of equality bear some ethical risks? Can the assumption of equality favour one of the parties and harm the other?*
- How to achieve that respect for the dignity of the offender does not cause an impression with the victim that the reality of the inflicted evil and injustice is belittled?*
- Can we find a fair balance of interest in the needs of the offender and in the needs of the victim? Or do we prefer the needs of any party during mediation? Is it at all possible to maintain an attitude of impartiality and neutrality towards the parties? (According to Dolanská, 2011).*

The ethical principle of **impartiality** puts a duty on the mediator to maintain impartiality towards all parties. Impartiality means freedom from favouring (putting at an advantage) or bias, either in words or in actions. Impartiality includes the commitment to facilitate all parties (as opposed to a single individual) in achieving a mutually satisfactory agreement and/or a mutually satisfactory dialogue. Impartiality means that the mediator won't play the role of either the plaintiff or the defence lawyer. A mediator shall maintain impartiality and at the same time ask the parties questions necessary for them to consider the acceptability of the proposed solution options and of dialogue. Current impartiality of the mediator may be at risk for instance when they had any past social or professional relationships with any of the parties to the mediation. If the mediator provided professional services in the past to both parties, they shall not be allowed to continue in the mediation, unless this matter is discussed and unless both parties freely decide to continue in the mediation with the particular mediator. Current impartiality is also questionable if the mediator reacts in an emotional way on the parties (liking or antipathy) during the mediation. Ethical dilemmas are also elicited in mediators by the tension between impartiality and the temptation to suggest solutions or to direct the process towards achieving a fairer and just solution. It is also ethically challenging to handle the tension between maintaining a neutral attitude and provision of the necessary professional legal or therapeutic advice.

- To what extent do we determine the needs of the victims and of the offenders? What needs are we willing to accept as justified?*
- To what extent do the experiences of some parties take priority or impact the needs of other parties? Who shall decide about that? What are the implications?*
- Can or should the effort to facilitate healing and to provide a symbolic reparation fully replace the punishment, revenge or prison?<sup>17</sup>*

We hope this viewpoint will also be helpful in better grasping the principle of restorativeness and the mediation process with emphasis on saturation of the victim's needs, which are not necessarily of financial nature only.

#### **Glossary of terms used in mediation:**

**Mediation (from lat. mediare = to be in the middle)** – is a task- and goal-oriented process. It

<sup>17</sup> DOLANSKÁ, R. 2011. *Postavenie a etické aspekty činnosti probačného a mediačného úradníka (Position and Ethical Aspects of Work of the Probation and Mediation Officer)*. In *Restoratívna spravodlivosť ako výzva (Restorative Justice as a Challenge)*. Michančová S. (Ed.) Prešovská univerzita (Prešov University). p. 32 – 41. 2011. 146 pp ISBN 978-80-555-0389-9.



is focused on the achievement of results, does not address the inner causes of conflicts. Besides the agreement itself as a primary objective, it also focuses on auxiliary objectives. Each stage of the mediation process has its objective achieved via fulfilment of particular tasks.

**Mediator** – helps two or more parties in a conflict to achieve consent (agreement). It is an alternative conflict resolution form, with concrete steps directed in favour of the parties to the conflict.

**Conflict** (from the viewpoint of mediation) – can be defined in various ways: in a softer definition, we perceive it as a disagreement with ideas, opinions or interests of (an)other person(s), in the less soft definition, we understand it as a fight, opposition and even hostility.

**Facilitation** – is an effective method of organising, chairing and handling a successful meeting or negotiation.

**Facilitator** – is responsible for the actual negotiation process, oversees the dynamics and efficiency of the session, comprehensibility for all parties and feasibility of the resulting solution. Impartiality of the facilitator is an important condition for the success and functionality of facilitation.

**Conciliation** – is an alternative conflict resolution method, where the parties to the conflict agree on the services of a **conciliator**, who meets them separately in order to resolve the divergences (conflicts) between them. A third party is responsible for the course of communication between them and facilitates the conciliation procedure.

**Arbitration** – this is an arbitration procedure where the arbitrator is not necessarily a lawyer. The parties to the dispute or their representatives present evidence and arguments to a neutral party (a person unbiased towards any of the parties), who decides on resolution of the dispute. The arbitrator's decision is binding. The arbitrator often „divides in halves“, they want to be the same distance away or close to both parties, regardless of the parties' degree of contribution to the situation that arose. Arbitration is a dispute resolution remedy coming from the outside. Neither the authority nor the arbitrator is guided by our interests, but they decide according to the level of their knowledge, which the arbitrator can use to justify their decision if needed.

**Restorative justice programme** – is each programme that utilises restorative processes and is aimed at achieving restorative results.

**Restorative process** – is each process in which the victim and the offender, and any other individuals or community members affected by the crime, as applicable, mutually actively participate in addressing the matters following from the crime, usually assisted by a promoter. Restorative processes may include mediation, conferences and circles pronouncing judgments.

**Restorative result** – is an agreement reached as a result of the restorative process. Restorative results include answers and programmes such as reparation (compensation of damage), restitution and a publicly beneficial service, focused on meeting individual and collective needs and meeting of obligations of the parties, and achievement of re-integration of the victim and of the offender into



the society.

**Parties** – include the victim, the offender and any other individuals or community members affected by the crime, who can participate in the restorative process.

**Promoter** – is the person responsible for just and impartial facilitation of the parties involvement in the restorative process.

**Victim and the offender** – in mediation, they usually have to agree on the basic facts of the case as a starting point for their participation in the restorative process. Participation of the offender shall not be used as evidence of pleading guilty in the subsequent court proceeding.

**Differences leading to imbalance of powers** – as well as cultural differences between the parties shall be taken into consideration in submitting the case to a restorative process and during the restorative process.

## Martin Lulei: Selected aspects of criminal policy and tools to measure recidivism risk in probation

### Abstract

This expert article is a partial synthesis of the author's scientific knowledge concerning selected topics covered in the expert presentation on the topic *Tools to measure recidivism risk in probation* held in Budapest in 2014 in the framework of the project *Judiciary and Protection of Victims*. The author focused on criminal policy, basic characteristics of the risk factor paradigm and examples of specific tools to measure recidivism risk. The article features also selected findings from implemented research studies targeting criminality and victimization in the Slovak Republic.

### Key words

Crime, Probation, Recidivism, Risk, Criminal justice social work, Victimization.

### Foreword

The criminal justice system stands above criminal policy that (among other elements) contains also the institute of probation and alternative corrections. The term criminal policy is described in a number of national strategies, action plans, political parties' platforms, government platforms, etc. Some authors claim that criminal policy has become subject of political competition (Soľaníková, 2011), others talk about a so-called populist criminal policy (Rodriguez, 2012). There is no doubt about the cause-effect relationship of political decisions and crime (the control of which is the aim of criminal policy)<sup>18</sup>. In criminal policy, science and practice are linked through the term evidence-based practice, which however is not only used in criminal policy. In some publications (this unfortunately is true also about expert literature) there is a wrong translation of the English term evidence-based practice into Slovak. US authors Meghan and Enver (2009, p. 11) in their publication concerning EBP implementation in the field of criminal justice emphasize that EBP is an objective, balanced and responsible use of current research and best available research data and findings to implement policies and practical decisions to enhance the quality of the measures for the user. In the context of criminal justice, the scope of the term *user* comprises mainly offenders, victims and communities. Criminal policy measures should be designed based on EBP and the current mainstream of restorative justice.

Based on the data in *Social development trends in the Slovak Republic* (ŠÚ SR, 2013), crime resulted in a material damage of 701.4 million Euros in 2012, which is a 26% increase from 2011. Despite increasing material damage due to crime, the general registered crime rates in Slovakia have declined by 3 % between 2011 and 2012 and by 14% from 2008; there was a 31% reduction between the years 2004 and 2012. The crime rate has a decreasing trend, which is true even if Slovakia's demographic development is considered. The number of criminal offences between 2004 and 2012 decreased, whereas Slovakia's population grew in the same period. Currently there is no counterfactual analysis of the impact of political decisions on overall registered crime available, but research findings provide answers to many questions, e.g. whether Slovak citizens trust the criminal justice system. Public polls (Flash Eurobarometer 385, 2013) implemented from

<sup>18</sup> E.g. repressive US criminal policy in the 1980s (so-called get tough era).

30 September to 2 October 2013<sup>19</sup> show that less than 3 out of 10 respondents tend to trust Slovakia's justice system. Considering the fact that Slovakia ranked second from the bottom from among all EU Member State in terms of trust, this finding is alarming. Burrell (2005) considers one of the key points of trust in probation (as an element of the criminal justice system) trust in the courts (and other key institutions) and trust of the general public. Trust in the courts results in increased use of probation, which potentially leads to a lower prison population.

Probation as an element of the criminal justice system is one of the tools to decrease prison population and public protection. The importance of probation is stressed also by prison population statistics and the number of persons under specialized/probation supervision. E.g. in Germany, the prison population counted 73,000 individuals in 2008 and nearly 225,000 people were under specialized supervision in the framework of the criminal justice system. Similarly in England and Wales, the prison population was 83,500 and 241,500 people were under supervision (McNeill, 2011).

The question is how to design and implement an effective probation system, limited mainly by adequate funding. The authors of *Probation in Europe* calculated the percentage share of probation services funding from the total correctional services funding (i.e. what % from the correctional service budget is allocated to probation service). E.g. the probation service in Malta had 3.1% of the correctional services budget allocated, in Luxembourg the percentage was 18.4, it was 25% in Sweden, 21.8% in Scotland, 12.5% in Catalonia (Durnescu, Kalmthout, 2008, p. 33). In Slovakia it was 0.72% in 2005 and 0.97% in 2010 (Lulej, 2011). In 2013 correctional system expenditures (and/or the respective State budget chapter's program 070 Prisons) amounted to 148,923,828 € (Ministry of Justice of the Slovak Republic, 2014). Probation and mediation service and/or probation and mediation authorities acting at the district courts do not have specifically allocated budgets and their expenditures are not monitored separately. Their expenditures are included in the expenditures budgeted under the program *08P Judiciary funding*. It is impossible to get the requested data from the program *08P Judiciary funding*, and hence 2013 expenditures cannot be calculated.

In the context of probation and mediation offices acting at district courts in the Slovak Republic, Cehlár (2011) states that the number of allocated probation supervisions (probation cases) exceeded 6,000 in the period 2006–2009. 5,472 files (and 9,239 more files were transferred from the previous year) were allocated to probation and mediation officers in the Slovak Republic in 2010; as of 31 December 2010, the prison population in Slovakia counted 10,031 individuals (Correctional Service ZVJS data, 2010). According to the Internet labor market server (ISTP) job classification, the position probation and mediation officer under ISCO-08 Classification is numbered 2619: *Specialists in the field of law, social insurance and healthcare insurance not classified elsewhere*. Based on the Information system on average earnings (Slovak Ministry of Labor, Social Work and Family, 2014), the average gross monthly salary of this category was 894.00 € in 1Q/2014. This figure of course does not represent the average gross monthly salary of only probation and mediation officers. Probation systems differ in the V4 countries and e.g. the Czech Republic and Austria classify similar positions in the ISCO-08 Classification under the number 2635. In Slovakia, the above number is allocated to the position *Specialists in the field of social work and counseling*, whereas based on the Information system on average earnings (Slovak Ministry of Labor, Social Work and Family, 2014), the average gross monthly salary in this category was 721.00 € in 1Q/2014. In the Czech Republic

<sup>19</sup> Research sample of 26,581 respondents from 28 Member States using the method of a (phone) interview conducted in the mother tongue with possible answers: a) I tend to trust, b) I tend to distrust, c) I'm unsure.

(Information system on average earnings) this code (2635) is used for the position *Specialists in the field of social work* with the subcategory *Social workers of specialized probation centers, correctional and other institutions*, where the average gross salary was 26 585 Kč in the 1<sup>st</sup> half of 2013, which corresponds to 964.20 € based on the current exchange rate of the Slovak National Bank. In Austria this code (2635) stands for the position *Social worker* with the subcategory *Bewährungshelfer* (probation officer), whereas the Austrian national professions system states an average monthly gross salary of 1,960.00 € upon hiring (AMS, 2014) for this category at present.

One of the criminal policy efficiency indicators is the number of clients under probation supervision and the number of alternative corrections. Table 1 below shows a clear increase of the above indicators in selected countries.

Table 1 Increasing number of alternative corrections and probation clients in selected countries (McNeill, Beyens, 2013)

Country	Time period	Increase in %
Denmark / clients	2006 - 2011	6
France / clients	2002 - 2012	23
England and Wales / alternative sanctions	1999 -2009	28
Ireland / alternative sanctions	1980 - 2011	450
Switzer / alternative sanctions	1996 - 2007	400

### Criminal offence risk and protective factors

The risk factor paradigm (which also identifies protective factors) has a broad scope of practical application (e.g. in designing probation programs, criminal justice social work interventions targeting the youth, recidivism risk assessment and offender needs assessment, in designing probation plans, etc.). The risk factor paradigm was defined by Farrington (In Shader, 2003) as the identification of key risk factors for committing criminal offences and preventative tools to mitigate them. A protective factor focused approach is used especially when working with young people. Research conclusions in the field of protective factors are used also in the development of tools used for recidivism risk assessment and offender needs assessment (risk/needs assessment tools). Protective factors are characterized as internal and external resources, the existence of which has a positive effect on the selected target group (e.g. youth at risk, convicted individuals, etc.). Protective factors include e.g.:

- intense social support,
- strong link to a pro-social adult,
- flexible personality,
- marriage,
- move to a different location,
- employment and others (Lulei, 2011).

Protective factors may include personal resources (e.g. self-control), social resources (family cohesion, emotional support provided in the family) and community resources (positive strengthening at school, in the community etc.) (Walsh, 2006 in Maschi et al., 2009: 236). Shader (2003) states that scientific opinions concerning protective factors differ, but two orientations in defining protective factors are predominant:

1. the absence of risk and something notionally different (the opposite on two parts of a continuum) e.g. a pupil's excellent school results may be considered a protective factor, since it is the opposite of a pupil's bad school results, which is a well-known risk factor),
2. characteristics or conditions that have a mitigating effect on risk factors (e.g. poverty is characterized as a risk factor, yet support from parents can mitigate the negative effects of poverty as well as the probability to start a crime career).

These two main opinion orientations in defining protective factors are stated also by the Youth Justice Board (2005) in its information bulletin:

1. factors that mean the opposite or the absence of a risk factor and that help to protect children and youth from partaking in criminal activities, substance abuse and other antisocial behavior,
2. factors mitigating the effects of exposure to risk factors; this helps to explain why some children may be exposed to groups of various risk factors, yet shall not develop an antisocial behavior in the future or commit crime (Youth Justice Board, 2005).

Ioan Durnescu (2010) from the University of Bucharest, based on the results of a longitudinal study differentiates four main categories of risk factors of criminal offenders:

- historical (the age at the time of the first offence, the number of past accusations),
- dispositional (demographic characteristics of the offender's personality),
- contextual (antisocial peer group, antisocial parents),
- clinical (substance abuse, impulsiveness, intelligence level, mental health).

Risk factors can be divided into static factors (that cannot be changed, e.g. the offender's age at the time of the first offence) and dynamic factors (that are subject to change, e.g. an antisocial attitude, substance abuse, etc.). Durnescu (2010) based on a meta-analysis of 131 studies that was published in 1995 makes the following differentiation between static and dynamic factors:

a) static factors:

1. age,
2. history of criminal offences,
3. history of antisocial behavior,
4. family factors: history of criminal offences, education, structure
5. gender,

6. intelligence level,
7. race
- b) dynamic factors:
  1. antisocial personality, psychopathy,
  2. peer group,
  3. criminogenic needs: antisocial attitudes, leisure time, education, etc.,
  4. interpersonal conflicts,
  5. personal problems: depressions, low self-esteem, etc.,
  6. social success: marriage, education level, income, etc.,
  7. substance abuse.

The risk factor paradigm is based on current research and scientific data. Risk and protective factor assessment is used mainly in the probation process and in the development of tools to assess recidivism risk and offender needs with the aim to establish an effective intervention. Failure to assess recidivism risk and offender needs shall however lead to an incompatible intervention (e.g. in terms of probation program intensity), which is counterproductive and leads to recidivism.

#### **Recidivism risk measurement tools, scope and practical application**

In criminal policy terminology, risk is a recent term adopted in the 1990s in Western countries when terms such as risk assessment, risk management, public protection started to be discussed. In terms of etymology, the word risk comes from the Spanish *riesgo* or the Italian *risco* denominating danger posed to vessels by underwater rocks, and also from the term *rixicare* used by the Ancient Romans that meant to threaten someone with violence. In general, risk may be described as something negative to be better prevented whenever possible.

Risk/needs assessment tools:

- help distinguish the degree of the determined risk, which enables adoption of the necessary intensity and work methods,
- enable to set individual cooperation goals with the offender and to focus efforts to gradually achieve the set goals,
- ensure more objective work with the offender,
- serve to monitor and assess the process of gradual changes in the offender's behavior,
- provide a means to determine the need to adopt measures aimed at achieving safety in working with the offender and enhance public protection against reoffending after reentering the society (Štern et al, 2010).

The above tools are used

- as reports for the court,
- to plan interventions in the framework of the probation and the correctional system,
- to match the assessed risk with supervision intensity,
- to classify a client /a convicted individual or a person on probation,
- to establish the development and/or progress and its effects,
- in parole decisions (Durnescu, 2013).

Bonta (1996) and Durnescu (2010) have (historically) divided risk/needs assessments tools into the following 4 generations (the categories are based on e.g. objectivity, structure, factors):

1. subjective and unstructured risk assessment (past experience, professional estimate, scientific validity is out of the question),
2. the first tool structures are based on implemented research (factors include e.g. the type of criminal offence, offence committed by conspiracy, etc.), they are more objective than the 1<sup>st</sup> generation, empirically-based (however predominantly based only on static factors),
3. inclusion of also dynamic factors (employment, housing, abuse, etc.), therefore the term risk/needs assessments is being used,
4. inclusion in case management and supervision (risk factor identification is included), targeted interventions, plans to achieve objectives and applied approaches, progress and/or development monitoring, activity and completion checklist aimed at a coherent and consistent re-socialization.

A broad range of risk/needs assessment tools exists in various specializations e.g. the Center for Sex Offender Management (CSOM) in the US developed a specialized tool in 2000 that was later modified and published in 2003 as a research paper *Sex Offender Treatment Needs and Progress Scale* (McGrath, Cumming, 2003). In England and Wales, a specialized clinical tool *The Offender Assessment System (OASys)* is used, which was developed to determine and define offender needs, probability of recidivism and risk of serious harm by the offender. The OASys started to be used on a nationwide scale from 2001 and as of November 2005, some 870,000 assessments of 370,000 individual offenders were completed. This tool has three main components to determine offender needs, risk assessment and management, and development and assessment of a work plan with the offender. Offender needs measurement or determination is associated with some characteristics in relation to offending or re-offending. The OASys makes a distinction between static criminological factors (that cannot be changed, e.g. past accusations) and dynamic criminological factors (that are subject to change, e.g. substance abuse). This clinical tool defines 12 basic factors associated with criminal offences:

- information on offending,
- offence analyses,



- housing,
- education, training and employability,
- financial management and income,
- relationships,
- lifestyle and related aspects,
- drug abuse,
- alcohol abuse,
- emotional comfort,
- way of thinking and behavior,
- attitudes.

Application of this tool was highly effective in offending predictions and/or measurement (Howard, 2006, pages 1 – 3). Evaluated versions OASys1 and OASys2 are available, as well as their combined version. Croatia has seen a recent successful implementation of this tool. Of course there are many risk/needs assessment tools and they differ based on the specific target group (e.g. sex offenders). One of the examples are tools of this type, namely e.g. RRASOR (Rapid Risk Assessment for Sexual Offence Recidivism), STATIC-99, STATIC 2002, RM 2000 (Risk Matrix 2000), SORAG (Sex Offender Risk Appraisal Guide), STABLE 2007, SARN (Structured Assessment Risk Need), ACUTE 2007, SARPO, SAVRY, KARA etc. Recidivism risk/offender needs assessment tools are support tools (just like e.g. the electronic monitoring of domestic violence offenders) to an effective re-socialization process and public protection.

### **Victimization and selected findings from conducted research**

Heretik (1994) states a victimological classification and/or the following victimization stages:

- primary – direct harm inflicted on the victim by the offence,
- secondary – caused by the reaction of the environment, offence investigation, subjective victimization processing,
- tertiary – emanation of the criminal offence and its consequences on a broad circle of originally uninvolved people such as close relatives, survivors, etc. Čírtková (2000, p. 182) defines tertiary victimization as a “state when an individual is unable to adequately cope with the traumatic experience, even though from an objective point of view there has been remedy or healing and compensation. The individual’s psyche is changing dramatically, he/she has been diverted from the original life journey, e.g. he/she is unable to continue on the same job, his/her lifestyle has changed significantly”.

Based on the data drawn from the research of victims of criminal offences in the Slovak Republic (Košecká, Ritomský, 2013) implemented from 2007 using the 1886 structured interviews method, more than half of all victims of violence (50.9%) have declared that after the victimization they have less trust in the people around them. Sleep disturbances following victimization are reported more often by older victims and sleep disturbance incidence is high among respondents in the age brackets 45 – 54 years and 55 – 64 years, and on the opposite, younger respondents report sleep disturbances as the least common symptoms. This tendency is shown in age brackets 15 – 24 years, 25 – 34 years and 35 – 44 years. The most

commonly reported symptom nearly in all age brackets (with the exception of 45 – 54 years) was anxiety and fear of revictimization. The age bracket 45 – 54 years was the least affected category from among respondents affected by post-victimization symptoms, of whom as many as 50% didn't experience any difficulties, and to the contrary, post-victimization difficulties were experienced most often by the category of respondents 65 and older, none of whom declared not to suffer from any of the above symptoms.

What follows is a selection of research findings from research projects targeted at the correlations between social work and probation from the perspective of 31 foreign experts and the opinions of the general public in Slovakia concerning selected aspects of restorative justice. The survey was conducted in 2008.

Based on the information and communication with the Slovak Statistics Office, we based our findings on the data in Table 1 below. Since accurate data concerning the education structure of the entire Slovak population was unavailable at the time of the research (the most recent comprehensive statistics were from 2001), the above criterion was not included in the quota criteria. We used three quota criteria of gender, age categories and permanent residence. Since a questionnaire distributed based on the quota criteria was used in the survey, the selected sample may be characterized as „quota-based“, and similarly the term „general public“ may apply (considering the valid operational definition). We implemented a research survey respecting the quota criteria and selection of the sample (we used a questionnaire), and the research tool was distributed in June and July 2008 by 4 people trained to conduct the survey (2 were from a village and 2 were from a city). Table 2 below shows the numbers and the percentages of the research set based on the quota criteria.

Table 2 Characteristics of the research set based on the quota criteria

Quota criterion				TOTAL	
		%	n	%	n
GENDER	men	47.5	105	100	200
	(as of 31 Dec, 2007) women	52.5	95		
AGE	0 – 17	20.0	40	100	200
	18 – 40	36.5	73		
	(as of 31 Dec, 2007) 41 – 64	31.5	63		
	65 and older	12.0	24		
PERMANENT RESIDENCE	village	45.0	90	100	200
	(as of 31 Dec, 2007) city	55.0	110		

The following 13 Slovak cities were represented in the factographic item “city”: Levice, Martin, Bratislava, Prievidza, Zvolen, Trnava, Nitra, Partizánske, Prešov, Topoľčany, Piešťany, Želiezovce, Šahy. In the factographic item “village” were represented the following 32 municipalities in the Slovak Republic:

Lehnice, Rohovce, Hrubá Borša, Chynorany, Čeladince, Ludanice, Norovce, Mýtne Ludany, Koľačno, Solčany, Bošany, Rajčany, Brodzany, Velké Bielice, Oslany, Tehla, Radobica, Krušovce, Devičany, Kozárovce, Kubáňovo, Žirany, Ivánka pri Nitre, Cabaj Čápor, Hronské Kosihy, Starý Tekov, Hronské Kľačany, Kukučínov, Santovka, Pohronský Ruskov, Podlužany, Nitrianske Hrnčiarovce.

The following question was asked:

*“In general, do you believe that people who have served an imprisonment sentence for non-violent criminal offences and have reentered the society are now more, less or equally likely to commit an offence in the future compared to prior to their imprisonment?”*

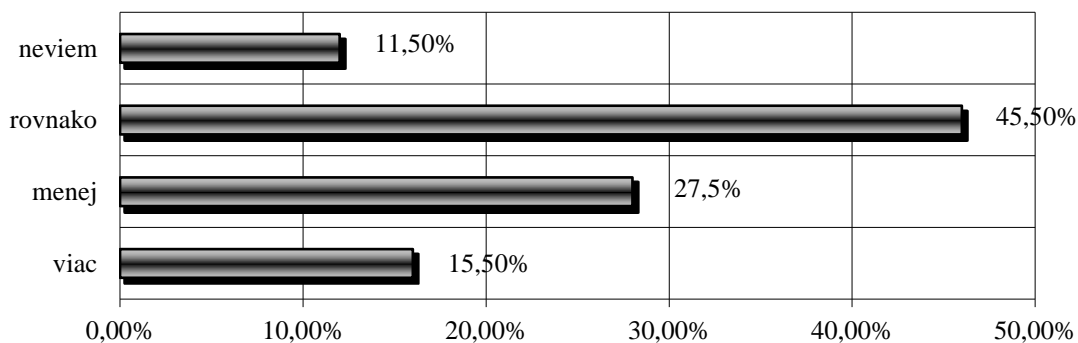


Chart 1: Change of the offender as a result of imprisonment

(top to bottom: unsure, equally, less, more likely)

Table 3: Change of the offender as a result of imprisonment

Item	n	%	Krisberg, Marchiona, 2006 – USA %
more	31	15,50	31,00
less	55	27,50	14,00
equally	91	45,50	51,00
unsure	23	11,50	4,00
total	200	100,00	100,00

Based on the above results, it may be said that on the interval scale the highest percentage of 45.50% was attributed to the answer *equally*. It is evident based on the graphic percentage Chart 1 that the least represented answer was *unsure*. However, when coefficients were attributed to the single positions,

the arithmetic average was 2.53, and the closest coefficient was 3, which is *equally*. Methodological comparison of the research conducted in the US and of our research set is unacceptable of course due to the failure to meet the criteria of a representative sample in our research. Therefore we state only an informative percentage from the research study conducted in the US in 2006 (Krisberg, Marchiona, 2006). It is a paradox that the answer represented with the highest percentage score in the above study was *equally* (51.00%) also. (Table 3).

Question:

*“The correction (penitentiary) system is funded from the state budget, meaning also from your taxes. If you were to choose, which of the following areas would you invest more in?”*

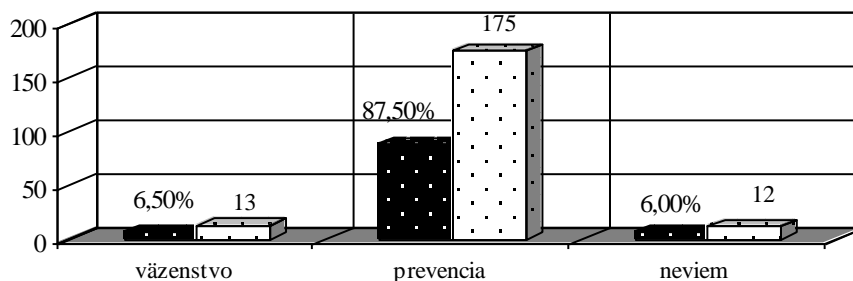


Chart 2 Prevention vs. correction (penitentiary) system

(Left to right: prisons, prevention, unsure)

Conclusions from the meta-analysis (secondary analysis) published in the US in 1999, in which among other things it is stated that “the general public is strongly in favor of timely intervention and supports timely intervention programs, also when it comes to the disbursement of tax payers’ money and this option is preferred to expansion and building of prison capacities” (U. S. Department of Justice, 1999, p. 10). As many as 87.50% (n=175) respondents from our research set would invest in prevention and measures leading to crime prevention. Only 6.50% respondents from our research set (n=13) would invest in expansion of prison capacities. *Unsure* was stated by 6.00% (n=12) respondents. Percentages and figures are shown in Chart 2.

Question:

*“In your opinion what is the main factor (which of the following options has the biggest impact) why people released from imprisonment commit a criminal offence again (meaning repeatedly, which is also referred to as recidivism)?”*

We realize how complicated the question is, but we decided to include it in our research survey mainly due to the fact that the item was used also in the research conducted in the US (Krisberg, Marchiona, 2006), and we included among the factors also a complementary item “insufficient supervision” that concerned probation. Percentages of the single factors are stated in Chart 3. Table 4 shows figures and

percentages, and the highest values are underlined. In Chart 3 we state recidivism factors based on percentages of data obtained in the above study conducted in the US.

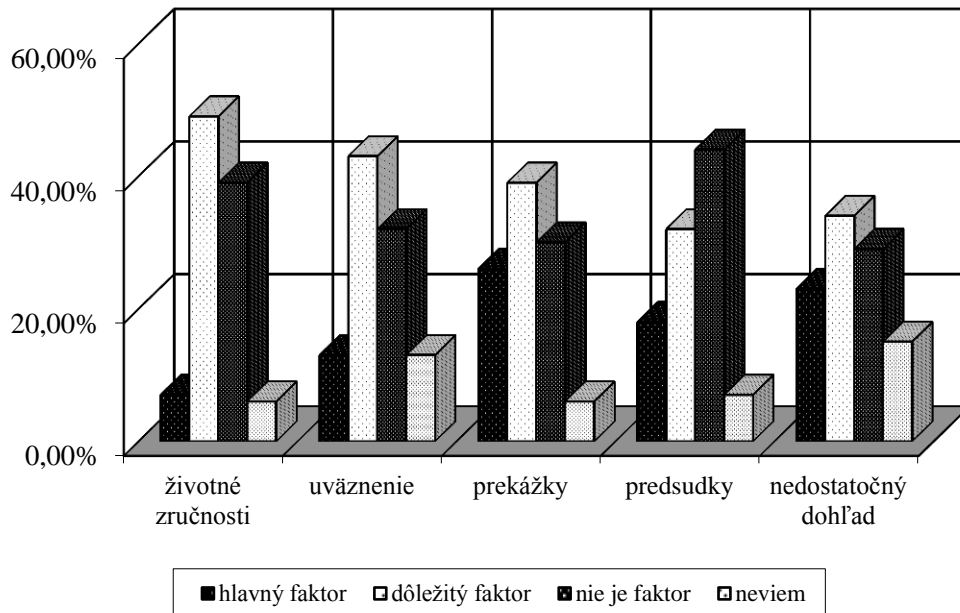


Chart 3 Recidivism factors

(From left to right: life skills, imprisonment, obstacles, prejudice, insufficient supervision)

From left to right: major factor, minor factor, not a factor, unsure)

Table 4 Recidivism factors

Item	Main factor		important factor		not a factor		unsure		total	
	n	%	n	%	n	%	n	%	n	%
life skills	13	6,50	98	49,00	78	39,00	11	5,50	200	100
prison experience	25	12,50	86	43,00	63	31,50	26	13,00	200	100
obstacles	52	26,00	77	38,50	59	29,50	12	6,00	200	100
prejudice	35	17,50	64	32,00	87	43,50	14	7,00	200	100
insufficient supervision	46	23,00	67	33,50	58	29,00	29	14,50	200	100

Based on the results shown in Table 4 it may be said that as many as 26% (n = 52) of the respondents involved in the research survey stated that obstacles were the main factor (“People reentering society after serving a term in prison experience too many obstacles to live a life without committing offences”). 49% (n = 98) of the respondents involved in the research survey considered life skills an important, but not the main factor (“When people leave prison, they don’t have more life skills than when they entered prison”). This statement concerning life skills was the main factor in the US study (Chart 4).

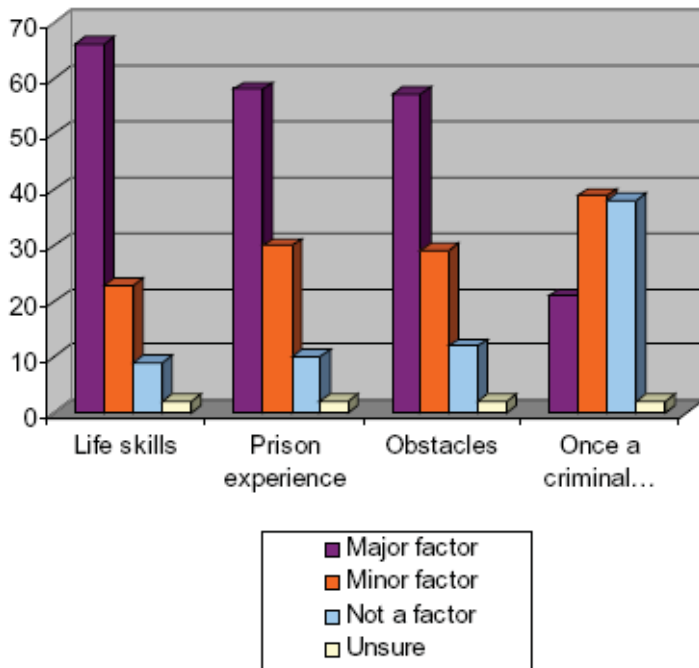


Chart 4 Recidivism factors – research study conducted in the US

### Conclusion

The prison population and the number of people under specialized/probation supervision is one of the indicators of criminal policy efficiency. Funding plays an important role for a probation system to be designed efficiently, the popularity of which (e.g. compared to the funding of the prison system) is low among the general public in Slovakia due to lack of knowledge. The consequences of an inefficient criminal policy are not only an increased overall registered criminality, but also increased property damage due to crime and an increased number of crime victims.

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## Peter Horvath: Rights of the victim of a criminal offence arising from Article 2 of the Convention on the Human Rights and Fundamental Freedoms

Before beginning to deal with the rights of the victim of a crime, I find it utterly important to discuss the status of a victim from another point of view, namely from the perspective of the Convention on the Human Rights and Fundamental Freedoms (referred as 'Convention').

Article 34 of the Convention envisages the sphere of 'Individual applications', which reads as follows:

*"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."*

Under Article 34, only applicants who consider themselves victims of a breach of the Convention can complain to the European Court of Human Rights (referred as 'Court'). It is important that it falls first to the domestic authorities to redress any alleged violation of the Convention. Thus, the question whether an applicant can claim to be a victim of the violation concerned is relevant at all stages of the proceedings before the Court.

The notion of 'victim' is interpreted autonomously and irrespective of domestic rules and it does not imply the existence of prejudice, and an act that has only temporary legal effects may suffice. As held for instance in *Monnat v. Switzerland*<sup>20</sup>, the interpretation of the term "victim" is liable to evolve in the light of conditions in 'contemporary society' and it must be applied without 'excessive formalism'.

There are distinct approaches when it comes to victim from the view of the Court, namely the direct and indirect victims. As to the former type, the act or omission in issue must directly affect the applicant, but this criterion cannot be applied in an inflexible way. Since the case-law of the Court constantly evolves, the Court has accepted applications from "potential" victims as well, i.e. from those who could not complain of a direct violation. However, a simple conjecture or suspicion is not enough to establish victim status e.g. a potential fine on an applicant; or alleged consequences of a judicial ruling). Nevertheless, an applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation. As to the indirect victims to be considered as victims in the light of the Convention, there must be a personal and specific link between the direct victim and the applicant (e.g. the wife of the victim killed by the agents of the state). Applications can be brought only by living persons or on their behalf; a deceased person cannot lodge an application with the Court, even through a representative. However, the victim's death does not automatically mean that the case is struck out of the Court's list. In general terms, the family of the original applicant may pursue the application provided that they have a sufficient interest in so doing, where the original applicant dies after the application has been lodged with the Court.

The applicant must be able to justify his or her status as a victim during the whole of the proceedings. Generally speaking, the mitigation of a sentence by the domestic authorities will deprive the applicant of victim status if the violation is expressly or at least in substance acknowledged, and is subsequently redressed by appropriate and sufficient remedy. Whether someone has victim status may also depend on the amount of the awarded compensation by the domestic courts and the effectiveness of the remedy affording the award.

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<sup>20</sup> *Monnat v. Switzerland*, judgment of 21 September 2006

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76947>

Now, let's turn to Article 2 of the Convention on - right to life -, which is the most basic human right of all and also the first substantive right envisaged by the Convention, and reads as follows:

*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

In this particular Article the Convention sets certain minimum standards on States instead of imposing strict and rigid requirements, it is up to the states, how to meet these basic requirements, which follows, they are allowed to have a certain discretion. This discretionary right depends on several circumstances, e.g. the nature of the approach, the interests at stake.

This right is absolute, that is, cannot be denied even in time of war or other public emergency threatening the life of a nation. Otherwise every other basic and fundamental right would become rather illusory. There is only one set of exception, under Article 15 Paragraph 2 of the Convention, which states that:

*'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision'.*

The second sentence of Paragraph 1 concerns the death penalty, which will be covered somewhat later.

There are two basic elements mentioned in Article 2 of the Convention, i.e. in Paragraph 1 a general obligation to protect the right to life 'by law'; and in Paragraph 2 a prohibition of deprivation of life, which latter is delimited by exceptions listed in Sub-paragraphs a) - c). These exceptions are allowed only when this is 'absolutely necessary' under the listed aims.

The first and utmost important case concerning this issue was *McCann v. the United Kingdom*<sup>21</sup>, where the Court held that the term 'absolutely necessary' in Article 2 „indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2”. A general positive obligation is imposed on States to investigate the particular deaths. The Court further held in its judgment that „there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State”.

As examining the matter in hand, there are several phrases and terms which need to be defined or at least clarified. Article 2 concerns a right of 'everyone' where, of course, only human beings are involved. Legal persons (companies) are 'persons', but nonetheless are not involved in the concept, since none of

<sup>21</sup> *McCann v. the United Kingdom*, judgment of 13 August 2008

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86233>

them have 'life'. Otherwise they might have fundamental rights protected by the Convention (e.g. right to a fair trial; or right to property), but not under Article 2. The term 'life' is not defined by the Convention. As to the concept of 'life', only 'human' life is protected, the life of an animal fall outside the scope in any event.

Not only the proper definition of what 'life' is is missing, but also the clarification of when it begins or ends. In its case-law, the Court does not or rather cannot set precise standards, these concerns always fall within the discretion of the States. There is a reasonable margin of appreciation of the States to rule on matters concerning the domestic way of handling the issue. The only obligation of the States that counts is to give appropriate weight to the different interests and reasonably balance between them.

Since the right to life wears an utmost important role amongst basic human rights, we do have to mention abortion which always triggers flagrant public discussions. In cases alike, the Court often refers to the case of *X v. the United Kingdom*<sup>22</sup> where the Commission held to have three options, namely Article 2 a) does not cover an unborn foetus at all; b) recognises a right to life of the foetus with certain limitations; or c) it grants an absolute right to life of the foetus. In *X v. the United Kingdom*, the Commission tended towards the first interpretation, that is, Article 2 concerns persons already born and cannot be applied to the foetus. As the case-law evolved, in the *H. v. Norway*<sup>23</sup> this perspective had changed somewhat to the direction of the second possibility, by holding that in specific circumstances the foetus may enjoy a certain protection under Article 2, considering a divergence of views in the States on whether or to what extent Article 2 protects the foetus's life. The Commission based its position on the different views by the Austrian and German Constitutional Courts and the Norwegian Supreme Court. The Austrian Constitutional Court found, that Article 2 did not cover the unborn life, whereas the German Federal Constitutional Court held that 'everyone' is every living human being, 'everyone' therefore includes unborn human beings. According to the 1978 Norwegian Termination of Pregnancy Act, it is only allowed "self-determined abortion" within the first 12 weeks of pregnancy; between 12 and 18 weeks (if the pregnancy, birth or care for the child might place the mother in a difficult situation of life) on the authority of two doctors; after the 18th week upon serious reasons, and never if there was reason to presume that the foetus is viable. The Commission concluded that „there are different opinions as to whether such an authorisation strikes a fair balance between the legitimate need to protect the foetus and the legitimate interests of the woman in question. However, having regard to what is Stated above concerning Norwegian legislation, its requirements for the termination of pregnancy as well as the specific circumstances of the present case, the Commission does not find that the respondent State has gone beyond its discretion which the Commission considers it has in this sensitive area of abortion. Accordingly, it finds that the applicant's complaint under Article 2 of the Convention is manifestly illfounded”.

The Court had to adjudicate on a case directly relating to abortion in the case of *Boso v. Italy*<sup>24</sup>, in 2002. The case concerned a woman who had had an abortion, against the wishes of her husband, the potential father, but in accordance with the relevant domestic law (Law No. 194 of 1978). The Court confirmed the principle stated in *H. v. Norway* and reassessed *'that it is not required to determine whether*

<sup>22</sup> *X. v. the United Kingdom*, decision of 13 May 1980

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74270>

<sup>23</sup> *H. v. Norway*, decision of 19 May 1992

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1759>

<sup>24</sup> *Boso v. Italy*, decision of 5 September 2002

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23338>

*the foetus may qualify for protection under the first sentence of Article 2. Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, the Court notes that in the instant case, ..., it appears from the evidence that his wife's pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978'. According to the relevant Italian legislation, an abortion may be carried out only in order to protect the woman's health: it authorises abortion within the first twelve weeks of a pregnancy if there is a risk to the woman's physical or mental health. Beyond that point, it may be carried out only where continuation of the pregnancy or childbirth would put the woman's life at risk, or where the child will be born with a condition of such gravity as to endanger the woman's physical or mental health. In the Court's view, such provisions strike a fair balance between the need to ensure protection of the foetus and the woman's interests. In the *Vo v. France*<sup>25</sup> case, the applicant was a woman who had been pregnant, who intended to carry her pregnancy to term and whose unborn child was expected to be viable. On a visit to hospital, she was mistaken for another woman with a similar name and had a coil inserted in the uterus which caused leaking of the amniotic fluid, as a result of which she had to undergo a therapeutic abortion, resulting in the death of the foetus. Mrs. Vo claimed that the doctors had acted negligently and that they should have been prosecuted for unintentional homicide. However, the French Court of Cassation held that, since the criminal law has to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application was therefore whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention. In answering this question, the Court summed up the submissions in *X v. the United Kingdom* and *H. v. Norway*, and in *Boso v. Italy*, and concluded that: 'It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions - that is, in the various laws on abortion - the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child'. ...That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" ... and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or vis-a-vis an unborn child'. According to the applicant, only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention, but the Court held that in cases of unintentional killing, this was not necessarily required. In the sphere of medical negligence, civil or administrative law remedies and disciplinary measures could suffice.*

Now, we shall further briefly refer to other sensitive areas, such as suicide, assisted suicide and euthanasia. Apart from the death penalty, Article 2 envisages only limited circumstances in which a person can be deprived of this right, but none of these relate to suicide or euthanasia. These issues raise difficult questions which are often overlap with each other. Firstly: when does life end? Secondly: is it acceptable to provide palliative care to a terminally ill or dying person (even if the treatment may result in the shortening of life)? Thirdly: do the State have to "protect" the right to life even of someone who does not want to live any longer, against that person's own wishes? Do they have also a right to die, in other words, to commit

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<sup>25</sup> *Vo v. France*, judgment of 8 July 2004

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887>

suicide? And if so, can they seek assistance from other individuals? And finally: can the State allow the ending of life in order to end suffering, even if the person concerned cannot express his or her wishes in this respect? The majority of these questions have not (yet) been put to the Court. When does life end? Just as with the beginning of life, there is no proper consensus (neither legal, nor scientific) on when this moment is. The question could arise, where the authorities had decided to switch off life-support machine at a certain moment when they deemed the person was no longer alive, but where this was disputed by relatives. The Court leaves the question to be answered basically on the States. The question that arises under the Convention in cases alike is whether the national legislation which allows the switching off of the life-support machines still adequately “protects” the right to life of the person concerned.

According to the Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe, the member States should ‘ensure that, unless the patient chooses otherwise, a terminally ill or dying person will receive adequate pain relief and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual’s life’. Mercy killings are not regarded as acceptable in the Recommendation. There are no Council of Europe member States that allow for active termination of life, other than at the request of the patient. But it must be noted that there is no clear line between “passive” withdrawal of life support and “active” euthanasia. Whether euthanasia can be in accordance with the Convention, has also not been determined.

In *Sanles Sanles v. Spain*<sup>26</sup> a man, Mr Sampedro, had been a tetraplegic since the age of twentyfive. From 1993, at the age of fifty, he had tried to obtain recognition from the Spanish courts to provide the right to end his life, with the help of others (including his doctor), without interference by the State. However, he died before the proceedings in Spain had come to an end, and the relative who was appointed to be the successor to this claim, Mrs. Sanles Sanles, was held by the Spanish courts to have no standing in the matter. The Court declared inadmissible (incompatible *ratione personae*) the applicant’s complaints under Articles 2.

The abovementioned Recommendation was referred in the Court’s chamber judgment of *Pretty v. the United Kingdom*<sup>27</sup>. This particular case concerned a 43-year-old married woman, Mrs Dianne Pretty, who was suffering from a degenerative and incurable illness, which was at an advanced stage. Although being paralysed from the neck down, and incapable of decipherable speech, her intellect and capacity to make decisions were unimpaired. Frightened and distressed at the suffering and indignity she would have to endure and unable to commit suicide by herself, she wanted her husband to assist her in this. In the United Kingdom, committing suicide is not a criminal offence, but assisting someone else is. However, prosecutions can only be brought with the consent of the Director of Public Prosecutions (the DPP). Mrs Pretty therefore sought an assurance from the DPP that her husband would not be prosecuted of assisting her to commit suicide in accordance with her wishes, but the DPP refused. The national courts upheld the DPP’s decision. Mrs Pretty then turned to the European Court of Human Rights. The Court admitted the case and quoted parts of Recommendation 1418 (1999). The Court was dismissive of the claim that Article 2 of the Convention should be read as granting individuals a right to commit suicide. As to the Court’s reasoning „Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of

<sup>26</sup> *Sanles Sanles v. Spain*, decision of 20 October 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22151>

<sup>27</sup> *Pretty v. the United Kingdom*, judgment of 29 April 2002

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448>

conferring on an individual the entitlement to choose death rather than life.”... „The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.” This ruling did not mean that if a particular State recognises such a right, that would be certainly contrary to Article 2; nor did it mean that if a State that did recognise a right to take one’s own life were to be held to have acted in accordance with Article 2, that would imply that the applicant, too, should be granted that right. A few days after the judgment, Mrs Pretty started having breathing difficulties and, following palliative care, she slipped into a coma and died a couple of days after the ruling.

Another issue with paramount role to be examined is the use of lethal force by agents of the State. This is covered by the second paragraph of Article 2, which refers to “deprivation of life”. Certain actions resulting in the death of persons by the act of the law enforcement forces of the state, will not be regarded as violations of Article 2, if they meet the exhaustively mentioned criteria in sub-paragraphs thereof: to defend any person from unlawful violence (Article 2 (2) (a)); to effect a lawful arrest (Article 2 (2) (b)); to prevent the escape of a person lawfully detained (Article 2 (2) (b)) and, finally; to quell a riot or insurrection through action lawfully taken for that purpose (Article 2 (2) (c)).

The so called “disappearances” (will be discussed below), when someone arrested by an agent of the state but later simply disappears without a trace, are likely to be treated equally to deliberate killings by a state agent.

The use of lethal force by the State was first addressed in details in the case of *McCann and others v. the United Kingdom*, mentioned above. Without reiterating myself, Article 2 restrictions within „absolute necessity” call for far more rigorous requirements than those layed down in Articles 8 to 11. The force used to the achievement of any of the aims set out in sub-paragraphs of Article 2 must always be strictly „proportionate”. The domestic law has got to positively protect individuals from actions not justified under the second paragraph.

In the case of *Mc Cann and Others v. the United Kingdom*, the Court stressed that “a stricter and more compelling test of necessity” is needed. As to the concrete case, it concerned the death of three members of the Irish Republican Army (IRA), who had travelled to Spain with the intention of detonating a car bomb and had parked a car next to their intended target. Later it turned out that at the time they were killed they were all unarmed, and that the car did not contain a bomb - although a bomb and a timing device was found in the terrorists’ hideout in Malaga. The Court held that the suspects had been deliberately killed, therefore the violation of Article 2 is to be observed. It was the first time that an European Government had been found responsible for the unlawful use of lethal force by law enforcement officials. As to the Court, the operation could have been planned and controlled without the need to kill the suspects. So the force that had been used was not proportionate and gone beyond the absolute necessity test. During its observations, the Court examined whether the national law adequately protected the right to life of the three persons killed, and whether the established facts show a violation of the substantive requirements of Article 2 in the light of the “absolutely necessary” requirement to achieve one of the aims listed in subparagraphs (a)-(c) of Article 2 (2). Furthermore, the procedural requirements under Article 2 were also put under scrutiny.

As it was formerly mentioned, the case-law of the Court uses the wording “absolutely necessary”. However, the English legal standard for use of lethal force used required the “reasonably necessary” expression. The question was, whether in Gibraltar the law adequately protected the right to life. The Convention standard apparently required a stricter „condition” than the national standard, but

substantially there was no significant difference between the two concepts. The Court, at this time, did not examine the training of the agents concerned as part of its assessment of whether the law provided sufficient protection.

It was not the case in another early case-law, where the Court did pay a significant attention to the domestic legal framework regulating the use of lethal force, and pointed out the serious deficiencies thereof. The case of *Matzarakis v. Greece*<sup>28</sup> concerned a police car chase. The fleeing man had driven through red traffic lights and crashed through a number of police barriers until the police seriously wounded him by firing several shots at the car with revolvers, pistols and submachine guns. The way in which the firearms were used by the police in the circumstances was chaotic. Sixteen gunshot impacts were counted on the car, some of which being horizontal or heading upwards, instead of downwards as would be expected if only the tyres of the vehicle were being shot. At the relevant time in Greece, the use of firearms was only regulated by a World War II act. It mentioned a number of situations where the member of the police could use firearms without being liable for the consequences. Later on, in 1991, a decree authorised the use of firearms only „when absolutely necessary and when all less extreme methods have been exhausted”. There was nothing else regulating the use of firearms during police actions, no guidelines on planning and control of law enforcement actions. In such circumstances, the domestic regulation was not able to fulfill the state’s obligation in this respect, so that it was impossible to provide adequate care during police actions, in other words, the domestic legal framework did not satisfy the need to provide the level of „protection by law” of the right to life. Consequently, the judgment made it clear that deficient legal framework will not suffice, it can constitute a violation, so the applicant, Mr. Matzarakis - though survived - had been the victim of a violation of Article 2 of the Convention. In cases alike, all the surrounding circumstances are under examination, so the respondent State must show the “absolute necessity” of any killing, not only in respect of the actions of the agents who had carried out the killing, but in respect of “all the surrounding circumstances”, planning, control and organisation of the operation included.

There are two notes to be mentioned at this stage. Firstly, the Court always relies on the findings of fact of the national „tribunals”. However, in utterly exceptional circumstances, it seldom occurred that the Commission sent a delegation to the country concerned to establish the facts. Secondly, generally speaking, the burden of proof is on the applicant to prove it with “convincing evidence” and „beyond reasonable doubt” in order his or her allegations to be accepted. However, at this time, it seems that this onus had been reversed by the Court to some extent, since it was the State that had the burden to prove that its actions were “absolutely necessary” in the sense of Article 2.

Also the substantive requirements of Article 2 were put under scrutiny. The Court stressed that the authorities - although they could have done that - did not arrest the suspects at the border and did not prevent them from travelling to Gibraltar. Moreover, the state authorities had made the SAS soldiers believe there was a bomb that could be detonated by remote control, and the suspects would be armed and have the equipment on them to explode the bomb. These were proven to be completely wrong. In such circumstances, the use of lethal force was almost unavoidable, especially in the light of the soldiers’ training. The Court assessed that the training of the soldiers involved to continue shooting once they opened fire until the suspect was dead. Their reflex action lacks the degree of caution in the use of firearms

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<sup>28</sup> *Matzarakis v. Greece*, judgment of 20 December 2004

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67820>

to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects.

These basic assessments has been confirmed in several cases later, like *Kaya v. Turkey*<sup>29</sup>, or *Andronicou and Constantinou v. Cyprus*<sup>30</sup> involving the use of lethal and/or near-lethal force.

Examples from recent case-law:

*Andreou v. Turkey*<sup>31</sup> concerned a British national shot and injured by Turkish armed forces during tensions at the United Nations buffer zone in Cyprus. There has been a violation of Article 2, since the use of potentially lethal force against the applicant had not been “absolutely necessary” and had not been justified by any of the exceptions permitted under Article 2.

In *Perisan and Others v. Turkey*<sup>32</sup> the force used against the prisoners to quell disturbances in a prison, which had led to the deaths of eight of them, had not been “absolutely necessary” and the Court held that there had been a violation of this article in respect of the eight prisoners who died and six who survived their injuries.

*Putintseva v. Russia*<sup>33</sup> concerned the death of a young man during his mandatory military service after being shot by a superior when trying to escape. The legal framework on the use of force to prevent the escape of a soldier had been deficient and the authorities had failed to minimise recourse to lethal force.

The procedural requirement to hold an investigation into a killing differs from the substantive requirement not to use lethal force unless absolutely necessary. It is important that there can be a violation of one without a violation of the other, either way. In the *McCann* case the Court found only a violation of the substantive requirement. Conversely, in *Kaya v. Turkey*, the Court found no violation of the substantive requirements, but a violation of the procedural ones of Article 2. In other cases, such as *Kılıç v. Turkey*<sup>34</sup> and *Ertak v. Turkey*<sup>35</sup> both kinds of requirements were violated.

The case of *Kaya v. Turkey*, referred above, concerned the killing of the applicant’s brother, who was allegedly killed by the security forces in 1993. The Government contended that he was killed in a gun battle between members of the security forces and a group of terrorists who had engaged the security forces on that particular day, and claimed that the applicant’s brother was among the assailants. The Court held that there was no sufficient factual and evidentiary basis to conclude (beyond reasonable doubt) that the deceased had been intentionally killed by agents of the State, and that there was therefore no violation of

<sup>29</sup> *Kaya v. Turkey*, judgment of 19 February 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58138>

<sup>30</sup> *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58102>

<sup>31</sup> *Andreou v. Turkey*, judgment of 27 January 2007

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95295>

<sup>32</sup> *Perisan and Others v. Turkey*, judgment of 20 August 2010

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98754>

<sup>33</sup> *Putintseva v. Russia*, judgment of 10 August 2012

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110814>

<sup>34</sup> *Kılıç v Turkey*, judgment of 28 March 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58524>

<sup>35</sup> *Ertak v. Turkey*, judgment of 9 May 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59199>



the substantive requirements of Article 2. However, the investigation into the killing had been seriously defective, because the prosecutor assumed without question that the deceased was a terrorist who had died in a clash with the security forces and failed to question the soldiers involved in the incident; no tests were carried out on the deceased for gunpowder traces; the deceased's weapon was not dusted for fingerprints; the corpse was handed over to villagers, making it impossible to obtain any evidence of any analysis; the autopsy report was perfunctory; etc. There had therefore been a violation of the procedural requirements of Article 2.

As to the procedural requirements (the positive obligation of the state) concerning killings, it is important to note that the essential purpose of investigation is to secure the effective implementation of the domestic laws and regulations which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The requirements during investigations are of paramount importance: independence, promptness and expedition, capacity to establish the facts, and accessibility to the public and the relatives.

Now, I would like to outline a recent case, which is quite interesting concerning the abovementioned issues. The *Giuliani and Gaggio c. Italy*<sup>36</sup> case concerned the death of a young man while he was taking part in an anti-globalization protest during the G8 summit in Genoa in 2001. No violation of Article 2 with regard to the use of lethal force, stating that it had not been excessive or disproportionate to what was absolutely necessary in defense of any person from unlawful violence. No violation of Article 2 was found regarding the national legislative framework governing the use of lethal force or with regard to the weapons issued to the law-enforcement agencies and no violation of Article 2 with regard to the organisation and planning of the policing operations at the G8 summit in Genoa. While authorities had a duty to ensure the peaceful conduct and the safety of all citizens during lawful demonstrations, they could not guarantee this absolutely and they had a wide discretion in the choice of the means to be used. No violation of Article 2 with regard to the alleged lack of an effective investigation into the death. The Court found that a detailed investigation into the fatal bullet, which was in dispute between the Parties, was not crucial as the Court stressed that the resort to lethal force had been justified.

Deaths in custody also raise the paramount role of protection of the right to life of a victim. In this respect the case of *Salman v. Turkey*<sup>37</sup> has a great value as an often referred case. In this judgment the Court held that: „Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.”

The applicant's husband, Agit Salman, had been arrested in February 1992 in Turkey, and was detained at a police station. Less than 24 hours later he was dead. Turkish medical experts concluded that he had died from a heart attack, with bruising to the chest and a broken sternum having been caused by a resuscitation attempt. However, international experts disagreed and found that the victim's injuries were consistent with beatings. The Court found that Agit Salman had been subjected to torture during interrogation, which had caused his death. As to the facts, the Court held: „Agit Salman was taken into

<sup>36</sup> *Giuliani and Gaggio c. Italy*, judgment of 24 March 2011

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104098>

<sup>37</sup> *Salman v. Turkey*, judgment of 27 June 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58735>

custody in apparent good health and without any pre-existing injuries or active illness. No plausible explanation has been provided for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage. ... The Court finds, therefore, that the Government have not accounted for the death of Agit Salman by cardiac arrest during his detention at Adana Security Directorate and that the respondent State's responsibility for his death is engaged. It follows that there has been a violation of Article 2 in that respect."

The procedural requirements of Article 2 are equally important in cases of deaths in custody. The Court said that the State should always investigate when a person dies in custody, which should involve an autopsy providing a complete and accurate record of injury and clinical findings, including the cause of death. In this respect there had been crucial failures, because no proper forensic photographs of the body were taken; no sufficient analysis of the injuries were carried out, and; "unqualified assumption" in the forensic report was to be observed. The defects in the examination of the autopsy undermined the chance to determine police responsibility for the death of the applicant's husband.

The responsibility of a state under the headings of Article 2 of the Convention may also occur in case of unresolved killings. In a narrower sense it raises the question of the responsibility of agents of the state, as it did indeed in *Kashiyev and Akayeva v. Russia*<sup>38</sup>. In the winter of 1999-2000, the applicants had fled the Chechen capital, Grozny, in order not to be involved in the fighting between the Russian Federation forces and Chechen fighters. While returning home, they discovered several bodies of their relatives, which bodies showed signs of beating and also bullet wounds. That particular area, where the bodies were found, was under control of the Russian Federation forces. Meanwhile, one of the applicants' relatives had been seen by eyewitnesses being detained by the Russian military forces. The applicants accused the Government for the killings of their relatives and also for having failed to set forth a proper investigation relating the killings. The Government were requested by the Court to submit a copy of the documents of the criminal investigation but they just partly did so, alleging that the missing part of the documents were not relevant... The Court finally found, since the State had not provided sufficient justification for the killings, that the applicants' relatives were killed by servicemen, therefore their deaths could be attributed to the state. Thus, there had been a violation of Article 2 in respect of its substantive requirements. From procedural point of view, the Court held that there had also been a violation of Article 2, since several deficiencies were to be observed, like procedural delays; no attempt to identify the potential soldiers involved; no autopsies were carried out; entirely futile adjournings of the investigation; unjustified transferrals of the file from one authority to the other; and also lack of scrutiny concerning the particular military operations. In such circumstances, the Court therefore concluded that, for the lack of an effective criminal investigation, the severe deficiencies or rather lack of state actions had led to a violation of the procedural requirements of Article 2.

The Court found a violation of both the substantive and the procedural requirements of Article 2 in its *Kılıç* judgment as well, since despite of the fact that the victim, a journalist, who was killed in early 1993, had expressly asked for protection from the authorities, which was not provided. The state was aware of the "real and immediate" risk of the unlawful attack against the victim, but failed to provide any protection.

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<sup>38</sup> *Kashiyev and Akayeva v. Russia*, judgment of 24 February 2005

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68419>

Similarly, in another relevant case, in *Shanaghan v. the United Kingdom*<sup>39</sup>, where a Northern Irish man had been shot dead by a pro-British terrorist organisation in 1991, according to the Court, the state was or should have been aware of the risk of attack. The applicant's son, Patrick Shanaghan had been suspected by the British security forces of being a member of the Irish Republican Army (IRA). The applicant claimed that her son had been threatened by members of the Northern Irish police force during interviewing. A case-file (including a photo), identifying Shanaghan as a suspected terrorist, had been lost, by allegedly falling off of an army lorry, and could have - allegedly, again - ended up in the hands of the terrorists who killed him. Most of the local police had been called to a traffic accident at the time of the shooting, so the killers escaped. A number of shortcomings were summed up by the Court (lack of independence of the police officers; lack of public scrutiny, and information to the victim's family; etc.), which had led to a violation of the procedural requirements of Article 2.

As we have seen, if there are allegations of active collusion between the killers and the State, the State has a heavy duty to carry out a full, impartial and speedy investigation.

In *Ertak v. Turkey*, referred above, another relevant issue came up to light, namely the phenomena of disappearances. In this particular case, the applicant's son, Mehmet Ertak, had been arrested during an identity check while returning home from work with three members of his family on 20 August 1992. There were eyewitnesses who had allegedly seen the victim while he was in police custody, and that he had been tortured there. One detainee made a report that Ertak had been brought to his cell after torture, apparently dead, and was then dragged out of the cell. He did not see him again. The authorities, against the Commission's expressed wish, did not provide the copies of the custody register. They denied even that Ertak had been arrested or detained and submitted that his name was not included in the custody register. The Commission sent delegates in Turkey to 'investigate' the case, and interviewed several witnesses. The conclusion was that Mehmet Ertak had been arrested. There was found another detainee, who was undoubtedly arrested and detained, and his name was not in the custody register either. Other deficiencies also were to be observed like unprovided, therefore missing, reports on interviews held by the prosecutor. The Court did not find the explanations given by the state sufficient enough to what happened after Mehmet Ertak's arrest and held that „in the circumstances of the case the Government bore responsibility for Mehmet Ertak's death, which was caused by agents of the State after his arrest". Therefore, there has been a substantive violation of Article 2. Since an effective and independent investigation must take place into killings (and alleged killings) by state officials, or in any case in which a person dies while in custody, the Court also examined the procedural aspects. It found that the state did not duly fulfilled its obligation to carry out an effective and adequate investigation into the surrounding circumstances of the disappearance of the applicant's son. The investigation at domestic level had not been thorough and had not been conducted by independent bodies. Thus, there has been a procedural violation of Article 2, as well.

Another important issue derives from the protection of victims of terrorism. At this time, I only briefly touch this sensitive issue. States are under the obligation to take all the necessary measures to protect the fundamental rights of everyone during the fight against terrorist acts, but all these measures taken must respect human rights and the principle of the rule of law at all time. Any form of arbitrariness, as well as any discriminatory or racist treatment must be excluded, and must be subject to appropriate supervision. *Nota bene*, the "absolute necessary" test wears a paramount relevance. At this point, the

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<sup>39</sup> *Shanaghan v. the United Kingdom*, judgment of 4 May 2001

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59452>

Finogenov and Others v. Russia<sup>40</sup> is to be mentioned. This case concerned the siege of the “Dubrovka” theatre in Moscow by Chechen separatists and the decision to overcome the terrorists and liberate the hostages using gas, in October 2002. The Court found that there had been no violation of Article 2 concerning the decision to resolve the hostage crisis by force and use gas. It further held that there had been a violation of Article 2 concerning the inadequate planning and implementation of the rescue operation. Moreover, a violation of the same Article was to be observed concerning the ineffectiveness of the investigation into the allegations of the authorities’ negligence in planning and conducting the rescue operation, as well as the lack of medical assistance to hostages.

In relation of Article 2, the states have the duty to provide adequate protection concerning the actions of their authorities not only in the abovementioned cases but also when, for instance, life-threatening environmental risks occur. In the majority of these cases, applicants complain other provisions of the Convention, but Article 2 also may come into play. In the Guerra and others v. Italy<sup>41</sup> case the applicants lived in Manfredonia, Italy. The factory, which was situated relatively close to the homes of the applicants, released large quantities of toxic substances and the applicants had been subjected to this pollution generally, because emissions from the factory were often channelled towards their homes. Once there had been a serious accident by which tonnes of dangerous gases had escaped. About 150 people had had to be brought to hospital, because of acute arsenic poisoning. The complaint was admitted only under Article 10, but the Court held that it had jurisdiction to examine the case under Articles 8 and 2 of the Convention as well. It focused on the former of these two. Having examined the facts, it concluded that the State had not duly provided the applicants with “essential information” so that they could assess the risks they might face if they stay to live at Manfredonia. Finally, the Court held that there had been a violation of Article 8 and found it unnecessary to consider the case under Article 2 as well.

Another interesting and also often referred case was L.C.B. v. the United Kingdom<sup>42</sup>. In this particular case, the applicant was the daughter of a man who had served in the British Air Force in the 50’s. He had been exposed to radiation caused by nuclear tests carried out in 1957 and 1958. The applicant, who was born in 1966, was diagnosed as having leukaemia when she was around four and she had to undergo medical treatment. The applicant considered that her father’s exposure to radiation was the probable cause of her childhood disease and challenged the state failing to warn and advise his father or monitor her health prior to the diagnosis of her illness. The Court basically examined three questions: first, whether the British authorities knew, or should have known, that the applicant’s father had been exposed to dangerous degree of radiation. If this was the case, whether the authorities should have given specific information and advice to the parents, or should have monitored the health of the baby. Thirdly, whether such advice or monitoring would have made the early diagnosis possible. The applicant’s complaints were rejected. The Court held that, at the specific time, the authorities could reasonably have believed that the applicant’s father had not been dangerously irradiated and it had not been established that there was a causal link between the radiation and the leukaemia. Therefore, it could not have been expected to notify the applicant’s parents of these matters, or to take any other preventive action. Thus, there had not been a violation of Article 2.

<sup>40</sup> Finogenov and Others v. Russia, judgment of 4 June 2012

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231>

<sup>41</sup> Guerra and others v. Italy, judgment of 19 February 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58135>

<sup>42</sup> L.C.B. v. the United Kingdom, judgment of 9 June 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58176>

We have touched the protection in case of 'killings' by agents of the state so far, but what about the protection of individuals from violence by other private people? A wide range of case-law deals with this particular area, where the applicants complain about the state having failed to protect their or their relatives' life. During the examination of these matters the Court takes into consideration both the substantial and the procedural aspects. States should not only refrain from the deliberate and unlawful taking of life, but also take appropriate steps to safeguard the lives of individuals, in particular by conducting effective provisions backed up by law-enforcement machinery. The case of *Osman v. the United Kingdom*<sup>43</sup> concerned the killing of the father of a schoolboy, by a teacher who otherwise had become obsessed by the boy. The boy was also involved in the shooting incident, where he wounded and survived. The teacher had been suspended following a psychiatric evaluation because of such infatuations. He was convicted of two charges of manslaughter but since he pled guilty on grounds of diminished responsibility, he was finally sentenced to be detained in a secure mental hospital without limit of time. The question arose whether the authorities could or should have done more to protect the victims. According to the applicants, the police had been informed of the facts, by which the police promised to protect them, but had failed to do so. However, the police denied that they had made any promise, and claimed that they never had enough evidence against the teacher to arrest him prior to the fatal incident. A scrutiny was held, but since someone had been convicted of the killings, this was a summary procedure only, which did not seek to establish the full facts, in particular the actions or rather inactions of the police. The applicants therefore instituted civil proceedings against the police for failing to take adequate steps to protect the child and his father, but these proceedings were dismissed by the British courts for public interest reasons, since, by law, the police was exempt from liability for negligence in the investigation and suppression of crime. The Commission found that the police had been made aware of the substance of the concerns about the teacher but the claim that the police had promised protection to the victims' families had not been substantiated. It had not been backed up enough that the police could or should have been aware of the seriousness of the threat shown by the teacher, therefore it had not been a violation of Article 2. However, it also held that there had been a violation of Article 6, in that the applicants had been denied access to a court by the rule that the police could not be sued for negligence in their official tasks. Subsequently, the Court was satisfied with the Commission's opinion and stressed that the positive state obligations under Article 2 should be interpreted in a way which does not impose an impossible or disproportionate onus on the authorities. The applicants had failed to show that the authorities knew or ought to have known that the lives of the Osman family were at „real and immediate risk” from the teacher. There was therefore no violation of Article 2. Nevertheless, the absence of any judicial examination of the issues at the national level resulted a violation of Article 6.

Another relevant and also often referred case is *Menson v. the United Kingdom*<sup>44</sup>. The applicants were the siblings of Michael Menson, a mentally disturbed black man, who was attacked and set on fire by a youth gang of white people in a racist attack in London, January 1997. He died in hospital two weeks later. The police failed to take proper measures after the incident to secure evidence and did not take any statement from the victim in hospital, although he had been able to describe the attack to his relatives. The applicants complained that the investigations had been affected by racism within the police. They also turned to the Police Complaints Authority, which subsequently confirmed that there was independent

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<sup>43</sup> *Osman v. the United Kingdom*, judgment of 28 October 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257>

<sup>44</sup> *Menson v. the United Kingdom*, decision of 6 May 2003

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23192>

evidence to back up the applicants' allegations. The file was transferred to the Prosecution, but a decision on whether to initiate criminal proceedings against members of the police for a crime had still not been taken by the time the Court dealt with the applicants' complaint, in 2003. The applicants complained of several violations of the Convention (Article 2 included). The Court finally declared the case as being "manifestly ill-founded", and inadmissible on all counts - mainly because, in the end, the perpetrators of the crime had been convicted and severely punished. The Court stressed that the investigation throughout the domestic proceedings must be prompt and it also repeated the requirements set out in other cases, concerning deliberate killings by agents of the State, deaths in custody, or killings in which the question of State involvement have remained unresolved.

The absence of any direct state responsibility for the death of an individual does not exclude the applicability of Article 2. In the case of *Angelova and Iliev v. Bulgaria*<sup>45</sup>, the applicants were the mother and brother of a man of Roma origin who was killed in an unprovoked attack by a group of teenagers in 1996. The attack had been racially motivated. The applicants alleged that the authorities had failed to carry out a prompt, effective and impartial investigation and that the domestic legislation contained no separate criminal offence or penalty for racially motivated murder or serious bodily injury. They further alleged that the authorities had failed to investigate and prosecute a racially motivated violent offence and the criminal proceedings had been far too excessive which have resulted in their being denied access to a court to claim damages. The Court noted that no one had been brought to trial over a period of eleven years and, as a result, the proceedings against the majority of the attackers had had to be dismissed under the statute of limitations. The authorities had failed to effectively investigate the death promptly, expeditiously and with the necessary vigour, considering the racial motives. The Court concluded that racist motives had been known to the authorities from early stage of the investigation. Their failure to complete the preliminary investigation and bring the perpetrators to trial expeditiously was, therefore, completely unacceptable. They had also failed to charge anyone with any racially-motivated offence and failed to make the required distinction between offences that were racially motivated and those that were not. The Court examined the case under Article 14 in conjunction with Article 2 and finally concluded that the act of the authorities constituted unjustified treatment that was irreconcilable with Article 14.

The state also has special responsibilities to protect persons in its custody from attacks by other private individuals. The case of *Paul and Audrey Edwards v. the United Kingdom*<sup>46</sup> concerned a mentally disturbed man, Christopher Edwards (the son of the applicants), who had been arrested in 1994 for accosting women on the street. After a hearing before a magistrate, he was incarcerated in a prison cell. Later that day, another mentally disturbed man, Richard Linford (with a history of violence), was also remanded in custody, apparently in the same cell as Edwards. In the night, Linford attacked and killed Christopher Edwards. A year later, Linford pleaded guilty to a charge of manslaughter and was sent to a secure mental hospital, where he has been diagnosed as suffering from paranoid schizophrenia. Because he pleaded guilty, the facts of the case were only cursorily examined at the trial. Three months after the trial, a private - therefore non-statutory - report was commissioned about the inquiry of the circumstances of the case by three state agencies. It concluded that the two men should not have been in prison and they should not have been sharing the same cell. The applicants complained that the authorities had failed to protect their son, and thus his right to life was violated. The Court reiterated its ruling in *Osman*, that there is a

<sup>45</sup> *Angelova and Iliev v. Bulgaria*, judgment of 26 July 2007

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81906>

<sup>46</sup> *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 March 2002

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60323>

violation of the substantive requirements of Article 2 if it is established that that the authorities knew or ought to have known of a real and immediate risk to the life of an individual from the criminal acts of a third party and that they failed to take necessary measures which might have been expected to avoid that risk. The Court found that there had been a number of failings in the way Edwards was treated, because he should have been detained either in a hospital or the health care centre of the prison. On the other hand, Richard Linford's medical history and perceived dangerousness was known to the authorities, and that this knowledge ought to have been brought to the attention of the prison authorities. The conclusion was that there has been a violation of Article 2 in its substantive aspect. From the procedural perspective, the Court found that no full inquest had been held in the case and the criminal proceedings in which Linford was convicted, since he pled guilty, had not involved a trial at which witnesses were examined. In this respect the procedural requirements had not been complied with, therefore the question was whether the non-statutory inquiry had remedied this, like independence, promptness, capacity to establish the facts, accessibility to the public and the relatives. The Court found that there had been two serious defects observed, namely, the inquiry had no power to compel witnesses, and it had been held in private. Because of these two defections, the inquiry had failed to satisfy the procedural requirements of Article 2, thus there had been a violation in that regard, too.

The state has positive obligations concerning the victim's right to life when we are talking about prevention. This duty also involves the prevention of suicide, especially when the individual in question is detained. It first occurred in the case of *Keenan v. the United Kingdom*<sup>47</sup>. The case concerned a young man, Mark Keenan, with a history of mental illness, who had been sentenced to imprisonment for assault. He displayed a threat of self-harm during his detention, therefore he was placed in the hospital wing of the prison for a period of time. After some time in the prison he assaulted two members of the prison staff after a change in his medication. For the assault, he was placed in a punishment cell, where he hanged himself. Asphyxiation was confirmed as the cause of death, but the procedure did not seek to establish the wider causes. The applicant, the deceased man's mother, complained under Article 2 that the prison authorities had been negligent in respect of his son's care. She was advised that she could not sue the authorities because English law did not allow an appropriate action. Basically, as mentioned before, states must provide effective criminal-law provisions, with effective law-enforcement machinery. Furthermore, it must take reasonable preventive measures to protect an individual whose life is threatened by the criminal acts of another individual. In the *Keenan* case, the Court had to consider to what extent these principles apply and finally concluded that the authorities responded in a reasonable way to Keenan's conduct, namely placing him in hospital care and under watch when he showed suicidal aptitude. Thus, there was no appearance of a violation of the substantive requirements of Article 2. However, the Court found that Keenan's treatment had not met the standards of treatment required under Article 3 of the Convention. Just for the sake of completeness, the Court found that the disciplinary punishment imposed on him belatedly may well have threatened his physical and moral resistance and it therefore was not compatible with the standard of treatment required by Article 3 in respect of a mentally ill person. It was seven-day segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days before his expected date of release. This must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3. This perfectly shows how the protection of various provisions of the Convention overlap and interrelate.

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<sup>47</sup> *Keenan v. the United Kingdom*, judgment of 3 April 2001

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59365>

A state also has to provide protection in other fields as well, as we have seen in the case of *Erikson v. Italy*<sup>48</sup>. The requirements as to the protection of the right to life “by law”, also apply to cases of alleged medical malpractice. In this particular case an elderly lady, the applicant’s mother, had died of an intestinal occlusion. The disease had not been diagnosed at a local hospital where she had been x-rayed but the report of this examination had not been signed by a doctor. The criminal investigation failed to identify the doctor and the applicant complained that his mother’s right to life was violated on account of the failure of the state authorities to identify those responsible for her death. The Court found that there had been a sufficient criminal investigation conducted. Moreover, it also held against the applicant that she had not initiated a separate civil action against the hospital and rejected the case as “manifestly ill-founded”.

In the case of *Powell v. the United Kingdom*<sup>49</sup>, the applicants’ son, a 10-year old boy, Robert Powell, died of Addison’s disease, which is susceptible to treatment if diagnosed in time. Although from early on, a test for the disease had been recommended by a hospital paediatrician, none had been ordered to be carried out. The applicants alleged that medical records had been falsified to cover this up. Beside the disciplinary proceedings and a police investigation, the applicants also initiated civil proceedings against the health authority. The Authority admitted liability for having failed to diagnose the disease, and paid the applicants a huge sum as damages. The alleged conspiracy to cover up the failure to diagnose, was, on the other hand, struck out by the judge on the ground that, under English law, doctors are not obliged to reveal all the issues to the parents of a deceased child about the circumstances surrounding the death. As to the falsification of the medical records and the subsequent cover-up, the Court held that the examination of the applicants’ complaint under Article 2 must necessarily be limited to the events leading to the death of their son. The applicants’ complaints under Articles 2 (8 and 10) were undermined by the fact that they withdrew from the appeal hearing in the disciplinary proceedings and settled their civil case. The Court pointed out that where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle can longer be considered as a victim in respect of the circumstances surrounding the treatment of the deceased or with regard to the investigation carried out into his or her death. The applicants could therefore no longer claim to be (indirect) victims.

The States’ positive obligations under Article 2 were, again, confirmed by the Court in the case of *Calvelli and Ciglio v. Italy*<sup>50</sup>, stating that it falls within the states’ obligation to adopt appropriate measures by hospitals to protect the patients’ lives and proper procedure needs to be conducted in order to unveil the cause of deaths and make those responsible thereof accountable. This latter case concerned the death of a baby shortly after birth. The mother was a level-A diabetic and had a past history of difficult confinements. The doctor in charge failed to make external examination of the mother to assess whether the foetus was too large for a natural birth, and was not present at the time of birth. The delay in bringing him to the delivery room had significantly reduced the newborn’s chances of survival. The applicants, the baby’s parents, had obtained compensation for damages, but believed the doctor in question should have been prosecuted. Criminal proceedings had been set forth, but had had to be abandoned after a couple of years, during which there had been procedural shortcomings and delays, and, finally, the case became time-barred. According to the applicants, this violated the provision of the right to life. The applicants

<sup>48</sup> *Erikson v. Italy*, admissibility decision of 26 October 1999

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-4817>

<sup>49</sup> *Powell v. the United Kingdom*, admissibility decision of 4 May 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5215>

<sup>50</sup> *Calvelli and Ciglio v. Italy*, Grand Chamber judgment of 17 January 2002

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60329>



entered into an agreement with the insurers of the doctor and the clinic under which the insurers were to pay a specific sum to the applicants. The Court noted the shortcomings in the criminal proceedings, but found that the civil avenues would have offered the applicants sufficient redress, if they had not settled the case. Furthermore, a civil court judgment could also have led to disciplinary action against the doctor. The Court therefore found it unnecessary to examine the case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2. There had therefore been no violation of Article 2.

There are other areas touching the right to life envisaged in Article 2, out of which it is necessary to refer to, namely the domestic violence. This issue generally concerns all member states and is likely to be latent to a large extent since it often takes place within personal relationships. However, it is not only women who are affected, men or children may also be the victims of such crimes. Domestic violence can take various forms ranging from physical to psychological violence or verbal abuse.

In the case of *Opuz v. Turkey*<sup>51</sup>, the applicant's mother was shot to death by the applicant's husband in 2002 as she attempted to help the applicant flee the matrimonial home. In the years preceding the killing the husband had subjected both the applicant and her mother to a series of (life-threatening) violent assaults, including beatings, hit by car, and stabbing as well. The incidents and the women's fears for their lives had been brought to the authorities' attention repeatedly. Although criminal proceedings had been brought against the husband for a range of offences, but in at least two instances they were discontinued after the women withdrew their complaints. In respect of the running down case and the stabbing incident the husband was convicted, receiving a three-month prison sentence, and a fine, respectively. The series of violence culminated in the fatal shooting of the applicant's mother. For that offence, he was convicted of murder in 2008 and sentenced to imprisonment with a lodged appeal. The Court held that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life and that they failed to take measures within the scope of their powers of an identified individual which, might have been expected to avoid that risk. The case disclosed a typical pattern of escalating violence against the applicant and her mother that was serious enough to have warranted preventive measures. The situation was known to the authorities that the husband had a record of domestic violence and thus, there was a significant risk of further violence. The possibility of a lethal attack had been foreseeable. On the other hand, the criminal proceedings arising out of the death had been going on for more than six years and an appeal was still pending, which could not be described as a prompt response by the authorities to an intentional killing where the perpetrator had already confessed. As a result, the Court held that there has been a violation of Article 2 of the Convention.

Other example for domestic violation is the case of *Kontrovà v. Slovakia*<sup>52</sup>. On 2 November 2002 the applicant filed a criminal complaint against her husband for assaulting and beating her with an electric cable. Accompanied by her husband, she later tried to withdraw her complaint and modified it that her husband's alleged actions were just minor offences which called for no further action. On 31 December 2002 her husband shot dead their five year-old daughter and one year-old son. Before the Court, the applicant alleged that the police had failed to take appropriate action to protect her children's lives. The Court observed that the situation in the applicant's family had been known to the local police given the

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<sup>51</sup> *Opuz v. Turkey*, judgment of 9 June 2009

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945>

<sup>52</sup> *Kontrovà v. Slovakia*, judgment of 31 May 2007

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80696>

criminal complaint and emergency phone calls. However, one of the officers involved had even assisted the applicant and her husband in modifying the criminal complaint of November 2002 so that it could be treated as a minor offence without any further action. The Court held, in conclusion, that the police had failed in its obligations and the direct consequence of those failures had been the death of the applicant's children and that there had been a violation of Article 2.

As another relatively recent case of domestic violence we have got to mention *Branko Tomašić and Others v. Croatia*<sup>53</sup>. The applicants were the relatives of a baby and his mother. The mother's husband, the father, had killed his wife and their common child and then committed suicide. All these happened one month after being released from prison, where he had been held for making death threats. He was originally ordered to undergo compulsory psychiatric treatment while in prison and after his release, as necessary, but during the appeal process the court ordered that his treatment be stopped on his release. The applicants complained that the Croatian State had failed to take adequate measures to protect the child and his mother and had not carried out an effective investigation into the deaths relating the responsibility of the state. The Court concluded that the Croatian authorities failed to take adequate steps to prevent the deaths of the child and his mother. The findings of the domestic courts and the conclusions of the psychiatric examination showed that the authorities should have been aware of the serious threats against the lives of the mother and the child. The Court observed several deficiencies in the authorities' conduct as well. Although the need for the husband's psychiatric treatment had been drawn up, the state had failed to prove that such treatment had actually and properly been administered. Although the husband's treatment in prison had consisted of several conversational sessions, but these were conducted without the presence of a psychiatrist and the ordering of compulsory psychiatric treatment had not provided sufficient details on how it should be administered. Furthermore, the husband had not been examined prior to his release whether he still posed a risk to the child and his mother. As a conclusion, the Court held that the domestic authorities had failed to take adequate measures to protect the victims' lives.

And, finally, a couple of words about the death penalty. Article 2 and Protocols Nos. 6 and 13 are concerning the death penalty and the abolition thereof. The second sentence in the first paragraph of Article 2 refers to the death penalty and reads as follows: „*No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*” For the States that are party to them (i.e. almost all of the States Party to the Convention), this stipulation has been replaced by the provisions in Protocols Nos. 6 and 13 to the Convention, which abolish the death penalty in times of peace and in all circumstances, respectively. The drafters of the Convention did not regard the existence or use of the death penalty as a violation of the right to life of the Convention per se. At the time, in the early 1950s, many States still retained the penalty on their statute books, even if its use was already in decline. Article 1 of Protocol No. 6 stipulates that „*The death penalty shall be abolished. No one shall be condemned to such penalty or executed.*” Subject to its one limitation, the absolute nature of the provision - which, for States that are Party to the Protocol, is regarded as an additional article to the Convention as a whole (Article 6 of Protocol No. 6) - means that no reservations may be made in respect of it. Article 1 of Protocol No. 6 does not affect the application of the rest of Article 2, other than the second sentence of the first paragraph of the latter article. Extra-judicial killings contrary to Article 2 Paragraph 2 remain prohibited. The new article prohibits judicial executions. The one limitation - to which, however, the stipulations in Articles 3 and 4 of the Protocol also apply - is contained in Article 2 of Protocol 6, which reads: „*A State may make provision in its law for the death*

<sup>53</sup> *Branko Tomašić and Others v. Croatia*, judgment of 15 January 2009

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90625>

*penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.”*

The second sentence of Paragraph 1 of Article 2 of the Convention remains applicable for those States which retain the death penalty for acts committed in time of war or of imminent threat of war, in particular as regards the requirement that the sentence must be pronounced by a “court” - that is, by an independent and impartial tribunal established by law. The Protocol stipulates, in Article 3, that: „*No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.*” This means that States may not derogate from their obligations under Article 6 in respect of proceedings in times of war or imminent war that could result in the death penalty. Any State Parties to the Protocol that do retain the death penalty in times of war (imminent war) must therefore ensure that the relevant courts and procedures do not depart from the minimum fair trial requirements (envisaged in Article 6).

The phrase in Protocol No. 6 “in time of war or of imminent threat of war” has not yet been clarified. However, in accordance with general international law, it should be read as referring to actual or imminent international armed conflict.

Under Protocol No. 13, States can agree to abolish the death penalty “in all circumstances”, i.e. both in times of peace and in times of war.

Now, here are some examples of cases relating both the issue of death penalty and Article 2 of the Convention.

In *Bader and Kanbor v. Sweden*<sup>54</sup>, the applicants were a family of four Syrian nationals who had had their asylum applications refused in Sweden. The deportation orders to be returned to Syria had served on them. They complained that as the father in the family had been convicted of murder in absentia and sentenced to death in Syria, he risked of being executed if returned there. The Court held that the first applicant had a well-founded fear that the death sentence against him would be executed if he was forced to return to his home country. Regarding the criminal proceedings which had led to the death sentence of a summary nature, the Court found that, because of the total disregard of the defence rights, there had been a flagrant denial of a fair trial. The death sentence imposed on the applicant following an unfair trial would cause him and his family additional fear and anguish as to their future in case of being forced to return to Syria. Accordingly, the applicants’ deportation to Syria, would give rise to a violation of Articles 2 and 3 (prohibition of inhuman or degrading treatment) of the Convention.

The case of *Rapo v. Albania*<sup>55</sup>, the applicant (Albanian and American national) was detained in a prison in the United States following his extradition from Albania to stand before the court in the United States on numerous criminal charges, one out of which carrying the death penalty. While still detained in Albania, the applicant complained that, given the risk of the death penalty if he were tried and convicted in the US, his Convention rights would be breached as a result of his extradition. The Court found that the applicant’s extradition to the United States had not given rise to a breach of Articles 2 and 3 and Article 1 of Protocol No. 13 to the Convention. There was nothing in the materials before the Court that could cast doubts as to the credibility of the assurances that capital punishment would not be imposed in respect of

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<sup>54</sup> *Bader and Kanbor v. Sweden*, judgment of 8 November 2005

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70841>

<sup>55</sup> *Rapo v. Albania*, judgment of 25 September 2012

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113328>

the applicant by the United States. Otherwise, the Court held that there had been a violation of Article 34 (right to individual application), because the applicant had been extradited to the United States in breach of the Court's indication to the Albanian Government, under Rule 39 (interim measures) of the Rules of Court, not to extradite him.

At last, but not least, the case of *Öcalan v. Turkey*<sup>56</sup> should be referred as to an example concerning, amongst others, the death penalty as a result of a fair trial. Abdullah Öcalan is a Turkish national serving a life sentence in a Turkey. Prior to his detention, he was the leader of the Workers' Party of Kurdistan (PKK), which is considered as an illegal organisation. Arrested in Kenya in on 15 February 1999, he was flown to Turkey where he was sentenced to death in June 1999. Following the 2002 abolition of the death penalty in peacetime in Turkish law, the domestic Court commuted the applicant's death sentence to life imprisonment. He complained about the imposition and/or execution of the death penalty in his regard. Because of this, the Court held that there had been no violation of Articles 2, 3 or 14, as the death penalty had been abolished.

There are of course many other aspects, opinions backed up by cases concerning the victims' rights under the perspective of the European Convention on Human Rights, and the scale is getting wider and wider as our economic and society evolves from time to time.

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<sup>56</sup> *Öcalan v. Turkey*, judgment of 12 May 2005

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022>

## Peter Horvath: Rights of the victim of a criminal offence arising from Article 6 of the Convention on the Human Rights and Fundamental Freedoms

Article 6 of the European Convention on Human Rights (referred as: Court) enshrines the utmost important role of judicial proceedings within a democratic society and it guarantees the right to a fair trial. Thus, no wonder that it is one of the most often referred provision of the Convention before the Strasbourg Court. This particular article is complex and consists of guarantees for the parties involved in civil proceedings, and also for defendants of criminal procedures. The former set of guarantees, which otherwise deals with both, is expressed by the first paragraph and the remainder two paragraphs are dealing with only criminal related matters.

### Article 6 - Right to a fair trial

*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

*2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*3. Everyone charged with a criminal offence has the following minimum rights:*

*a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him;*

*b. to have adequate time and facilities for the preparation of his defence;*

*c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The question in *Mihova v. Italy*<sup>57</sup> was whether Article 6 was applicable. The applicant lodged a

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<sup>57</sup> Mihova v. Italy, 30 March 2010

complaint for sexual abuse of her daughter. The investigating judge applied a sentence resulting from a plea bargain between the accused and the prosecution. The applicant was not informed of the date of the hearing and appealed against the judgment. The Court of Cassation declared her appeal inadmissible on the ground that the injured party who was not joined to the proceedings as a civil party could not appeal against a conviction or acquittal. Meanwhile, the applicant commenced civil proceedings against the man in question. The applicant complained that she had been unable to challenge the sentence imposed, which she felt to have been too lenient. The Court held that the applicant's aim in the criminal proceedings had been to take punitive action, which was not guaranteed by the Convention. Even assuming that Article 6 (1) was applicable in such circumstances, the fact that domestic law did not allow the injured party to intervene in the plea bargaining between the accused and the prosecution could not, in itself, be considered contrary to the Convention. Furthermore, the applicant had been able to bring a civil action for damages against the man in question. She had therefore had access to a court with jurisdiction to examine her civil right to compensation. Consequently, the complaint was to be found inadmissible since there was no appearance of a violation of Article 6 (1).

This abovementioned example shows the very importance of the scrutiny that has got to be set forth from the scratch when dealing with any complaints.

Before getting any further, I find it essential to express my intent that, to the best of my belief, whenever we discuss Article 6, from any perspective, we have to give a whole view on the provision itself to understand the holistic meaning and importance thereof.

Regarding both the substantive and procedural aspects of Article 6, it must be ascertained that it enjoys a significant autonomy within the national laws. This means that a procedural violation of a right might occur even if it does not considered to be violating at domestic level and, at the same time, a procedural deficiency of domestic law does not automatically mean a breach of Article 6. The Court, when it comes to fairness, generally examines the proceedings as a whole, which does not mean that it cannot examine certain crucial moments of the procedure in question.

We also have to underline the basic differences between the status of a victim in terms of the Convention and the status of a victim of a criminal offence in terms of its everyday meaning in domestic jurisdictions. Under Article 6 of the Convention, a person can claim to be a 'victim' only if the proceedings are over, and once person is found guilty of a crime (or has lost a civil case). There are exemptions also to be observed, for instance when we are talking about the requirement of reasonable time or the presumption of innocence. All the Member States of the Council of Europe, by the meaning of Article 1, are required to organize their legal systems so as it to be complied with Article 6, where the failure to do so cannot be justified with reference to practical or financial difficulties.

The majority of Article 6 rights may be waived, but a waiver must be unambiguous, knowledgeable and cannot go against public interest. The waiver cannot be considered as justified if it had been obtained by compulsion, or the person in question does not understand the consequences thereof. An example for the waiver could be the *Gustafson v. Sweden* case<sup>58</sup>, where the applicant's claim for compensation was rejected

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<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98314>

<sup>58</sup> *Gustafson v. Sweden*, judgment of 1 July 1997

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58051>

on account of his failure to adduce any new relevant evidence proving that he had been the victim of a crime. The applicant only submitted material that had already been considered by the domestic court which acquitted the alleged perpetrator. The application was rejected by the Court on the ground that the applicant could have requested an oral hearing but failed to do so being the applicant aware that the Board in question seldom had recourse to oral hearings. This may reasonably be considered to have waived his right to an oral hearing.

The basic interpretation of the right to a fair trial depends on whether the matter in hand concerns civil right or obligation, or a criminal charge. In case of civil rights and obligations, the cumulative presence of all the following elements are required: (i) there must be a 'dispute' over a 'right' or 'obligation', which is also referred as the 'Bentham criteria' (it was worked out in the case of *Bentham v. the Netherlands*<sup>59</sup>); (ii) that right or obligation must have a basis in domestic law, and; (iii) the right or obligation must be of a 'civil' nature. The 'dispute' has got to be construed in a substantive meaning and may relate only to an existing right within the scope it is exercised. It also has got to be genuinely and seriously relate to questions of fact or law and must be decisive for the rights of the applicant. In the case of *Georgiadis v. Greece*<sup>60</sup>, the allegedly unlawfully detained applicant's claim for compensation, even though the right to compensation was only available under the national law in principle, not in the particular circumstances of the applicant, who was a conscientious objector, was regarded as 'dispute'. Thus, the Court examined the application on its merits and held that there had been a violation of Article 6 (1).

As we will see below, those victims of criminal offences might turn before the European Court of Human Rights, who - for instance - have been involved in a criminal act and, as a consequence, suffered loss or injuries and, subsequently initiated civil proceedings in order to seek compensation, but to no avail, or at least not to an extent with what he or she could have felt satisfied.

Now, let's turn to the to the issue of 'criminal charge'. Under the Convention it has an autonomous concept and applies irrespective of the definition of a charge in domestic law. It has a substantive rather than a formal meaning in the understanding of the Court. It definitely constitutes a "charge", when someone's arrest for a criminal offence is ordered, or; when officially informed of the prosecution against him. However, there are three elements which allows us to determine the applicability of Article 6 under its criminal headings, which are also known as 'Engel criteria', since these had been worked out in *Engel and others v. the Netherlands*<sup>61</sup>. If any of these criteria is to be observed, then the case will fall under the criminal headings of Article 6. The first Engel criterion is that the offence in question is categorized in the domestic law as 'criminal'. The second Engel criterion is the nature of the offence that counts, and the third criterion is the nature and degree of severity of the possible penalty. Not every judicial decision taken by the course of a criminal procedure falls within the ambit of Article 6, only those proceedings which may result in a criminal conviction.

Categorisation in domestic law means that if the categorisation on national level is criminal, it will

<sup>59</sup> *Bentham v. the Netherlands*, judgment of 23 October 1985

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57436>

<sup>60</sup> *Georgiadis v. Greece*, judgment of 29 May 1997

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58037>

<sup>61</sup> *Engel and others v. the Netherlands*, judgment of 8 June 1976

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479>

automatically bring the matter in hand within the scope of Article 6 under its criminal limb.

However, if this first criterion cannot be observed, then the second and third criteria comes into play, which was clearly established in the case of *Weber v. Switzerland*<sup>62</sup>.

By examining the nature of the offence, a comparison is needed between the domestic law and the scope of its application with other criminal offences within that legal system. Those domestic provisions which are aiming to punish a particular offence are usually considered to be “criminal”, but in some cases, the aim of punishment can exist together with the purpose of deterrence. The ‘criminal’ nature does not necessarily require a certain degree of seriousness, the minor nature of an offence might also fall within the scope of Article 6. Where an offence is directed at a larger proportion of the population also might be a relevant circumstance that indicates the “criminal” nature of the offence. If the penalty is punitive rather than merely deterrent, it is usually to be classified as ‘criminal’ and if so, the degree of severity, i.e. the amount of the penalty becomes irrelevant. There might be cases of a mixed nature, where the possibility of criminal and disciplinary liability can coexist. In these cases a more thoroughgoing analysis is needed. The offence is more likely to be considered as disciplinary and not criminal, where the facts of the matter do not seem to give rise to an offence outside a particular closed context, such as prison.

The third Engel criterion is to be considered if there no conclusion could be reached after the analysis of the first and second elements on their own. This is an alternative criterion which may attest a charge as criminal even where the nature of the offence is not necessarily criminal.

In any event, in cases concerning a ‘criminal charge’, the protection of Article 6 starts with an official notification of suspicion against the person, or with practical measures by which the person is first ‘affected’ by the charge. However, if someone is questioned by the police a potential suspect and his answers are used against him at a later stage (during the trial), Article 6 is applicable to this questioning as well, despite the fact that the person had not the formal status of suspect or accused.

Article 6 covers the whole of the trial in both civil and criminal cases, including the determination of the damages and sentence. However, it does not apply to different proceedings incidental to the determination of the ‘criminal charge’, i.e. procedures which are conducted after the conviction and sentence have become effective. For instance, a petition for retrial, or a request for reduction of a sentence, an application for release on probation, proceedings concerning the sentence in which prison to be served, determination of the security class of a prisoner fall beyond the ambit of Article 6. Meanwhile, if the domestic authorities agree to re-open the case, or on the request of an extraordinary review is granted, the guarantees of Article 6 will apply to the ensuing court proceedings.

The right to a fair trial involves the right to a court which has different forms in civil and criminal spheres.

The first and utmost important essential part of Article 6 is the right to access to court. There is no *expressis verbis* guarantee of the right of access to court in the text, but according to the Court, this provision secures to everyone the right to have any claim relating to his or her civil rights and obligations

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<sup>62</sup> Weber v. Switzerland, 22 May 1990

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57629>



brought before a court (or tribunal). However, the right of access to a court is not an absolute one since the Court expressed in the case of *Golder v. the United Kingdom*<sup>63</sup>, that its very nature calls for regulation by the states, which regulation must never injure the substance of the right nor conflict with other rights envisaged in the Convention.

This is the right to submit a claim to a tribunal with the jurisdiction to examine points of fact and law relevant to the dispute concerned, with a purpose of adopting a binding decision. The right claimed in court must have a basis in domestic legislation and the claimant should have a personal interest in the outcome of the proceedings, but Article 6 does not create substantive rights, for instance, to obtain compensation or damages. In the domestic law there must be a structural right of appeal to a judicial body, that is, access to court involves the ability to apply for at least one stage of court review, which is an autonomous requirement of Article 6. It doesn't necessarily mean that this right can be exercised only in respect of an appeal from a lower court to a higher one, only if the domestic procedure foresees such a right. The right to a court involves, as such, the right to a reasoned decision as well.

The refusal of access to court requirement, in some cases, might be justified, because of the nature of the litigant. Limitations on access for persons of unsound mind, minors, bankrupts and vexatious litigants do pursue a legitimate aim.

There are several different formalities as obstacles of access to court, like court fees, time-limits for appeals, which are of a procedural nature. As to the domestic law, the applicant must show a considerable diligence to comply with these procedural requirements. One of these procedural requirements is the personal presence. Continuation of civil proceedings may be conditioned thereto. According to the Court, the accused in criminal proceedings must be present at the trial hearing, since the object and purpose of Article 6 paragraphs 1 and 3 c-e presuppose the presence of the accused. However, the absence of the accused or a party may be allowed in certain exceptional circumstances, e.g. if the authorities have acted diligently but not been able to notify the person concerned of the hearing. The restriction on access to court was held disproportionate in the case of *Atanasova v. Bulgaria*<sup>64</sup>, where the criminal courts' refusal to the applicant's civil claim owing to statutory limitation in the criminal proceedings amounted to a violation. As to the essence of this case, the applicant was injured in a road-traffic accident in 1992. In 1994 she joined as a civil party the criminal proceedings that had been brought against the driver and claimed compensation for her alleged physical injuries. The domestic courts concluded in 2002 that they could not examine her claim as a civil party in the criminal proceedings as those proceedings had been discontinued under the statute of limitations, but that she retained a remedy in the civil courts. The question before the Court was whether the criminal courts' decision not to examine her civil claim once the criminal proceedings had been discontinued under the statute of limitations had infringed her right of access to a court or not. However, she retained the right to seek compensation in the civil courts. The applicant had exercised her right under domestic law to seek compensation in the criminal proceedings as a civil party. Therefore, she had had a legitimate expectation that the courts would determine her claim. Because of the Bulgarian authorities' delays in dealing with the case, the prosecution of the offence had become time-barred. It resulted that she could no longer obtain a decision on her compensation claim in the criminal

<sup>63</sup> *Golder v. the United Kingdom*, judgment of 21 February 1975

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496>

<sup>64</sup> *Atanasova v. Bulgaria*, judgment of 2 January 2009

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88659>

proceedings. In such circumstances, it would not be right for her to be required to wait until the prosecution of the offence had become time-barred through the negligence of the judicial authorities before she was allowed, years after the accident had taken place, to bring a new action in the civil courts for compensation for her injuries. Thus, there had been a violation of Article 6 paragraph 1 and she was awarded EUR 4,000 in respect of non-pecuniary damage.

Another perspective of access to court is the question of legal aid. In some jurisdictions of the Contracting Parties, e.g. Cyprus, there is no legal aid scheme for civil cases, thus, whether or not the lack of a legal aid scheme leads to a violation of the Convention will depend on the facts of the particular case. Refusal of legal aid in civil case on the ground of the frivolous or vexatious nature of the claim will, of course not amount to a violation, nor will the statutory exclusion of certain types of civil dispute from the legal aid scheme. The right of access to court may sometimes be violated where an immunity exists that is effectively preventing a claim from being pursued. The position as to immunities enjoyed by certain domestic or foreign authorities from civil actions is rather unclear.

In the case of *Osman v. the United Kingdom*<sup>65</sup>, the question of immunity arose. This particular case concerned the killing of the father of a schoolboy, by a teacher who had become obsessed by the boy. The boy was also involved in the shooting incident and, although wounded, survived. The teacher had a history of such infatuations and, following a psychiatric evaluation, had been suspended. He was convicted of two charges of manslaughter and pled guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time. The question was whether the authorities could and should have done more to protect the victims. According to the applicants, the police had been informed of all the relevant facts from early on, and had promised to protect them, but had failed to do so. The police denied that they had made such a promise, and claimed that they never had enough evidence against the teacher to arrest him prior to the killings. An inquest was held, but since the perpetrator had been convicted of the killings, this was only a summary procedure, which did not establish the full facts. The applicants, Mrs Osman and Ahmet (mother and son) therefore instituted civil proceedings against the police for failing to take necessary steps to protect Ahmet and his father, but these proceedings were dismissed by the British courts, on the ground that the police was exempt from liability for negligence in the investigation and suppression of crime. The Commission found that the police had been made aware of the substance of the concerns about the teacher but the allegation of the applicants, namely that the police had promised protection to the victims of the crime had not been duly substantiated. It could not be proven that the police should have been aware of the seriousness of the threat by the teacher. However, the Court held that there had been a violation of Article 6, in that the applicants had been denied access to a court by the domestic regulation that the police could not be sued for negligence in the performance of their official task. The Court essentially confirmed the Commission's opinion and finally concluded that the absence of any judicial examination of the issues at the national level resulted a violation of Article 6.

Another essential element of the right to a fair trial is the finality of court decisions, in other words, the *res iudicata*. It draws its source from the principle of legal certainty and it means that once a criminal acquittal, or a civil judgment, has become final, it must instantly become binding. As we have seen, extraordinary review must be limited to very compelling circumstances and the mere possibility of there

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<sup>65</sup> *Osman v. the United Kingdom*, judgment of 28 October 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257>

being two views on the subject of law in question, is not a reasonable ground for re-examination, only newly discovered circumstances may suffice for a case to be re-opened.

In addition to the abovementioned issues, from the principle of effectiveness, the timely enforcement of a final decision of a court is also to be drawn as an immanent segment of the right to a fair trial. Lack of funds cannot be relied on by a state as an excuse for not honouring a debt incurred as a result of a judgment ordered against a state authority. However, it is not the case when the final judgment found against a private individual or a company, when this occurs, the lack of funds may justify failure to enforcement. In such cases the obligation of the state remains to assist (and not guarantee) successful claimants in enforcing the judgment in their favour. As to enforcement, a breach of domestic time-limits does not automatically mean a breach of Article 6, a delay for a certain period of time may be acceptable.

Article 6 states that everyone is entitled to a hearing by an independent and impartial tribunal established by law. These two requirements (independence and impartiality) are often considered together by the Court. The wording 'independent and impartial tribunal established by law' involves three main core-points, namely the tribunal 'established by law'; 'independent' tribunal, and; 'impartial' tribunal. It is utterly important, that these characteristics are applicable only to judicial bodies, since police or prosecution authorities need not be impartial, independent, or lawfully established. This latter provision deals with the question whether a particular disciplinary or administrative body has the characteristics of a 'tribunal' or 'court' within the meaning of Article 6, even if it is not called as such in the domestic system. This is the only provision of Article 6 which explicitly refers back to domestic law. The body need not be part of the ordinary judicial machinery, and must have the power to make binding decisions and not merely tender advice or opinions.

The notion of 'independence' of the tribunal overlaps with the 'tribunal established by law' to some extent. It is often analysed in conjunction with 'objective impartiality' of the member of the tribunal, there is no clear distinction being made between these two aspects. Anyway, the 'independence' requirement entails the existence of procedural safeguards to separate the judiciary from other powers, with special regard to the executive. The notion of the "independence" of the tribunal involves a structural examination of statutory and institutional safeguards.

On the other hand, 'impartiality' entails inquiry into the court's independence vis-à-vis the parties of a particular case. It is a lack of bias or prejudice towards the parties. As stated in the *Sander v. the United Kingdom*<sup>66</sup> case, the presence of even one biased judge in the bench may lead to a violation, even if there are no reasons to doubt the impartiality of other judges. There are two forms of impartiality, the subjective and the objective one. The former one is presumed unless there is proof to the contrary, while the objective impartiality necessitates a less stringent level of individualisation and, accordingly, a less serious burden of proof for the applicant.

The fairness requirement of Article 6 covers the proceedings as a whole, where a cumulative analysis is needed on all stages. A deficiency at one level may be put right at another, at a later stage. 'Fairness' is completely autonomous from the domestic interpretation, which means that a procedural defect amounting to a violation during the national proceedings may not in itself result the establishment of the

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<sup>66</sup> *Sander v. the United Kingdom*, judgment of 9 May 2000

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58835>

trial being unfair, but also, a violation of Article 6 can be found by the Court even if the domestic procedure was complied with the national law. Various minor deficiencies may lead, by a cumulative analysis, to a violation, even if each defect, taken alone, would not result in breach of 'fairness'. We should never forget and always have to bear in mind, that the Court is not allowed by Article 6 to act as a fourth instance court, it can never re-establish the facts of the domestic case and cannot overrule the discretion of weighing an evidence by the domestic court. Fairness within the meaning of Article 6 always depends on whether the applicants were afforded sufficient opportunities to state their case and contest an evidence which they consider false, and not whether the domestic courts reached a right or wrong decision.

'Fairness', as such, includes both in criminal and civil cases the requirements of adversarial proceedings, equality of arms, presence and publicity. In criminal matters it furthermore includes the requirement of entrapment defence, right to silence and not to incriminate oneself and, finally right not to be expelled or extradited to a country where one may face a flagrant denial of a fair trial.

The adversarial principle means that the relevant material or evidence is made available to both parties, i.e. having then opportunity to know and comment at trial on the observations filed or evidence adduced by the other party. Access to the materials vital to the outcome of the case must be granted, however, access to less important evidence may be restricted. Alleged violations of adversarial proceedings under Article 6 (1) and defence rights under Article (3) are usually examined in conjunction, since these requirements usually overlap. A more specific requirement of adversarial proceedings in a criminal trial requires disclosure of evidence to the defence, however, the right to disclosure may be limited, e.g. in order to protect secret investigative methods. Whether or not to disclose materials to the defence cannot be decided only by the prosecution. To comply with Article 6, the question of nondisclosure must be put before the domestic courts at every level, and can be approved by the national courts and only when strictly necessary.

Equality of arms often overlaps with the adversarial requirement, but it essentially denotes equal procedural ability to state the case. The adversarial principle is a rather narrow understanding of the access to and knowledge of evidence and it is not clear in the Court's case-law whether these principles in fact have independent existence from each other. A minor inequality which does not affect fairness of the proceedings as a whole will not infringe Article 6. However, there's no exhaustive definition as to what are the minimum requirements of "equality of arms". There must be clear procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties, which may include opportunities to adduce evidence, challenge hostile evidence and present arguments on the matters.

Article 6 also guarantees to everyone a public hearing in any criminal charge against him or her. It further states that the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This provision requires that in principle, there should be an oral hearing attended in criminal cases by the prosecutor and the accused. A public hearing is an essential feature of the right to a fair trial. It consists accordingly four implied rights: (i) right to an oral hearing and personal presence before the court; (ii) right to effective participation; (iii) right to publicity (i.e. third persons and media be allowed to attend the hearing); and (iv) right to publication of the court decision.

As to the right to an oral hearing and personal presence, it is to be noted that this presence presupposes an oral hearing, however, not every oral hearing must necessarily be public. However, there's no significant distinction between situations involving merely a lawyer being present (although it may be relevant for the purpose of Article 6 (3) b and c); and cases conducted by written procedure in the parties' total absence). According to the Court's opinion, where the case is to be heard before one instance only, and where the issues are not highly technical or purely legal, there must be an oral hearing, written proceedings will not suffice. It is for the Court to define whether the appeal proceedings were alike. Written proceedings at the appeal stage are generally accepted as complying with Article 6, when no issues with the credibility of witnesses arose, or facts are not contested, or even if parties were given adequate opportunities to put forward their cases in writing and challenge the evidence against them. A party to be present before at least one level of court jurisdiction is an autonomous requirement, but exemptions might occur. For instance in misdemeanour cases (speeding or other road traffic offences), as long as there was no need to assess the credibility of witnesses, the Court has accepted that no oral hearing was required and the proceedings could be written. The physical presence of parties is required to collect evidence from them where they are witnesses to the events important for the case. On the other hand, it can be relevant to give the judge an opportunity to make conclusions about the applicants' personality, abilities, etc. Where proceedings at first instance were held in absentia, this may be cured at the appellate stage if the court of appeal is empowered to rule both on questions of fact and law and has got the power to completely re-examine the first instance court's decision. In any event, presence before an appellate court is required if it deals both with questions of fact and law and is fully empowered to quash or amend the lower decision. This is also the case where an applicant risks a major detriment to his situation at the appeal level, even if the appeal court deals merely with points of law or, where the assessment of the applicant's character or state of health is relevant of the appeal court's legal opinion. Since most of Article 6 rights can be waived, a person can waive his or her right to be present but it must be made in an unambiguous manner. Trials in absentia will only be allowed as long as the authorities made their best efforts to track down the accused and inform of forthcoming hearings, and the possibility of full re-trial in case of their re-appearance.

The effective participation is important to take account of the defendant's physical and mental state, age and other personal characteristics at a court hearing. A criminal defendant must feel sufficiently uninhibited by the atmosphere of the courtroom (especially in case of excessive public scrutiny) in order to be able to consult with his lawyers and participate effectively. In criminal cases involving minors, specialist tribunals must be set up and make proper allowance for the handicaps.

The purpose of attendance by third parties and the media, i.e. the public nature of a hearing ensures greater visibility of justice, maintaining the confidence of the society in the judiciary. A merely technical character of the case is not a good reason to exclude the public. The public nature does not mean that the proceedings should be held in camera by default, but a court must individualise its decision when excluding the public. There are some sort of matters, where the procedure can be held in camera by default, like prison disciplinary cases. Failure to hold a public hearing at first instance will not be redressed by opening the appellate proceedings to the public, unless the appeal court has full review jurisdiction in the case, however, there's no right to a public hearing on appeal where the first instance has been public, unless it is a full appeal, i.e. on facts and law.

As to the fourth element of the 'public hearing' within the fair trial, it is to be noted that there's no obligation for a court to read out its full judgment in open court since publishing in writing is sufficient and

the court decision must be available for consultation in the registry of the court.

There are specific elements of the 'fairness' requirement in criminal proceedings, namely (i) the entrapment defence, (ii) the right to silence and not to incriminate oneself and, finally, (iii) the right not to be expelled or extradited to a country where one may face a flagrant denial of a fair trial.

As to the first requirement<sup>67</sup>, the case of *Ramanauskas v. Lithuania*<sup>67</sup> wears a great significance. In this case the applicant worked as a prosecutor and in his application he submitted that he had been approached through a private acquaintance by a person previously unknown to him who was, in fact, a police officer from a special anti-corruption unit. The officer offered the applicant a bribe of USD 3,000 in return for a promise to obtain a third party's acquittal. The applicant refused the offer first but later agreed as it was repeated a number of times. The officer informed his employers and the Deputy Prosecutor General authorised him to simulate criminal acts of bribery. Shortly afterwards, the applicant accepted the bribe from him. In 2000 he was convicted of accepting a bribe of USD 2,500 and sentenced to imprisonment. On appeal, the second instance court upheld the judgment. The Supreme Court dismissed the applicant's cassation appeal and held that the question of incitement was of no consequence for the legal classification of the applicant's conduct. According to the Court, the national authorities could not be exempted from responsibility for the actions of police officers simply by arguing that, although carrying out police duties, the officers were acting "in a private capacity". It was particularly important that the authorities should have assumed responsibility, as the initial phase of the operation had taken place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the officer to simulate acts of bribery and by exempting him from all criminal responsibility, the authorities had legitimised the preliminary phase afterwards and made use of its results. Moreover, no satisfactory explanation had been provided as to what reasons or personal motives could have led the officer to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he had not been prosecuted for his acts during that preliminary phase. On that point, the Government had simply referred to the fact that all the relevant documents had been destroyed. The authorities' responsibility was thus engaged for the actions of the officer and the applicant's acquaintance prior to the authorisation of the bribery simulation. To hold otherwise would open the way to abuse and arbitrariness by allowing the applicable principles to be circumvented. The actions of the officer and the applicant's acquaintance had gone beyond the mere passive investigation of existing criminal activity: there was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences; all the meetings between the applicant and the officer had taken place on the latter's initiative; and, the applicant seemed to have been subjected to blatant prompting on the part of his acquaintance and the officer to perform criminal acts, although there was no objective evidence to suggest that he had been intending to engage in such activity. The applicant had maintained, throughout the proceedings, that he had been incited to commit the offence. The domestic authorities had denied that there had been any police incitement and had taken no steps at judicial level to carry out a serious examination of the applicant's allegations. More specifically, they had not made any attempt to clarify the role played by the protagonists in the applicant's case, despite the fact that the applicant's conviction was based on the evidence that had been obtained as a result of the police incitement complained of. The Supreme Court found that, once the applicant's guilt had been established, the question whether there had

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<sup>67</sup> *Ramanauskas v. Lithuania*, judgment of 5 February 2008

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935>

been any outside influence on his intention to commit the offence had become irrelevant. The Court contested these statements. The actions of the officer and the applicant's acquaintance had had the effect of inciting the applicant to commit the offence of which he had been convicted. There was no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial had been deprived of fairness. Finally, the Court held that there had been a violation of Article 6 (1), and awarded the applicant EUR 30,000 in respect of all damages.

As we can see, the Court's case-law uses the term entrapment interchangeably with the phrase police incitement but, anyway, these terms appear to be construed in an equivalent way for Convention purposes, despite of the fact that there is a substantial difference between them, since police incitement relates to instigation of crime in the context of an official investigation. However, while someone offering of a bribe may amount to incitement, it does not necessarily amount to entrapment. The protection against entrapment under the fair trial provision of the Convention is of an absolute nature, which means that even the public interest cannot justify conviction based on evidence obtained by police incitement. Similarly, in the case of *Teixeira de Castro v. Portugal*<sup>68</sup> two policemen procured small amount of drugs from applicant without previous criminal record during an unsupervised investigation, where no good law-enforcement reason existed to carry out the operation, thus the court concluded the violation of Article 6 (1), since the active behaviour of the police officers went beyond the burden of an acceptable level.

When it comes to police incitement, there is a two-step test to be examined, namely whether the state agents remained within the limits of "essentially passive" behaviour or had gone beyond them, and whether the applicant had been able to raise the issue of entrapment effectively during the domestic proceedings, and how the domestic courts had dealt with that. During the examination of the state agents' "essentially passive" behaviour the Court, under its analysis, reexamines the facts whether the authorities created a risk that an ordinary reasonable person would commit an offence under the influence of the investigation in question, and also the quality of the national legal basis regulating those undercover operations. As to the scrutiny of the legal basis, it is to be examined whether the special activities by undercover agents leading to the commission of an offence were properly supervised (by a judge), whether the authorities remained essentially passive, and whether the authorities had good reason to commence the investigation (not just against incidental target). It might be also relevant, whether the target had started performing criminal acts by him or herself. If these elements of the analysis are inconclusive, only then will the Court go on to examine whether the applicant had been enabled by the national law to raise the issue of entrapment during a trial. In this latter case the prosecution has got to show that the applicant's allegations of entrapment are, at least, unsubstantiated.

The right to silence and not to incriminate oneself is another important aspect to take into consideration when dealing with Article 6 (1), which essentially prevents the prosecution from obtaining evidence by defying the will of the accused not to testify against himself. The law itself might impose an obligation for someone to testify under the threat of sanction (e.g. to give evidence as a witness at a trial). Moreover, there are other types of situation which involve defying the will of accused persons who had decided not to give a testimony, namely the physical or psychological coercion and, also the coercion with

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<sup>68</sup> *Teixeira de Castro v. Portugal*, judgment of 9 June 1998

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58193>

the use of covert investigation techniques. As a basic rule, the admissibility of the domestic evidence cannot be reexamined by the Court since it would go against the fourth-instance rule. Whether the coercion or oppression of the will of the accused is permissible or not, depends on various factors, namely on the nature and degree of compulsion, the weight of the public interest in the investigation and, finally, existence of any relevant safeguards regarding the procedure. It is still not clear-cut, whether the warning of the suspect of his right to silence is always compulsory but it appears that at least a formal warning is inevitably required before the first questioning if there is a chance that the person being questioned might become a suspect and the questioning takes place without the absence of a lawyer. The right to silence overlaps with the presumption of innocence under Article 6 (2). In the case of *Shannon v. the United Kingdom*<sup>69</sup> the applicant, charged with false accounting and conspiracy to defraud, was required to attend before a financial investigator to answer questions on whether any person had benefited from the false accounting. The applicant failed to attend because he feared his replies could be used as evidence against him during the trial. The applicant was, as a result, convicted and fined for the offence of failing without reasonable excuse to comply with the investigators' requirements to answer questions. His appeal against conviction was initially allowed by the County Court, but the Court of Appeal confirmed the applicant's conviction on the ground of not having a reasonable excuse for refusing to comply with the investigators' requirements because the information sought could be potentially incriminating. The Court finally held that the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in respect of events of which he had been charged was not compatible with his right not to incriminate himself, therefore there had been a violation of Article 6 (1).

It is not always unequivocal whether a person is being questioned as a suspect or a witness. Though it is a relevant circumstance, since the former having the right to silence, and the latter not. In analysing such cases the Court takes into account not only the formal status of the person being questioned, but also the factual circumstances of the questioning in order to establish whether or not the he or she could reasonably be considered as a potential suspect, in which case the right to silence may also be claimed.

The right to a reasoned decision is also immanent part of the fair trial requirement. The domestic decision should contain reasons that are sufficient to reply to the essential aspects of the party's factual and legal argument. Article 6 does not allow complaining about the factfinding and legal competence of domestic courts by alleging that they reached a wrong decision. As long as some reasons are given, the decision in question will in principle be compatible with Article 6, it does not require a detailed answer in the judgment to every argument raised by the parties.

When it comes to the reliability of an evidence obtained by the domestic court, the the Court will verify whether the 'unlawfulness' in the domestic terms coincides with the 'unfairness' in the autonomous terms of the Convention and whether the applicant had been able to raise the matter before the domestic courts. However, most complaints under Article 6 about unreliable evidence are likely to be rejected as being of fourth instance nature.

The reasonable time requirement, a quite often referred violation, arose from the principle of effectiveness and is *expressis verbis* envisaged in the wording of Article 6 as a fully autonomous need. It concerns the length of procedural actions and applies both to civil and to criminal cases. Under the Court's

<sup>69</sup> Shannon v. the United Kingdom, judgment of 4 October 2005

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70364>



case-law there is no fixed time-limit for any type of the proceedings, all situations are examined on a case-by-case basis. Length cases are the first area where the Court has issued pilot judgments. The “reasonable time” requirement must not be confused with the length of detention test, which latter applies only as long as the person is deprived of his or her pre-trial liberty. In a criminal case, the beginning of period to be taken into account for the purpose of the “reasonable time” requirement is determined by the date the “charge” was notified. It may vary in different national laws, so there’s not an exhaustive list or proper definition to establish an exact date. The date of opening an investigation indicating the applicant as a suspect may be taken as a starting date, but also the date of arrest, search, or questioning, even as a witness may count. The ending date is the date of notification of the final domestic decision determining the dispute by a higher court. Where a case is re-opened, for instance upon a supervisory review, the period when no proceedings had been pending is excluded from the calculation. There are some basic criteria which is to be taken into account by dealing with length issues. First of all the nature and complexity of the case, which involves the number of defendants, number of charges and what is at stake for the applicant in the domestic proceedings. For example child-care or compensation claims for blood tainted with HIV, or even action for serious injury in a traffic accident related cases usually enjoy priority and always call for special diligence. The conduct of the applicant and the authorities are also taken into consideration when length complaints arise. Delays attributable to the authorities are taken into account but delays (deliberate or not) attributable to the applicant will not be taken into consideration in assessing “reasonable time”. However, the defendant cannot be blamed for taking all the legal resources (appeals, requests, etc.) afforded by domestic law, unless these were not abusive. There is no general rule on the time allowed by Article 6, but more attention is to be paid to cases that last more than 3 years at 1 instance, 5 years at 2 instances, and 6 years at 3 levels of jurisdiction.

Length related claims are those which considered one of the most typical complaints victims of criminal offences may successfully complain of. The case of *Pantea v. Romania*<sup>70</sup> concerned a Romanian lawyer (formerly public prosecutor) who was involved in an altercation with a person who sustained serious injuries. He was prosecuted and remanded in custody for months. The case was still pending at the time of the Court’s decision. The Court noted that the proceedings had begun to affect the applicant’s situation as soon as the prosecution began. The criminal proceedings, which were currently pending at the first level of jurisdiction, had lasted eight years and eight months. Considering that the Romanian authorities could be held responsible for the overall delay in dealing with the case, the Court held that the proceedings failed to satisfy the ‘reasonable time’ requirement under Article 6 (1) of the Convention, and thus there had been a violation.

The interesting thing about the abovementioned Pantea case is, that the applicant can be considered as a ‘victim’ in the understanding of both the Convention and the national aspects.

Article 6 (2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This is the presumption of innocence principle, by which not only the courts but also other State organs are bound and must equally be upheld after acquittal as before trial. This basic principle applies during criminal proceedings in their entirety, included the pre-trial stage and also when the criminal proceedings are over, irrespective of their outcome, but a violation thereof can occur even in

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<sup>70</sup> Pantea v. Romania, judgment of 3 September 2003

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61121>

absence of a final conviction.

Article 6 (3) is often examined in conjunction with the right to a fair trial under Article 6 (1), since the former contains the defence rights listed in a form of minimum guarantees, which means, at the same time, that it is not an exhaustive list. The sub-paragraphs a) - e) indentify different aspects of the right to a fair trial.

Article 6 (3) a) stipulates that everyone charged with a criminal offence has the right to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him. This provision is aimed at the information that is required to be given to the accused at the time of the charge or the commencement of the proceedings and in a language that the accused understands, it does not necessarily have to be his or her mother tongue.

The information provided must be sufficient enough to enable the accused to begin formulating his defence, however, full evidence against the accused is not required at the earliest stage, it may be presented later. No written notification of the “nature and cause of the accusation” is needed as long as sufficient information is given orally.

As to Article 6 (3) b), everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his or her defence. The adequacy of the time is a subjective test and always depends on the circumstances and the complexity of the case, including the stage the proceedings have reached, and what is stake for the applicant. Any restrictions on this requirement can be justified only if it is no more than strictly necessary and must always be proportionate to identified risks. A certain overlap can be explored between this right and the right to adversarial proceedings and equality of arms. As stated in *Öcalan v. Turkey*<sup>71</sup> a delicate balance must be struck between the need to ensure trial within a reasonable time and the need to allow enough time to prepare the defence, in order to prevent a hasty trial which denies the accused an opportunity to defend himself properly.

Article 6 (3) c) consists of four distinct elements, namely the right to defend oneself in person, which is actually not an absolute right; to choose a lawyer; to have free legal assistance where someone cannot afford it and where the interests of justice so require; and finally, the right to practical and effective legal assistance, which latter means that the legal assistance should not be solely theoretical and illusory. The right to choose a lawyer arises only if the accused has sufficient means to pay the lawyer, however, a legally aided person has no right to choose his representative, or to be consulted in the matter.

Article 6 (3) d) stipulates that the accused has the right to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. It cannot be interpreted as an absolute right for an accused to call witnesses, its basic conditions shall be laid down by the domestic law. The evidence relied on by the prosecution should be produced in the presence of the accused person at a public hearing and in the meantime with a view to adversarial argument. It could cause problems if the prosecutor provides written statements by a witness who does not appear at the hearing for some reasons. A good example of this is e.g. when the witness, actually a victim of a crime fears to show up. In the *Al-Khawaja and Tahery v. the*

<sup>71</sup> *Öcalan v. Turkey*, judgment of 12 May 2005

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022>

*United Kingdom*<sup>72</sup> case from 2011, where the first applicant a physician, was charged with two counts of assault on two female patients. One of the patients, died before the trial, but had made a statement to the police prior to her death which was read to the jury. The judge stated that the contents of the statement were crucial to the prosecution on count one as there was no other direct evidence of what had taken place. During the trial, the jury heard evidence from a number of different witnesses and the defence was granted the opportunity to cross-examine all the witnesses who gave live evidence. Finally, the first applicant was convicted on both counts. The second applicant was charged, amongst others, with wounding deliberately following a gangland stabbing. None of those questioned at the scene claimed to have seen the applicant stab the victim, but two days later one of those present, made a statement to the police implicating the second applicant. At the trial, the prosecution applied for permission to read out this particular witness's statement on the ground that he was feared to appear in court, and this statement was finally read to the jury in his absence. The applicant was convicted and his conviction was upheld on appeal. Both applicants turned before the Court complaining that their convictions had been based on statements from witnesses they had been unable to cross-examine at the trial and this circumstance apparently violated their right to a fair trial. The Chamber of the Court held in both cases that there had been a violation of Article 6 (1) in conjunction with Article 6 (3) d) on the grounds that the loss of the opportunity to cross-examine the witnesses concerned had not been effectively counterbalanced in the proceedings. As to Article 6 (1) in conjunction with Article 6 (3) d), it was noted that originally before an accused can be convicted, all evidence must be produced in his presence at a public hearing with regard to adversarial argument. Exceptions are possible but those must not infringe the rights of the defence. Two consequences were drawn from this general principle. Firstly, there has got to be a good reason for admitting the evidence of an absent witness. Good reason exists, amongst others, where a witness had died or was absent because of fear attributable to the defendant or his accomplices. If the witness's absence is due to only a general fear of testifying and it cannot directly attributable to the defendant or accomplices, it is for the domestic court to conduct appropriate enquiries to determine whether there were objective grounds for that fear. Secondly, if a conviction is based on the statement of an absent witness whom the accused has no opportunity to examine, during the proceedings, would generally be considered incompatible with Article 6. Accordingly, the national courts have to balance under a heavy scrutiny because of the dangers of the admission of such evidence. The question in each case was whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of that evidence. In this connection, the Court considered that the domestic law had contained strong safeguards as to to ensure fairness. As regards how those were applied in practice, it considered three issues, namely whether it had been necessary to admit the absent witnesses' statements; whether these untested evidence had been the sole or decisive basis for the applicants' conviction; and whether there had been sufficient counterbalancing factors.

As to the first applicant's case, it was not disputed that the victim's death had made it necessary to admit her and it had to be regarded as decisive. The reliability of that evidence was supported by two friends, who had both given evidence at the trial. Moreover, there were strong similarities between her description of the assault and that of the other complainant, with whom there was no evidence of any collusion. The Court considered that the jury had been able to conduct a fair and proper assessment of the reliability of the deceased witness's allegations against the first applicant so there had been sufficient

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<sup>72</sup> Al-Khawaja and Tahery v. the United Kingdom, judgment of 15 December 2011

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108072>

factors to counterbalance the admission in evidence of the statement in question, and the Court held that there had been no violation of the relevant Article.

As to the second applicant's case, the witness's statement concerned was the only one which had claimed to see the stabbing and it was a decisive evidence against the applicant. It was not sufficiently counterbalanced. Even though the applicant had given evidence denying the charge, he had not been able to test the reliability of the absent witness's evidence through cross-examination. However, a warning of the dangers by the judge to the jury of relying on untested evidence could not be a sufficient counterbalance where an untested statement of the only prosecution witness was the only direct evidence against the applicant. By the decisive nature of the statement without any strong corroborative evidence, examining the fairness of the proceedings as a whole, the Court concluded that there had been a violation of Article 6, and awarded EUR 6,000 to the second applicant in respect of non-pecuniary damage.

Another example from the recent case-law regarding the fair trial, is the case of *Gani v. Spain*<sup>73</sup>. It concerned the criminal proceedings of the applicant, who was arrested and charged with, amongst others, rape, following the criminal report to the police by his former partner and the mother of their child. She testified at a hearing before the investigating judge in absentia of the applicant's counsel, who otherwise gave no reasons for his absence. The statement was written up and, at the trial, the woman started to answer the public prosecutor's questions. Her evidence had to be interrupted, as she was said, medically confirmed, to be suffering from post-traumatic stress symptoms and as a consequence, she could not be cross-examined. As an alternative, the court ordered that her statement should be read out. The applicant was finally convicted and imprisoned. The Court held that the applicant had been allowed to challenge the woman's truthfulness by giving his own account of the facts, which he had duly done. The domestic courts had carefully compared both versions of the facts and had also taken into account the statement given by the victim at the hearing which, although incomplete, had served to corroborate her pre-trial statements. The reliability of her statements had further been supported by indirect evidence and by the medical reports confirming that her physical injuries and psychological condition were consistent with her account of the facts. There had been sufficient counterbalancing factors admit the evidence of the woman's statements, therefore there had been no violation of Article 6 (1) read in conjunction with Article 6 (3) d) of the Convention.

However, there are utterly important exemptions to be observed since the majority of the Convention States grant rules which excuse, for instance family members, from giving evidence.

The free assistance of an interpreter requirement envisaged in Article 6 (3) e) sets forth that the accused is entitled to free assistance of an interpreter if he can not understand or speak the language used in court. If interpretation is denied, the onus is on the authorities to prove that the accused has sufficient knowledge of the court language. In contrast to the right to free legal assistance under Article 6 (3) c), which is basically subject to a means test, Article 6 (3) e) applies to everyone charged with a criminal offence. There is an overlap between this provision and the rights to adversarial proceedings and the equality of arms, the right to notification of a charge in a language one understands, and the right to adequate time and facilities to prepare one's defence. In *Diallo v. Sweden*<sup>74</sup> a heroin smuggler from France

<sup>73</sup> *Gani v. Spain*, judgment of 9 September 2013

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116836>

<sup>74</sup> *Diallo v. Sweden*

was arrested and questioned by Swedish customs officer without the contribution of an interpreter during first interview at the customs office, but since the customs officer had sufficient command of French, the Court was satisfied with that and held that there had been no appearance of a violation and the application was declared inadmissible.

The Court's principle role is primarily to state whether the Convention has been violated or not and, in case of a violation, to award compensation if it considers appropriate. The Court cannot order a re-trial at domestic level, nor quash a judgment of a national court but reveals the actions or inactions of a state which has amounted to a violation of the Convention. This system, with its boundaries, offers protection of the provisions set forth in the Convention for applicants, let them be 'only' victims of the Convention, victims in our general understanding, or both at once.

### Peter Horvath: Link between the human rights catalogue in the Convention and in the Charter

Before getting into a detailed comparison, an evitable need arises to take a succinct look into the history of both the Charter and the Convention.

The *Charter of Fundamental Rights of the European Union*<sup>75</sup> is the first document that provides a written catalogue of provisions in order to protect human rights within the European Union, which ensures the legal certainty and also the synoptical visibility of human rights.

There was an attempt, as an antecedent to the Charter, to provide a common constitution for Europe (European Constitution) with the intention to replace all the EU treaties in one text. This was signed in Rome on 29 October 2004 by 25 Member States of the European Union, and it would have given legal force to the Charter. After several debates, due to the Dutch and French voters, it was finally rejected in 2005 and the process of ratification discontinued. The Charter itself originally formed part of the European Convention. Subsequently, on 13 December 2007, the Treaty of Lisbon<sup>76</sup> was signed in Portugal, which was created to replace the abovementioned defunct European Constitution. It contained a large number of changes that were basically part of the common constitution and amended the two basic treaties of the European Union.

As is well-known, the two major treaties of the EU are:

- the Treaty establishing the European Economic Community<sup>77</sup> (TEEC) or the Treaty of Rome from 1958, which was renamed at Lisbon to the Treaty on the Functioning of the European Union (TFEU); and
- the Treaty on European Union<sup>78</sup> (TEU) or Maastricht Treaty from 1993, which created the European Union and was amended by the treaties of Amsterdam, Nice and, finally, Lisbon. This did not include any reference to fundamental or human rights at all.

Now, the Treaty of Lisbon amended these two basic treaties on a number of fields, e.g. the voting system; it gave member states explicitly the right to leave the EU; made the Charter of Fundamental Rights legally binding. The most important amendment, though, was the giving a consolidated legal personality for the European Union. This is one of the utmost important point which will determine and give the base for the EU as a legal person to become a member of the Convention.

Just to be fully comprehensive, we shall refer to Article 6 of the Treaty on European Union as well, which stipulates that

*„1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

<sup>75</sup> [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>76</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>

<sup>77</sup> non consolidated version of TEEC:

[http://www.cvce.eu/obj/treaty\\_establishing\\_the\\_european\\_economic\\_community\\_rome\\_25\\_march\\_1957-en-cca6ba28-0bf3-4ce6-8a76-6b0b3252696e.html](http://www.cvce.eu/obj/treaty_establishing_the_european_economic_community_rome_25_march_1957-en-cca6ba28-0bf3-4ce6-8a76-6b0b3252696e.html)

<sup>78</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*

The aim of the Treaty of Lisbon is „to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action"<sup>79</sup>.

As seen, the Charter brought together in one single document the fundamental rights protected in the EU. It was initially proclaimed at the Nice European Council in 2000 - without binding legal effect. As of the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter became legally binding on the EU institutions and on national governments.

However, the text itself does not intend to establish new rights, but it assembles existing rights:

- a range of civil, political, economic and social rights (Court of Justice of the EU (CJEU) case-law rights; Convention rights and freedoms; and rights and principles of the common constitutional traditions of EU Member States); and

- 'third generation' of fundamental rights (such as data protection; clean environment; guarantees on bioethics; good administration).

The Charter is based on the European Convention on Human Rights<sup>80</sup>, the European Social Charter<sup>81</sup>, the case-law of the European Court of Justice; and pre-existing provisions of EU law.

On the other hand, the *European Convention on Human Rights* (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) was created as an international treaty to protect human rights and fundamental freedoms throughout Europe.

It was drafted by the Council of Europe in 1950 and entered into force on 3 September 1953. All Council of Europe (also referred as CoE) Member States are party to the Convention (47 to date), and new CoE members are expected to ratify the Convention at their earliest opportunity.

The Convention established the European Court of Human Rights (referred as ECtHR). Without going into details, it is noteworthy that in 1998, the Court became a full-time institution and the European Commission of Human Rights, which used to decide on admissibility of applications, was abolished by Protocol 11 to the Convention<sup>82</sup>. Any person who feels his or her rights have been violated under the Convention by a CoE member state can bring his or her case before the Court. The Convention is the only *international* human rights document which provides individual protection of such a high level.

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<sup>79</sup> Preamble of the Treaty of Lisbon

<sup>80</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>81</sup> <http://www.refworld.org/pdfid/3ae6b3678.pdf>

<sup>82</sup> <http://conventions.coe.int/Treaty/en/Treaties/html/155.htm>

As to its structure, the Convention consists of 3 parts. The main rights and freedoms are contained in Section I, which consists of Articles 2 to 18. Section II (Articles 19 to 51) sets up the Court and its rules of operation. Section III contains various concluding provisions.

As of January 2010, fifteen protocols to the Convention have been opened for signature. These can be divided into two main groups: those amending the framework of the convention system, and those expanding the rights that can be protected.

The Charter contains 54 articles divided into 7 titles: the first six titles deal with substantive rights under the headings of: dignity, freedoms, equality, solidarity, justice, citizens' rights, and the general provisions governing the interpretation and application of the charter. The last title deals with the interpretation and application of the Charter.

Before examining the concrete provisions of both documents, it is utterly important to take a short look into the rules relating the interpretation and application of the Charter first in order to understand the link between the Charter and the Convention. By way of introduction it is to be noted that there is some uncertainty about the relationship between the Charter and the Convention.

The essence of the interlink between the documents is to be found amongst the general provisions of the Charter governing the interpretation and application thereof. The last Title (from Article 51 to 54) is the one that deals with the interpretation and application of the Charter, namely the Field of application (51); Scope and interpretation of rights and principles (52); Level of protection (53); and, finally, the Prohibition of abuse of rights (54).

Article 51<sup>83</sup> of the Charter sets forth the field of application. It aims to determine the scope of the Charter, by which it applies primarily to the institutions and bodies of the Union, of course, in compliance with the principle of subsidiarity. The requirement of respecting fundamental rights defined in a Union context is only binding on a Member State when it acts in the scope of Union law. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. The Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established by the treaties.

Article 52<sup>84</sup> concerns the scope and interpretation of rights and principles to lay down rules for their interpretation and deals with the arrangements for the limitation of rights. Paragraph two refers to rights which were already guaranteed in treaties and have been recognised in the Charter. The most important

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<sup>83</sup> Article 51 - Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

<sup>84</sup> Article 52 - Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



issue relating to the Convention can be found in paragraph three which is intended to ensure the consistency between the Charter and the Convention by establishing:

*„In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”*

It means that if the rights in the Charter also correspond to rights guaranteed by the Convention, the meaning and scope of those rights are the same as those laid down by the Convention. It is to be noted that this provision also involves the authorised limitations, which means that the legislator have to comply with the same standards as are fixed by the limitation arrangements under the Convention, without adversely affecting the autonomy of Union law and the CJEU. It is noteworthy that a reference to the Convention also involves its Protocols. It is not only the text itself which determines the meaning and the scope of a particular fundamental or human right, but the case-law of both the ECtHR and the ECJ. However, the last sentence of Article 52 Paragraph 3 allows the Union to guarantee more extensive protection, which means that the level of protection by the Charter may never be lower than that guaranteed by the Convention.

Article 15 of the Convention stipulates that:

*„1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

*2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

*3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”*

The Charter does not affect this particular provision of the Convention, i.e. Member States have the possibility to avail themselves derogations from Convention rights in the event of war or of other public dangers threatening the life of the nation.

The list of rights which may be regarded as corresponding to rights in the Convention within the meaning of Article 52 Paragraph 3 of the Charter does not include rights additional to those in the Convention.

Articles containing rights envisaged in the Convention corresponding to the ones of the Charter can be divided into two groups:

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the Convention.

2. Articles where the meaning is the same as the corresponding provisions of the Convention, but the scope is wider.

These two fields will be covered hereinafter, but first, let's proceed further to Article 53<sup>85</sup> of the Charter, which contains the level of protection, which is indeed intended to maintain the level of protection afforded within their respective scope by Union law, international law and national law. Being aware of its importance, the Convention is expressly mentioned.

Article 54<sup>86</sup> refers to the prohibition of abuse of rights. This particular Article corresponds to the Convention, namely to Article 17 thereof, which reads as follows:

***"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."***

With all this end in view, we shall go back to the concrete Articles of the two basic human rights documents.

The European Convention on Human Rights contains the following provisions concerning human rights with reference to the particular Articles (other provisions relating to procedural aspects excluded):

Article 1 – Obligation to respect human rights

Article 2 – Right to life

Article 3 – Prohibition of torture

Article 4 – Prohibition of slavery and forced labour

Article 5 – Right to liberty and security

Article 6 – Right to a fair trial

Article 7 – No punishment without law

Article 8 – Right to respect for private and family life

Article 9 – Freedom of thought, conscience and religion

Article 10 – Freedom of expression

Article 11 – Freedom of assembly and association

Article 12 – Right to marry

Article 13 – Right to an effective remedy

Article 14 – Prohibition of discrimination

Article 15 – Derogation in time of emergency

Article 16 – Restrictions on political activity of aliens

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<sup>85</sup> Article 53 - Level of protection

*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.*

<sup>86</sup> Article 54 - Prohibition of abuse of rights

*Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.*

## Article 17 – Prohibition of abuse of rights

### Protocols

No. 1: Article 1 – Protection of property

Article 2 – Right to education

Article 3 – Right to free elections

No. 4: Article 1 – Prohibition of imprisonment for debt

Article 2 – Freedom of movement

Article 3 – Prohibition of expulsion of nationals

Article 4 – Prohibition of collective expulsion of aliens

No. 6: Article 1 – Abolition of the death penalty

Article 2 – Death penalty in time of war

Article 2 – Right of appeal in criminal matters

Article 3 – Compensation for wrongful conviction

No. 7: Article 4 – Right not to be tried or punished twice

Article 5 – Equality between spouses

No. 12: Article 1 – General prohibition of discrimination

No. 13: Article 1 – Abolition of the death penalty

Meanwhile, the Articles envisaged in the Charter of Fundamental Rights of the European Union are the following under the heading of Dignity:

Article 1 - Human dignity

Article 2 - Right to life

Article 3 - Right to the integrity of the person

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

Article 5 - Prohibition of slavery and forced labour

- Freedoms:

Article 6 - Right to liberty and security

Article 7 - Respect for private and family life

Article 8 - Protection of personal data

Article 9 - Right to marry and right to found a family

Article 10 - Freedom of thought, conscience and religion

Article 11 - Freedom of expression and information

Article 12 - Freedom of assembly and of association

Article 13 - Freedom of the arts and sciences

Article 14 - Right to education

Article 15 - Freedom to choose an occupation and right to engage in work

Article 16 - Freedom to conduct a business

Article 17 - Right to property

Article 18 - Right to asylum

Article 19 - Protection in the event of removal, expulsion or extradition

- Equality:

Article 20 - Equality before the law

Article 21 - Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

Article 23 - Equality between women and men

Article 24 - The rights of the child

Article 25 - The rights of the elderly

Article 26 - Integration of persons with disabilities

- Solidarity:

Article 27 - Workers' right to information and consultation within the undertaking

Article 28 - Right of collective bargaining and action

Article 29 - Right of access to placement services

Article 30 - Protection in the event of unjustified dismissal

Article 31 - Fair and just working conditions

Article 32 - Prohibition of child labour and protection of young people at work

Article 33 - Family and professional life

Article 34 - Social security and social assistance

Article 35 - Health care

Article 36 - Access to services of general economic interest

Article 37 - Environmental protection

Article 38 - Consumer protection

- Citizens' Rights:

Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament

Article 40 - Right to vote and to stand as a candidate at municipal elections

Article 41 - Right to good administration

Article 42 - Right of access to documents

Article 43 - European Ombudsman

Article 44 - Right to petition

Article 45 - Freedom of movement and of residence

Article 46 - Diplomatic and consular protection

- Justice:

Article 47 - Right to an effective remedy and to a fair trial

Article 48 - Presumption of innocence and right of defence

Article 49 - Principles of legality and proportionality of criminal offences and penalties

Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence

While comparing the protected rights envisaged in the Charter and the Convention, in the first set of provisions there are Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the Convention.

CHARTER	CONVENTION
<p><i>Article 2 - Right to life</i></p> <p>1. <i>Everyone has the right to life.</i></p> <p>2. <i>No one shall be condemned to the death penalty, or executed.</i></p>	<p><i>Article 2 - Right to life</i></p> <p>1. <i>Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.</i></p> <p>2. <i>Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:</i></p> <p><i>(a) in defence of any person from unlawful violence;</i></p> <p><i>(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;</i></p> <p><i>(c) in action lawfully taken for the purpose of quelling a riot or insurrection.</i></p>

As we can see, paragraph 1 of the Charter is based on the first sentence of *Article 2 paragraph 1 of the Convention*. The second sentence refers to the death penalty, which was superseded by virtue of *Article 1 Protocol 6 to the Convention*. Article 2 paragraph 2 of the Charter is based on that provision.

In accordance with Article 53 paragraph 3 of the Charter, Article 2 has the same meaning and scope, negative definitions appearing in the Convention included.

CHARTER	CONVENTION
<p><i>Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment</i> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.</p>	<p><i>Article 3 - Prohibition of torture</i> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.</p>

Article 4 of the Charter guarantees the same right as Article 3 of the Convention does. It prohibits corporal punishment, interrogation techniques that violate physical integrity, as well as 'stress and duress' techniques (e.g. wall standing, deprivation of sleep or food and drink, as well as forcing prisoners to parade naked). It also covers three separate categories of prohibited treatment:

- (1) torture;
- (2) inhuman treatment/punishment; and
- (3) degrading treatment/punishment.

There's no proper accepted definition of what constitutes 'torture', it is only defined or rather circumscribed in broad terms like 'deliberate inhuman treatment causing very serious and cruel suffering' (whether physical or mental). Ill-treatment 'must attain a minimum level of severity'. The threshold level depends on all the circumstances of the case (duration; physical or mental effects; and in some cases, the sex, age and state of health of the victim, etc. Concerning the distinction between these is typically the *intensity* of treatment.

CHARTER	CONVENTION
<p><i>Article 5 - Prohibition of slavery and forced labour</i> 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.</p>	<p><i>Article 4 - Prohibition of slavery and forced labour</i> 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.</p>

The right in Article 5 paragraphs 1 and 2 corresponds to Article 4 paragraphs 1 and 2 of the Convention, with the same wording.

As to paragraph 1, no limitation may be justified, i.e. this prohibition is absolute.

In paragraph 2 'forced or compulsory labour' must be understood in the light of the negative definitions contained in Article 4 paragraph 3 of the Convention, which contains exclusions:

- a) work required to be done in course of detention or during conditional release from such detention
- b) service of a military character;
- c) service exacted in case of a life-threatening emergency or calamity;
- d) work or service forming part of normal civic obligations.

CHARTER	CONVENTION
<p>Article 6 - Right to liberty and security Everyone has the right to liberty and security of person.</p>	<p>Article 5 - Right to liberty and security</p> <p>1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:</p> <p>(a) the lawful detention of a person after conviction by a competent court;</p> <p>(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;<sup>8 9</sup></p> <p>(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;</p> <p>(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;</p> <p>(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;</p> <p>(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.</p> <p>2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.</p> <p>3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.</p> <p>4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take</p>

	<p>proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.</p> <p>5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.</p>
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Article 6 of the Charter contains the rights guaranteed by Article 5 of the Convention, with the same wording, meaning and scope. The limitations which may legitimately apply cannot not exceed those permitted by the Convention.

The *right to liberty* is most often concerned with arrest and unlawful detention by the State. Right to liberty is not an absolute right, it ensures that a person can only be detained pursuant to law. The '*security of person*' refers to the prohibition against arbitrary detention by the State.

Arrest is the most common kind of interference with liberty. Not everyone who is arrested is subject to detention (e.g. they are taken to the police station and then released without charge), but if an arrest is unlawful, any detention that follows it will be unlawful also. The other form of deprivation of liberty is the *detention*, which is most often associated with imprisonment. As to 'unlawfulness', the length of time is not itself determinative. The grounds upon which may lawfully deprive an individual of liberty are those exhaustively envisaged in Article 5 of the Convention.

CHARTER	CONVENTION
<p><i>Article 7 - Respect for private and family life</i> Everyone has the right to respect for his or her private and family life, home and communications.</p>	<p><i>Article 8 - Right to respect for private and family life</i> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</p>

Article 7 of the Charter corresponds to Article 8 of the Convention. The word 'correspondence' has been replaced by 'communications' as of from 1 June 2010, and that is only difference. 'Communications' include letters, telephone calls, faxes and e-mails as well. The ECtHR has not given an exhaustive definition of '*private life*'. As to '*family life*', blood relationship is a starting point for describing 'family life', but the financial and emotional ties may suffice to establish family life. The right to respect for a person's private or family life may be subject to interference by the State on the grounds of an exhaustive listing of Article 8 of the Convention: national security; public safety; economic well-being of the country; prevention of disorder or crime; protection of health or morals; and protection of the rights and freedoms of others.



CHARTER	CONVENTION
<p><i>Article 10 (1) - Freedom of thought, conscience and religion</i></p> <p><i>1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.</i></p>	<p><i>Article 9 - Freedom of thought, conscience and religion</i></p> <p><i>1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.</i></p> <p><i>2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.</i></p>

This particular right might be one of the oldest recognised right. The right *not* to hold religious beliefs or engage in religious practices is equally protected. Limitations in respect of this right must respect under Article 9 paragraph 2 of the Convention.

CHARTER	CONVENTION
<p>Article 11 - Freedom of expression and information</p> <p>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.</p> <p>2. The freedom and pluralism of the media shall be respected.</p>	<p>Article 10 - Freedom of expression</p> <p>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. <i>(This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.)</i></p> <p>2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.</p>

Article 11 of the Charter corresponds to Article 10 of the Convention. The limitations may not

exceed those provided for in Article 10 paragraph 2 of the Convention, without prejudice to any restrictions which competition law of the Union may impose on Member States' right to introduce the licensing arrangements (broadcasting, television or cinema).

CHARTER	CONVENTION
<p><i>Article 17 - Right to property</i></p> <p><i>1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.</i></p> <p><i>2. Intellectual property shall be protected.</i></p>	<p><i>Article 1 of the Protocol No.1 - Protection of property</i></p> <p><i>Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.</i></p> <p><i>The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.</i></p>

Article 17 of the Charter is based on Article 1 of the Protocol to the Convention. This is common to all national constitutions. The wording has been updated but the meaning and scope of the right are the same as those of the right guaranteed by Article 1 of Protocol No. 1 to the Convention and the limitations may not exceed those mentioned there.

CHARTER	CONVENTION
<p><i>Article 19 (1) - Protection in the event of removal, expulsion or extradition</i></p> <p><i>1. Collective expulsions are prohibited.</i></p> <p><i>Article 19 (2)</i></p> <p><i>2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.</i></p>	<p><i>Article 4 of Protocol No. 4 - Prohibition of collective expulsion of aliens</i></p> <p><i>Collective expulsion of aliens is prohibited.</i></p> <p><i>Article 3 of Protocol No. 4 - Prohibition of expulsion of nationals</i></p> <p><i>1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.</i></p> <p><i>2. No one shall be deprived of the right to enter the territory of the State of which he is a national.</i></p>

Article 19 paragraph 1 of the Charter has the same meaning and scope as Article 4 of Protocol No. 4 to the Convention relating collective expulsion. This right derives from the Member States' right to control the entry, residence and expulsion of non-nationals. Its purpose is to guarantee that no single measure can be taken to expel all persons having the nationality of a particular. This particular prohibition in international law is based on two principles, namely the prohibition of discrimination and the prohibition of arbitrariness.

Article 19 paragraph 2 of the Charter refers to and thus incorporates the case-law of the European

Court of Human Rights regarding Article 3 of the Convention.

CHARTER	CONVENTION
<p><i>Article 48 - Presumption of innocence and right of defence</i></p> <p><i>1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.</i></p> <p><i>2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.</i></p>	<p><i>Article 6 (2) and (3) - Right to a fair trial</i></p> <p><i>2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.</i></p> <p><i>3. Everyone charged with a criminal offence has the following minimum rights:</i></p> <p><i>(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;</i></p> <p><i>(b) to have adequate time and facilities for the preparation of his defence;</i></p> <p><i>(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;</i></p> <p><i>(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;</i></p> <p><i>(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.</i></p>

The presumption of innocence and right of defence guaranteed by Article 48 of the Charter are of the most important fundamental rights of criminal law in both common and continental law systems. This is the same as Article 6 paragraphs 2 and 3 of the Convention, with the same meaning and scope - in accordance with Article 52 paragraph 3 of the Charter. The presumption of innocence means that a person charged with a criminal offence shall be presumed innocent until proved guilty according to law. The onus of proof in this respect is on the prosecution to prove that the accused has committed the crime. If it fails to prove it, the accused shall be acquitted. It is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence.

'Criminal charge' has an autonomous meaning. This particular right does not apply to practices in the course of a criminal investigation such as blood or breathalyser tests, medical examinations, fingerprinting, searches, or identity parades. Another general basic legal principle and right in criminal proceedings is the right to a defence. In this respect common minimum standards have been set out, like access to legal advice, access to free interpretation and translation, or notifying suspected persons of their rights.

CHARTER	CONVENTION
<p><i>Article 49 paragraphs 1 (last sentence excluded) and 2 - Principles of legality and proportionality of criminal offences and penalties</i></p>	<p><i>Article 7 - No punishment without law</i></p>

<p>1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.</p> <p>2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.</p>	<p>1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.</p> <p>2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.</p>
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Paragraph 1 of Article 49 of the Charter refers to 'criminal offence', i.e. only applies when somebody is found guilty (convicted of a criminal offence). This article applies only to criminal prosecutions. Regarding 'penalty' in this respect has an autonomous meaning, which should mean a measure imposed following conviction for a criminal offence. In Paragraph 2, the reference to 'civilised' nations has been deleted but this does not change the meaning of this paragraph. In accordance with Article 52 paragraph 3 of the Charter, the right guaranteed here has the same meaning and scope as the right guaranteed by Article 7 of the Convention. Article 49 paragraph 3 of the Charter<sup>87</sup> states the general principle of proportionality between penalties and criminal offences which is envisaged, on one hand, in the constitutional traditions of the Member States and, on the other, in the case law of the European Court of Justice. Three main principles are set forth in Article 49, namely the principle of legality (*nullem crimen, nulla poena sine lege*), of non-retroactivity, and of proportionality.

At this point, we shall proceed to the second set of provisions, where the meaning is the same as the corresponding Articles of the Convention, but where the scope is wider:

CHARTER	CONVENTION
<p><i>Article 9 - Right to marry and right to found a family</i></p> <p><i>The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.</i></p>	<p><i>Article 12 - Right to marry</i></p> <p><i>Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.</i></p>

Article 9 of the Charter covers the same field as Article 12 of the Convention but with extended scope to other forms of marriage in an ordinary sense if these are established by national legislation, which means the modernization of the wording to cover cases where domestic legislation recognises alternatives

<sup>87</sup> Article 49 3. „The severity of penalties must not be disproportionate to the criminal offence.”

of marriage (marriage between people of the same sex included).

CHARTER	CONVENTION
<p><i>Article 12 (1) - Freedom of assembly and of association</i></p> <p><i>1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.</i></p>	<p><i>Article 11 - Freedom of assembly and association</i></p> <p><i>1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.</i></p> <p><i>2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.</i></p>

Everyone has the right

- to freedom of peaceful assembly and
- to freedom of association at all levels, in particular in political, trade union and civic matters.

Political parties at Union level contribute to expressing the political will of the Union citizens. The meaning of Article 12 paragraph 1 of the Charter is the same as that of Article 11 of the Convention, but its scope is wider since it applies at all levels (European level included). With reference to Article 52 paragraph 3 of the Charter, limitations may not exceed those mentioned under Article 11 paragraph 2 of the Convention.

CHARTER	CONVENTION
<p><i>Article 14 (1), (3) - Right to education</i></p> <p><i>1. Everyone has the right to education and to have access to vocational and continuing training.</i></p> <p><i>(2. This right includes the possibility to receive free compulsory education.)</i></p> <p><i>3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the</i></p>	<p><i>Article 2 of Protocol No. 1 - Right to education</i></p> <p><i>No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.</i></p>

*national laws governing the exercise of such freedom and right.*

This particular Article of the Charter is to be considered with an extended scope to cover access to *vocational and continuing training*. This right covers entry to nursery, primary and secondary education, and to higher education, including university and vocational training. However, the essence of this right depends very much on the level and kind of education concerned: primary education is of a universal nature, which is compulsory and must be provided free of charge but, of course it does not mean that *all* primary education must be free.

CHARTER	CONVENTION
<p><i>Article 47 (1) - Right to an effective remedy and to a fair trial</i> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</p> <p><i>Article 47 (2) and (3)</i> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.</p>	<p><i>Article 13 - Right to an effective remedy</i> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.</p> <p><i>Article 6 (1) - Right to a fair trial</i> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.</p>

Article 47 paragraph 1 of the Charter is based on Article 13 of the Convention. The second paragraph corresponds to Article 6 paragraph 1 of the Convention. In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations, which is one of the consequences of the fact that the Union is a community based on the rule of law. As to paragraph 3, provision should be made for legal aid where the absence of such aid would go against the right to an effective remedy. This Charter Article combines two rights, namely the right to a fair trial and the right to an effective remedy.

CHARTER	CONVENTION
<p><i>Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence</i></p>	<p><i>Article 4 of Protocol No. 7 - Right not to be tried or punished twice</i></p>

*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*

*1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*

*2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*

*3. No derogation from this Article shall be made under Article 15 of the Convention.*

Article 50 is to be considered with an extended scope to European Union level between the domestic courts of the Member States. This is a rule of "*non bis in idem*" requirement, or often referred to as *double jeopardy*, which also prohibits double prosecution. This principle essentially means that it is forbidden to initiate proceedings or reopen a judgment for the second time time against the same person for the same offence or by the same national courts.

After the comparative overview of the abovementioned two sets of Articles, we should take a succinct look at the remainder of the Charter rights without being fully comprehensive (only referring to the most important rights) and without citing the text of those Articles.

#### Article 1 - Human dignity

Dignity is essentially not only a fundamental right but envisages the basis of fundamental rights, it recognizes that each human life has value, independently from any factors (e.g. social status) and this value is the same in all human beings, regardless of their characteristics (sex, race, ethnic origin, age, disability, etc.). Article 1 guarantees the right to life and prohibits torture, slavery, death penalty, eugenic practices and human cloning. Generally speaking, torture, humiliating or degrading treatment, cruel and unusual punishment, flagrant denials of fundamental rights, or even discrimination on the basis of sex, race, etc. are considered to violate human dignity.

#### Article 3 - Right to the integrity of the person

The principles of Article 3 are included in the Convention on Human Rights and Biomedicine. As to free and informed consent there is no violation of the right to personal integrity so long as a person concerned understands the risks and benefits that a procedure involves (as well as the alternatives to it) and freely gives his or her consent. This particular Article refers to eugenic practices (like forced sterilisation, forced pregnancy and abortion, etc.), and also to human reproductive cloning as a forbidden issue.

Article 8 of the Charter calls for protection of personal data, which guarantee is based on, amongst others, Article 8<sup>88</sup> of the Convention.

<sup>88</sup> Right to respect for private and family life

#### Article 13 - Freedom of the arts and sciences

This right is arose from the right to freedom of thought and expression and it may be subject to the limitations envisaged under Article 10 of the Convention (Freedom of expression).

#### Article 16 - Freedom to conduct a business

This particular Article is based on the case-law of the European Court of Justice. It may be subject to the limitations provided for in Article 52 paragraph 1 of the Charter.

#### Article 20 - Equality before law

The principle of rule of law is included in all European constitutions and has been recognised by the Court of Justice as well. This Article corresponds to both.

#### Article 21 - Non-discrimination

This provision points beyond Article 14 of the Convention in providing protection. The clause does not apply to a limited class of persons, the categories of people who shall be protected can be extended as necessary to social needs. If a treatment among similarly situated persons significantly differs from the one considered ordinary, a reasonable and objective justification must be shown, which depends on the purpose of the measure, and a proportionate link between the measure attempted to achieve and the aim of the particular measure.

#### Article 23 - Equality between men and women

It concerns all areas and involves not only equality in terms of equal pay for equal but extends to equal participation in all spheres of society.

#### Article 24 - The rights of the child

This relates to children under the age of 18, unless the relevant domestic legislation recognises an earlier age of majority and it protects their basic interests.

#### Article 26 - Integration of persons with disabilities

This guarantee derives from the general requirement of non-discrimination and equal treatment.

From Article 27 to Article 38, the Charter guarantees the fundamental rights of workers and consumers under the heading of solidarity, from right to information to fair and just working conditions, from social security to health care throughout environmental protection.

Under the concept of citizens' rights in Articles 39-46, the Charter offers guarantees in order to protect rights concerning elections, the European Ombudsman, and also the freedom of movement and of residence.

Finally, it is worth to take some notes about the relationship between the European Court of Justice , the Convention and the ECtHR. Article 6 paragraph 2 of the Treaty of the European Union<sup>89</sup> provides that

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

<sup>89</sup> Article 6 (2) of TEU



the EU will accede to the Convention, which involves the EU collectively signing up to the Convention, just like an individual country would do. When it does, the EU as a whole will be subject to the authority of the Strasbourg Court and, as a result, EU measures could be directly challenged before the Court. Apparently, the existing relationship between the ECJ and the ECtHR could be described as of mutual recognition and co-operation. After the accession it is not clear whether judgments of the ECJ will be open to challenge in Strasbourg. However, it is likely that as a result of article 6 (2) TEU there should be a right of appeal from the ECJ to the ECtHR when an act of the EU is challenged for violation of a right enshrined in the Convention. However, it is important to note that the ECJ will never become some sort of general constitutional court - it only has jurisdiction to deal with cases which fall within the scope of EU law. It is not necessary for local remedies to have been exhausted. A lower court can itself decide to refer a case to the ECJ. It is significantly different from the ECtHR, where the case must have gone all the way up to the highest court of the country concerned. If this has not been done, the ECtHR will not accept the case. After the Lisbon Treaty, the differences between the ECJ and the ECtHR might result in more human rights cases appearing before the ECJ. The binding status of the EU Charter and the possibility of a higher standard of protection might make it more attractive for people in the EU to go to Luxembourg rather than Strasbourg. We'll see...

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„The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”

### Marica Pirošíková: Crime victims' rights from the perspective of ECHR case law

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”) does not include a specific provision regarding crime victims’ rights (hereinafter referred to as the “victim”). Nevertheless, the European Court for Human Rights (hereinafter referred to as the “Court”) drew guarantees in its case law from the Convention’s single articles, which have a significant impact on the position of the victim in the proceedings held before domestic authorities. Should the above guarantees be violated by domestic authorities, the victims may lodge a petition with the Court.

#### Article 2 of the Convention

Pursuant to the Court’s case law, the first sentence of Art. 2, section 1 imposes an obligation on the State not only to refrain from intentional and unlawful deprivation of life, but also to adopt appropriate measures to protect life of individuals who are subjects to its authority. In the Court’s view, this commitment includes a State’s primary obligation to ensure the right to life by implementing effective criminal law provisions deterring from commitment of crimes against individuals and by having in place a law enforcement system to ensure prevention, suppression and punishment for the violation of the above provisions. At the same time, this commitment may under certain circumstances arise into a positive obligation of state authorities to adopt preventative operational measures to protect the life of an individual where it is known, or ought to have been known to them in view of the circumstances, that he or she is at real and immediate risk from the criminal acts of a third party. Keeping in mind the difficulties of managing the current society, the unpredictability of human behavior and the necessity to balance out priorities with the allocation of resources, the scope of the above obligations shall be interpreted as not to put an unbearable or disproportionate burden on state authorities. Therefore, not every presumed danger that threatens the life puts an obligation on state authorities to adopt measures under the Convention to prevent its materialization. A positive obligation shall arise based upon the finding that the state authorities knew or should have known at the time about the existence of an actual and immediate threat posed onto the life of a specific individual due to the crime activities of a third party and they failed to adopt measures within their authority that are deemed reasonable and appropriate to prevent the threat.

The obligation to protect the right to life under Article 2 of the Convention also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. Whatever mode is employed, however, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of

death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

In the case *Mižigárová vs. Slovak Republic* (judgment of 14 December 2010), the applicant objected under Article 2 of the Convention a violation of the right to life due to the fact that her husband died of the consequences of a lethal injury that he suffered in the course of police custody and that Slovak authorities failed to conduct a thorough and factual investigation into the circumstances of his death. The applicant complained under Article 3 of the Convention that her husband was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into that ill-treatment. The applicant complained that she had not had an effective remedy for her complaints under Articles 2 and 3 within the meaning of Article 13 of the Convention. The applicant complained that her rights, and the rights of her deceased husband, under Articles 2, 3 and 13 of the Convention were violated in conjunction with Article 14 on grounds of ethnic origin.

The facts of the case may be summarized as follows: At approximately 8.00 to 8:30 p.m. on 12 August 1999 police officers apprehended the applicant's husband and another person on suspicion of having stolen the bicycles they were riding. Police officers used force to apprehend them and drove them to the District Police Department in Poprad. At the time of his arrest, the applicant's husband (Mr. Šarišský) was in good health. After four policemen questioned him, Mr. Šarišský was taken to another room for further interrogation by Lieutenant F., an off-duty officer with whom he had had previous encounters. At some point during the interrogation, the applicant's husband was shot in the abdomen. He died after four days in hospital as a result of the sustained wounds. On 29 May 2000 a public prosecutor indicted Lt. F. with the offence of causing injury to health under Section 224(1) and (2) of the Criminal Code as a result of his negligence in the course of duty. In the indictment the public prosecutor stated, inter alia, that according to the reconstitution of the events of 4 May 2000 Lt. F.'s testimony that the pistol was on his belt covered by the shirt was not true, because if that had been the case, the applicant's husband could not have pulled it away from him. On 18 October 2000 a judge of the District Court in Poprad issued a penal order under Section 314e of the Code of Criminal Procedure. In it he convicted Lt. F. of injury to health caused by negligence in the course of duty within the meaning of Section 224(1) and (2) of the Criminal Code. The penal order stated that Lt. F. had failed to secure his service weapon contrary to the relevant regulations and that as a result, the applicant's husband had managed to draw the weapon from the case and to inflict with it a lethal injury on himself. Lt. F. was sentenced to one year's imprisonment, suspended for a two-and-a-half-year probationary period. Neither the public prosecutor nor Lt. F. challenged the penal order which thus became final. Lt. F. committed suicide on 23 January 2001.

With its judgment of 14 December 2010, the Court stated on the merits of the case, that Article 2 of the Convention has been violated. In this respect the Court stated that even if the applicant's husband committed suicide in the manner described by national authorities, they violated their duty to take appropriate measures to protect his health and physical integrity during police custody. The Court also

noted that the circumstances of the case did not provide any grounds for the police office on duty to have a weapon on him during the interrogation of the applicant's husband who had been arrested on suspicion of bicycle theft. Secondly, the Court noted that at the time of Mr Šarišský's death there were regulations in force which required police officers to secure their service weapons in order to avoid any "undesired consequences". Consequently, the Court found that there has accordingly been a violation of Article 2 of the Convention under its substantive limb.

As to the procedural part of Article 2 of the Convention, i.e. investigation into the circumstances surrounding the death of the applicant's husband, the Court concluded that it was not sufficiently independent. The criminal investigation was supervised by police officers from the Department of Supervision and Inspection at the Ministry of the Interior. The Court observes that these police officers were under the command of the Ministry of the Interior. Even if the Court were to assume that these officers were sufficiently independent for the purposes of Article 2 of the Convention, it is concerned that they did not commence their investigation until 13 August 1999, when an officer interviewed the wounded Mr Šarišský in hospital. The task-force that was formed immediately after the shooting was comprised of police officers from Poprad, which was the district in which Lt. F. was based. It was these officers who conducted the initial forensic examination of the scene. Moreover, after the Department of Supervision and Inspection took over, officers from Poprad continued to be involved in the investigation. In particular, it is clear from the record of the reconstruction conducted on 4 May 2000 that the technicians carrying out the experiments were from the Criminal Police Department in Poprad, which was Lt. F.'s department. Further investigations were also carried out by the Regional Investigation Office in Prešov. Whilst the Court acknowledges that the local police cannot remain passive until independent investigators arrive, in the absence of any special circumstances, immediate action by local police should not go beyond securing the area in question. In the present case, the task-force examined the crime scene, photo-documented it and recovered fingerprints and ballistic, biological and material evidence. They did not, however, have the necessary technical equipment to test Lt. F.'s hands for gunshot residue, and instead permitted him to return home, although they submitted that he remained under the constant supervision of a police guard. No further details have been provided concerning the identity of this guard or the extent of the supervision. However, as police officers from the Department of Supervision and Inspection at the Ministry of the Interior did not arrive until the following day, it must be assumed that the guard was also from Lt. F.'s department in Poprad. The Court is also concerned about the continued involvement of technicians from Lt. F.'s department in Poprad in the investigation, most notably during the reconstruction carried out on 4 May 2000. Their involvement diminished the investigation's appearance of independence and this could not be remedied by the subsequent involvement of the Department of Supervision and Inspection. The Court therefore finds that the investigation was not sufficiently independent.

Moreover, the Court finds that the failure of the investigators to give serious consideration to Mr Šarišský's claim that he shot himself after Lt. F. handed him the gun amounted to a serious deficiency in the Šarišský's death. The allegation that Lt. F. voluntarily gave Mr Šarišský his gun amounts to a much more serious allegation against Lt. F. than that of causing injury to health by negligence, and yet the investigators do not appear to have considered it, preferring instead to rely on Lt. F.'s claim that Mr Šarišský forcibly took the weapon from him. The Court further observes that in a case such as the present, where there were no independent eyewitnesses to the incident, the taking of forensic samples was of critical importance in establishing who was responsible for Mr Šarišský's death. If the investigators had brought the necessary equipment to the police station, samples of gunpowder residue could have been taken from Lt. F.'s hands in the immediate aftermath of the shooting. If such samples had been taken, it might have been possible

either to exclude or confirm that he pulled the trigger. Instead, samples were not taken until the following day. Although the Government submitted that Lt. F. remained under the supervision of a police guard until the samples were taken, the Court has concerns about the independence of the guard, who was most likely a police officer from Lt. F.'s department. Consequently, the result of the gunpowder residue test cannot be relied on. Although a ballistics test later confirmed that Mr Šarišský “most probably” shot himself, if conducted properly the gunpowder residue test could have been conclusive. Thus, there was a failure by the investigators to take reasonable steps to secure evidence concerning the incident which in turn undermined the ability of the investigation to determine beyond any doubt who was responsible for Mr Šarišský's death. Finally, the Court observes that very little attention appears to have been paid to the applicant's claim that her husband had injuries to his face, shoulder and ear, even after the autopsy confirmed the presence of these injuries. The Government have subsequently indicated that these injuries were ignored because they were not relevant to determining the cause of death. They were, however, relevant to determining whether Mr. Šarišský was ill-treated by police officers either during his arrest or in police custody, which in turn is relevant both to an investigation into a potential violation of Article 2 of the Convention and to a separate allegation under Article 3. The Court therefore finds that the failure to investigate the applicant's claim that her husband was ill-treated by police officers prior to the shooting amounted to a serious shortcoming in the criminal investigation and prevented the authorities from obtaining a clear and accurate picture of the events leading to Mr. Šarišský's death. In light of the above, the Court concludes that no meaningful investigation was conducted at the domestic level capable of establishing the true facts surrounding the death of Mr. Šarišský. It follows that there has also been a violation of the procedural limb of Article 2 of the Convention.

The Court awarded the applicant 45,000 EUR in respect of non-pecuniary damages and 8,000 EUR in respect of legal costs and expenses. The Court dismissed the remainder of the applicant's claim.

In the case *Eremiášová and Pechová vs. the Czech Republic* (judgment of 16 February 2012) the applicants objected that in the case of Mr. V. P., who was respectively the partner of Ms. Eremiášová and the son of Ms. Pechová, and who died in July 2002 as a result of a fall through a window of the building of the Czech Police Regional Department in Brno, the right to life protected by Article 2 of the Convention was violated, and namely due to two reasons: on the one hand, this death is attributable to national authorities, on the other hand its investigation was not effective, since some important investigative steps were not taken duly and thoroughly, nor was it independent, since it was conducted mainly in its initial stage by police officers and not by an authority independent of the police.

In terms of violation of the substantive head of Article 2, the Court dealt with the fact whether national authorities were responsible for the death in question. The Court stated, *inter alia*, that a state must adopt reasonable measures to safeguard the life of everyone within its jurisdiction, including certain preventative measures, and even more so in the case of detained persons, in which case the police must be vigilant. The Court had grave concerns about the extent to which the authorities have provided “a satisfactory and convincing explanation”. Even if the Court were to accept that V. P. died in his attempt to escape from the police, which the police had tried to prevent shortly before the incident, they should have been more vigilant when they walked him next to a window without bars. The Court noted the obligation of state authorities to take reasonable measures to protect persons from harming themselves. Even though national authorities claimed that the victim behaved in a calm way, they had not allowed him to use toilets on the second floor, where there were no bars on the windows, and they escorted him to a toilet with bars on the windows and due to security reasons they did not allow him to close the door. In the view of the above, state authorities were aware of the risk that V.P. might attempt to escape. Article 2 was thus

violated due to the reason that state authorities failed to provide V.P. with sufficient and adequate protection as required by Article 2 of the Convention.

Subsequently the Court analyzed in the light of its case law the manner in which investigation of the death was conducted. It noted the importance of the requirement for a due investigation into the circumstances surrounding his death. The Court held that although the investigation started of official power, however from the beginning it admitted only one version of events, and namely potential participation of police officers in V. P.'s suicide. This led to an excessive reduction of the scope and manner of conducting the investigation. When the applicants filed criminal charges, the prosecution labelled the investigations conducted until that time as manifestly insufficient. Despite that, some investigating acts such as reconstitution of the events, analysis of the victim's clothes or separate interrogation of the police officers, in order to find the cause of V.P's death, were not conducted in a timely manner or at all and some other circumstances were not verified. The Court furthermore noted that although the investigation was conducted by various police authorities, including the Inspectorate of the Interior Ministry, the majority of them, similarly to potential offenders, were hierarchically subject to the City Police Director, and all of them to the Interior Minister in the end. Although the Court did not find any evidence about a link or a bias of the investigating authorities, they did not seem independent and no sufficient guarantees were provided as to potential pressure from their superior authorities. Moreover, the inspection itself to a substantial degree based its investigation on actions taken by police authorities on the local level. Considering the aforementioned facts, the Court stated a violation of Article 2 also in the procedural part.

The court awarded the applicants 10,000 EUR in respect of non-pecuniary damages and 2,000 EUR in respect of legal costs and expenses. The Court dismissed the remainder of the applicant's claim.

In the judgment *Kontrová vs. Slovak Republic* (judgment of 31 May 2007) the Court noted that in the applicant's case the police had failed to meet its duties under the applicable criminal code provisions and service regulations, such as: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. The Court deemed proven that the shooting of the applicant's children by her husband had been a direct consequence of the police officers' failure to act. The above was *de facto* stated already by the Supreme Court upon abolishing the decision of the Regional Court of 21 January 2004 and the judgment of the District court of 20 October 2003. The District Court dismissed the summons. It found that the criminal offence of dereliction of duty presupposed a complete or enduring failure to discharge the duty. Merely impeding the discharge of the duty was not enough. It found that in the present case the officers' actions did not amount to such a failure to discharge their duty and that the connection between their actions and the tragedy of 31 December 2002 was not sufficiently direct. The Regional Court dismissed an appeal against the judgment. The Supreme Court took action on the merits based on a complaint in the interest of the law lodged by the Prosecutor General. The Supreme Court found that the lower courts had assessed the evidence illogically, that they had failed to take account of all the relevant facts and that they had drawn incorrect conclusions. The Supreme Court found that it was clear that the accused officers had acted in dereliction of their duties. It concluded that there was a direct causal link between their unlawful actions and the fatal consequence. The Supreme Court remitted the case to the District Court for reconsideration and pointed out that, pursuant to Article 270 § 4 of the CCP, the latter was bound by its above legal views. The District Court found officers B., P.Š. and M.Š. guilty as charged and sentenced them to, respectively, six, four and four months' imprisonment. The Court held that the applicant had no effective remedy available on the national level, through which it

would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death, which was the direct consequence of the Government's failure to meet its positive obligations under Article 2 of the Convention. In the proceedings before the Court the Government argued that an action for protection of personal integrity was a remedy that the applicant should have used in respect of her complaints under Articles 2 and 8 of the Convention in order to comply with the requirement to exhaust domestic remedies pursuant to Article 35 § 1 of the Convention. In support of this argument, the Government relied on judicial decisions and maintained that these decisions showed that the action in question was available to the applicant both in theory and practice. The Government argued that in an action in the Nitra District Court (file no. 10C 142/2002) a mother claimed, among other things, financial compensation for non-pecuniary damage in connection with the death of her daughter. She relied on the previous conviction for manslaughter of her daughter. In a judgment of 15 May 2006 the District Court accepted that the plaintiff had suffered damage of a non-pecuniary nature and awarded her 200,000 SKK by way of compensation. In an action in the Žiar nad Hronom District Court (file no. 7 C 818/96) a mother claimed, among other things, financial compensation for non-pecuniary damage caused to her and her son in connection with the latter's violent death. She relied on the defendant's previous conviction for the extremely violent and racist murder of her son. The District Court concluded that the plaintiff and her son had suffered non-pecuniary damage and in a judgment of 9 September 2004 it awarded the plaintiff 100,000 SKK by way of compensation of the non-pecuniary damage she suffered and 200,000 SKK by way of compensation of the non-pecuniary damage her son suffered. On 19 January 2005 the Banská Bystrica Regional Court upheld the first-instance judgment. The Court dismissed the Government's objection on the failure to exhaust domestic remedies. It found that there was no sufficiently consistent case-law in cases similar to the applicant's to show that the possibility of obtaining redress in respect of non-pecuniary damage by making use of the remedy in question was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law. The Court observed at the admissibility stage that there had been some development in academic understanding and judicial practice in respect of the scope of actions for protection of personal integrity. The events which gave rise to the present case occurred in 2002. The decisions on which the Government recently relied date from 2006. Any relevance they might possibly have in respect of the present case is therefore reduced by the fact that that they were taken after the relevant time.

For the determined violation the Court awarded the applicant 25,000 EUR in respect of non-pecuniary damage and 4,300 EUR in respect of legal costs and expenses. The Court dismissed the remainder of the applicant's claim.

Consequently the Slovak Republic was found guilty in the case *Kontrová* due to the fact that the Court agreed with the applicant's allegation that no effective national remedy was available to her in relation to the objected violation of the right to life, through which she would have been able to apply for compensation for non-pecuniary damage.

In the case *Furdík vs. Slovak Republic* (decision of 2 December 2008) the applicant *inter alia* objected violation of Article 2 of the Convention in that the state involved failed to adopt necessary measures to protect the life of his daughter who died as a result of injuries which she sustained while climbing the Široká veža peak in the High Tatras. He claimed that Slovak law did not provide sufficient guarantees to ensure efficient organizing of medical rescue service in similar cases. Mainly, no specific time limit was set, during which the rescue service would be obliged to get to the injured person. In the applicant's opinion it should have been within 10 - 15 minutes from when an emergency call was placed, with the exception of vis major cases. The applicant claimed that he would have been able to successfully demand compensation

before national authorities only if national law incorporated a similar guarantee. The Government argued that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. In particular, he could have sought redress by means of an action under Act 514/2003 as well as by means of an action for protection of personal integrity under Articles 11 et seq. of the Civil Code. As regards both the decisions of civil courts on such claims and the above conclusions reached by the prosecuting authorities, the applicant could have ultimately sought redress before the Constitutional Court pursuant to Article 127 of the Constitution. The Government maintained that, in any event, domestic law contained comprehensive and sufficient guarantees for ensuring effective and timely assistance to persons in emergency. It was not realistic to fix in the relevant regulations a specific time-limit for the air rescue team to reach a person whose life was in danger as suggested by the applicant.

The Court does not consider that the regulatory framework in place in Slovakia as such is inconsistent with the requirements of Article 2 of the Convention. The Court did not consider that the positive obligations under Article 2 stretch as far as to require the incorporation in the relevant regulations of an obligation of result, that is a time-limit within which an aerial ambulance must reach a person needing urgent medical assistance, as suggested by the applicant. Various limiting factors inherent to the operation of airborne medical assistance, such as its dependence on weather conditions, accessibility of terrain and technical constraints would render such a general obligation difficult to fulfil and impose a disproportionate burden on the authorities of Contracting States.

As for an action for protection of personal integrity, in the Court proceedings the Government noted next to the judgments in the case *Kontrová* another case from domestic practice that confirms the effectiveness of this remedy, namely the proceedings held at the Prešov District Court, file no. 6C 67/2004. In that case the plaintiff demanded compensation for non-pecuniary damage following the death of her mother due to shortcomings in medical assistance during the latter's confinement. On 17 May 2006 the District Court upheld the petition in part referring to expert reports stating that the plaintiff's mother did not receive adequate medical care as required by the law. The medical institution had been obliged to pay the plaintiff 400,000 SKK in compensation for non-pecuniary damage. That judgment became final on 6 November 2006.

The Court dismissed the Government's objection on the failure to exhaust domestic remedies noting that the decisions on which the Government relied date from 2006. Any relevance they might possibly have in respect of the present case is therefore reduced by the fact that they were taken after the relevant time. The Court in relation hereto reminded that on 7 November 2005, an expert commission within the Health Care Supervisory Office found an infringement of the relevant health care legislation by the Air Rescue Service. The Ministry of Health discontinued the proceedings in that respect, on 28 June 2006, holding that the Air Rescue Service had not contravened any of the duties imposed on it by law. In the context of the criminal proceedings which ended on 13 November 2006, the Regional Prosecutor's Office in Prešov expressed the view that there had been shortcomings in the organization of the rescue operation but that these did not qualify as criminal offences. Unjustified delay in the arrival of the rescue team was also noted in the report submitted by the Czech Mountaineering Association. The Court noted another case from domestic practice from 2006 that confirms the effectiveness of an action for the protection of personal integrity in the case of a death (the above judgment of the Prešov District Court that became final on 6 November 2006). The Court held in view of the above that the applicant could arguably claim redress under Article 11 et seq. of the Civil Code and, if unsuccessful, lodge a complaint with the Constitutional Court relying on the guarantees of Article 2 of the Convention or its constitutional equivalent.



If a person was deprived of his or her life as a result of a criminal offence or another unauthorized interference, his or her next-of-kin indicated in Art. 15 of the Civil Code may claim compensation of non-pecuniary damage due to unauthorized interference in the right to life and the physical integrity or their next-to-kin. Such an unauthorized interference with the right to life at the same time entails an unauthorized interference in private and/or family life of the next-of-kin, and hence they may request a compensation for the non-pecuniary damage inflicted on their personality rights. The amount of the compensation for non-pecuniary damage is up to the court's discretion, taking due consideration of the statutory criteria regarding the severity of the incurred damage and the circumstances, under which the unauthorized interference with the personality rights occurred. The specific amount of the compensation shall take due consideration of all the circumstances surrounding the case and must be in compliance with the requirement of justice. It should be noted that the payment of the court fee has been lifted for crime victims instigating proceedings for the compensation of damage or non-pecuniary damage incurred as a result of a criminal offence under Art. 4, section 2 (i) of the Act No. 71/1992 Coll. on court fees and penal registry excerpt fees with effect from 1 January 2006.

In conclusion, pursuant to Art. 287 of the Act no. 301/2005 Coll., as amended, if a court has found guilty a person charged with a criminal offence, as a result of which damage was inflicted to a third party, the court's judgment shall impose damage compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory hindrance exists, the court shall always impose to the charged person the obligation to compensate the damage if the amount is included in the description of the merits in the judgment, by which the charged person was found guilty or in case of compensation of moral damage incurred as a result of an intentional violent criminal offence under a special law as far as the damage has not been paid. The charged person's obligation to compensate the damage must specify the recipient and the claim. In justified cases the court may decide that the obligation shall be paid by instalments and the court shall specify the payment terms and conditions, taking into consideration the victim's submissions. The original provision of Art. 287, section 1 read as follows: *"If a court has found guilty a person charged with a criminal offence, as a result of which pecuniary damage was inflicted to a third party, the court's judgment shall usually impose compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory hindrance exists, the court shall always impose to the charged person the obligation to compensate the damage if the amount is described in the judgment, by which the charged person was found guilty, if the damage has not been paid in that amount."* Albeit Art. 46 of the Act no. 301/2005 Coll. defines the crime victim as an injured party who suffered an injury to health, pecuniary, non-pecuniary or other damage as a result of a criminal offence, compensation of other than pecuniary damage in criminal proceedings was excluded by the above wording of the provision of Art. 287, section 1. This provision was amended by Act No. 650/2005 Coll., which removed the above legal obstacle. In this regard we note the commentary to the Rules of Criminal Procedure concerning the provision of Art. 287, section 1, which *inter alia* states the following: *"Considering the definition of the term damage (Art. 46, section 1), the obligation to decide on the damage in the convicting judgment, if duly applied, applies to pecuniary, non-pecuniary as well as other damage, and also to the violation or jeopardy of other legal rights or freedoms of the victim, in that the term "damage" in relation to the harmful effects of intentional violent criminal offences pursuant to special law shall be interpreted in the case of death, rape or sexual violence according to the interpretation of the term "non-pecuniary damage" in civil proceedings."* This legislative amendment aligned the Slovak legal framework with the European standards and enables a crime victim to claim compensation of non-pecuniary (moral) damage in criminal proceedings (e.g. file no. 1To/10/2011, in

which the Regional Court as the appeals court awarded non-pecuniary damage (EUR 10,000 each) to the parents of the victim killed as a result of the crime of manslaughter under Art. 147, section 1 of the Criminal Code). In this regard we note that legal systems exist in Europe (e.g. in France), where a court acting in a criminal matters decides on all aspects of a criminal offence within the criminal proceedings and without referring the victim to other proceedings to claim damages. We consider this approach correct not only in terms of a timely redress and victim protection (preventing revictimization in civil proceedings), but also in terms of economical court proceedings (civil courts don't need to take repetitive actions and get acquainted with the criminal file). In this regard we note that meanwhile the establishment of the pecuniary damage incurred as a result of a criminal offence may significantly exceed the scope of criminal proceedings, in the establishment of the compensation of non-pecuniary damage in most cases the evidence collected in relation to the circumstances surrounding the criminal offence and its commitment shall suffice. The Court, which often awards compensation of non-pecuniary damage, limits itself in the justification to the following wording: *"Ruling on an equitable basis, the Court decides to award the applicant..."* since the merits of the case have been sufficiently assessed in the justification of the Court's opinion concerning the violation of the rights guaranteed by the Convention.

### Articles 3 and 8 of the Convention

Pursuant to the Court's case law, the obligation of the High Contracting Parties under Article 1 of the Convention is to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention in conjunction with Article 3: States are required to take measures designed to ensure that individuals under their authority shall not be ill-treated, including by other private individuals. Where an individual makes a credible assertion that he has suffered treatment infringing Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This obligation must be capable of leading to the identification and punishment of those responsible and must not be limited to cases of ill-treatment by state employees. Similarly, the right to respect of private life includes positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Albeit it is the government's discretion to choose the means to ensure compliance under Article 8 to provide protection against ill-treatment by private persons, an effective countering of serious criminal offences where basic values and private life elements are at stake, requires adequate criminal law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection. The State's positive obligation under Article 8 to protect the physical integrity of an individual may be extended onto issues concerning effective investigation.

In the case *Kummer vs. the Czech Republic* (judgment of 25 July 2013) the applicant was placed for about an hour in a police cell, where his hands were painfully shackled to iron rings on the walls of the cell and lastly, his legs were tied with a leather strap. The restrained applicant allegedly suffered physical aggression by the police officers. In the police's account there had been no physical aggression of the applicant and his restraining was not disproportionate. One of the circumstances, on which the parties agree, was a certain degree of intoxication of the applicant by alcohol while his personal freedom was restrained at the police station.

As to the violation of the substantive aspect of Article 3, the Court noted that due to a lack of evidence it is not in a position to assess, which of the parties is right when it comes to physical aggression of the applicant while restrained in the police cell. The Court furthermore criticized the fact that the

applicant was restrained and took into account the opinions of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the “CPT”) concerning the practice of using restraints on a person already in a police cell. In the opinion of CPT a police cell is a secure environment where it is not necessary to use further restraints such as shackles. The detainee should instead be kept under close supervision in a secure setting and, if necessary, police officers should seek medical assistance or manual control techniques. In the event of a person in custody behaving in a highly agitated or violent manner, the short-term use of handcuffs may be justified. However, the person concerned should not be shackled to fixed objects in the cell.

The Court considered also the applicant’s injuries that he had sustained while he was detained at the police station, but which were denied and downplayed by the police. Since the cause and seriousness of the injuries could not be elucidated based on the evidence submitted to the Court beyond any doubt, the Court adhered to its well-established practice in similar cases and the principle that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, which was not the case in this case. Differently from the two expert medical opinions commissioned by the Police Inspectorate that ruled out that the injuries could have resulted from beatings, the expert opinion submitted by the applicant did not rule out that the injuries could have been caused by beatings. An aggravating circumstance for the respondent State was to have placed the applicant who was manifestly intoxicated by alcohol in a police cell. The Court noted that due to his drunkenness the applicant was in a vulnerable state, in a cell with no possibility of asking for assistance other than by banging on the door. When he did so, he was handcuffed to an iron ring. As the applicant did not calm down, the police officers continued to apply increasingly intrusive restraints. The Court considers that such a situation must have aroused in the applicant feelings of fear, anguish and inferiority and was an attack on his dignity. In assessing a violation of Article 3 in its substantive aspect, the Court concluded that it cannot lose sight of the whole picture. The events unrolled from a minor offence when the applicant was allegedly urinating in a public place. The applicant was apprehended on the street 50 m from his home only because he did not carry any identity documents with him, even though there is no obligation under domestic law to carry identity documents at all times.

As to the procedural aspect of violation of Article 3 of the Convention, the Court stated that if a relevant suspicion exists that the police may have violated Article 3 of the Convention, the Government has an obligation to conduct an effective and independent investigation into the case. As regards the first aspect, the Court notes that the applicant lodged his criminal complaint on the day of the alleged ill-treatment. However, the police officers who were allegedly responsible for it were questioned almost three months later, after the applicant had complained about the inactivity of the Police Inspectorate. Such an approach by the Police Inspectorate can hardly be reconciled with their obligation to conduct the investigation with exemplary diligence and promptness. Regarding the question of the independence of the Police Inspectorate, the Court notes that it was still a unit of the Ministry of the Interior. Yet, unlike the Supervision Department considered by the Court in the case *Eremiášová and Pechová* (cited above) the head of the Police Inspectorate was appointed by, and responsible to, the Government and not to the Minister of the Interior. While the Court agrees that this aspect increased the independence of the Police Inspectorate vis-à-vis the police, the Court does not consider that this sole difference can justify reaching a different conclusion from the one reached in the case of *Eremiášová and Pechová*. The Court also took into account that members of the Police Inspectorate remained police officers who had been called to perform duties in the Ministry of the Interior. This fact alone considerably undermined their independence vis-à-vis the police. In the Court’s view, such an arrangement did not present an appearance of independence and

did not guarantee public confidence in the State's monopoly on the use of force. The Court noted that the merely supervisory role of the prosecutor was not sufficient to make the police investigation comply with the requirement of independence. Accordingly, the Court concluded violation of Article 3 also in its procedural aspect.

The Court decided on the matter of just satisfaction in a separate judgment (judgment of 27 March 2014), in which it approved the parties' agreement reached in this respect. The applicant was paid CZK 100,000 in respect of non-pecuniary damage, CZK 5,040 in respect of pecuniary damage for the injuries he had sustained and CZK 13,648 in respect of legal costs and expenses.

In the case *M. C. vs. Bulgaria* (judgment of 4 December 2003) the applicant alleged before the Court to have been raped twice (on 31 July 1995 and 1 August 1995), however Bulgarian law does not provide an effective protection from rape and sex assault because rape perpetrators are prosecuted only in the presence of evidence of significant physical resistance and that Bulgarian authorities failed to duly investigate the events of 31 July 1995 and 1 August 1995.

The Court observes that Article 152 § 1 of the Bulgarian Criminal Code<sup>90</sup> does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The Court recognizes that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little "direct" evidence. The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent. That was not done in the applicant's case. The Court finds that their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence. The authorities may also be criticized for having attached little weight to the particular

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<sup>90</sup> This provision defines rape as sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled by the use of force or threats; (3) who was brought to a state of helplessness by the perpetrator.

vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors. Furthermore, they handled the investigation with significant delays.

The Court finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention.

The Court awarded the applicant 8,000 EUR in respect of compensation of non-pecuniary damage and 4,110 EUR in respect of legal costs and expenses. The Court dismissed the remainder of the applicant's claim.

In the case *B. Č. vs. Slovakia* (judgment of 14 March 2006) the applicant claimed under Article 3 of the Convention that Slovak authorities failed to consider all relevant facts of the circumstances and punish her former husband for his misconduct in relation to their son. She mainly insisted that the investigator had been concerned exclusively with the incident of 7 July 1999 and failed to consider the boy's claims that his father oftentimes showed and intentionally handled his penis in the boy's presence.

The applicant filed a criminal complaint claiming that her former husband sexually misused their son. The criminal complaint was based on the fact that the applicant and her daughter on 7 July 1999 surprised the boy and his father who were undressed in the living room of their apartment, and the father's penis was erect. Expert opinions of several experts were produced in the course of the proceedings. One of them referred to the boy's statements, according to which the father moved his penis in the boy's presence as if he was playing the guitar. Charges were brought against the father in relation to the incident that occurred on 7 July 1999. Courts of two instances reviewed the case. The appeal court noted that the expert opinions submitted in the file were contradictory. It referred the case back to the pre-trial stage and ordered the relevant authorities to obtain a new expertise produced by an expert to be recommended by the Slovak Chamber of Psychologists.

Pursuant to the above instruction the investigator requested the Research Institute of Child Psychology and Patho-psychology in Bratislava to produce an expertise concerning the disputed issues. The experts from the Institute submitted a lengthy expertise that was, unlike the previous expert opinions, drawn up on the basis of an examination of all the involved persons. Before reaching their conclusions, the experts had analysed also the other available expert opinions. The experts from the Institute concluded that the father's conduct did not pose a threat to the boy's mental development. They deemed credible the boy's statement, according to which the father had never hit him or touched his body or asked him to touch his genitals. In connection with the alleged misuse of the child the only incriminating information was the boy's claim that the father touched his penis as if he was playing the guitar. It was not possible to ascertain when, in connection to what and with what frequency this conduct occurred.

After having studied the extensive evidence that had been produced, the investigator discontinued the proceedings in the end, because nothing in the accused person's conduct could qualify as sexual misuse pursuant to the applicable law. The public prosecutor confirmed the above conclusion with reference to the expertise produced by the Research Institute of Child Psychology and Patho-psychology in Bratislava.

The investigator and the public prosecutor considered the applicant's criminal complaint as well as the facts ascertained in the course of the investigation including the boy's statements. In the end they based their decision on the expertise of the experts who had examined all the involved persons.

The Court recognized the key role of experts also in similar cases when the issue arose of whether an inappropriate conduct or a conduct of a double meaning of an adult person in relation to a minor child or in the child's presence constituted sexual misuse. Taking into consideration all the available data the Court concluded that the domestic authorities had sufficiently investigated the circumstances surrounding the alleged sexual misuse of the applicant's son. Their final decision to discontinue the criminal proceedings in relation to the applicant's former husband was based on an expertise produced by the experts from the Research Institute, who had studied in detail the disputed issues including the contradictions present in the previous expert opinions and the expert opinions that were submitted later. In the Court's opinion, in the light of the particular circumstances of the case, such a decision could not be considered one that would fail to meet the requirements of the State's obligations under Article 3 of the Convention.

In its decisions concerning complaints lodged under Art. 127 of the Slovak Constitution the Constitutional Court concluded a violation of the procedural guarantees under Article 3 of the Convention in several cases.<sup>91</sup>

In the case I. ÚS 72/04 on 27 October 2003 the applicant lodged a constitutional complaint with the Constitutional Court under Art. 127 of the Constitution claiming *inter alia* a violation of Article 3 of the Convention. The applicant stated that on 7 July 2002 during a walk he was attacked by two persons from behind. He felt a strong kick in his back, after which he fell on the ground and they kept kicking him in his back, head and stomach. During the attack they insulted him "dirty black Gypsy" and made threats that "he would die". Despite the applicant's pleas to stop as he had been released from hospital shortly before, the offenders continued in the attack and started kicking him with even more violence and intensity. As a result of the criminal offence the victim developed movement disorders of the upper and lower limbs, his articulation and vision worsened, he suffered from balance disorders and walking instability. He was recovered at the neurology clinic for 7 weeks to recover from his injuries.

Albeit the victim identified very precisely the two attackers (he stated their names and the place of residence) upon filing a criminal complaint on 8 August 2002, the police failed to act and prosecute them, despite the attackers lived nearby the applicant's place of residence. The applicant claimed that the investigation in the matter failed to bring the offenders before an impartial court that could decide in the matter. To prove that the investigation procedure failed to be thorough, the applicant submitted a statement of the general prosecutor's office, by which his objections concerning the course and outcome of the investigation were accepted.

In assessing the conditions of an alleged violation of the right guaranteed under Article 3 of the Convention, and mainly its procedural guarantees, the Constitutional Court found that the offence that had allegedly happened on 7 July 2002 could amount to inhuman treatment of the applicant, which is a serious criminal offence, which had not been investigated until that time. The proceeding enjoys the protection under Article 3 of the Convention, i.e. protection from inhuman treatment. The applicant on 9 August 2002 filed a criminal complaint to the Bratislava IV Police Department (hereinafter referred to as the "Police Department"). Despite having identified the offenders and reported their place of residence, the criminal prosecution in the matter only started on 13 February 2003. Albeit the Police Department had accurate

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<sup>91</sup> See e.g. the finding of the Constitutional Court I. ÚS 72/04, III. ÚS 194/06.

information about the offenders identified by the applicant and could have obtained a medical assessment of the applicant's injuries, the criminal prosecution was launched after 7 months, which was deemed unacceptable by the Constitutional Court from the constitutional perspective. The director of the Police Department claimed that they were understaffed, that some police officers had left on parental leave or had found a job outside the police corps, yet the above facts could not have hindered the compliance with the state's obligation to investigate offences that enjoy the protection under Article 3 of the Convention in a speedy manner. An inexcusable delay in launching the criminal prosecution on the part of the Police Department was deemed a violation of the procedural conditions by the Constitutional Court, thus amounting to a violation of the rights under Article 3 of the Convention. As regards the assessment of the procedure of the Judicial Police Office, the case was referred to them on 13 February 2003 and K. Č. was only accused on 23 June 2003 and his co-offender M. K. identified by the applicant was accused as late as 15 April 2004. The investigation procedure from the viewpoint of timeliness and completeness was assessed also unacceptable by the Constitutional Court from the constitutional perspective. The Constitutional Court pointed out at some other errors in the proceedings. The applicant raised objections concerning the classification of the offence as well as the investigation procedure and nevertheless was only interrogated once on 11 March 2003, i.e. at a time when no suspect was yet accused. The suspects had been identified from the very beginning, yet the first suspect was accused after nearly 1 year after a criminal complaint had been filed and the second suspect was accused after more than 20 months. The applicant's objections were well-founded and in the Constitutional Court's opinion this fact was confirmed by the General Prosecution's Office accepting the applicant's complaints. The Constitutional Court confirmed a violation of Article 3 of the Convention also in the procedure of the Judicial Police Office. The Constitutional Court awarded the applicant a just satisfaction amounting to SKK 100,000.<sup>92</sup>

In the case *Hajduová vs. Slovak Republic* (judgment of 30 November 2010) the applicant alleged that the domestic authorities had violated her rights under Article 8 of the Convention by the District Court failing to comply with their statutory obligation to order that her former husband A. be detained in an institution for psychiatric treatment, following his criminal conviction.

The circumstances of the case may be summarized as follows: On 21 August 2001 the applicant's (now former) husband, A., attacked her both verbally and physically while they were in a public place. The applicant suffered a minor injury and feared for her life and safety. This led her and her children to move out of the family home and into the premises of a non-governmental organisation in Košice. On 27 and 28 August 2001 A. repeatedly threatened the applicant, *inter alia*, to kill her and several other persons. Criminal proceedings were brought against him and he was remanded in custody. In the course of the criminal proceedings, experts established that the accused suffered from a serious personality disorder. His treatment as a psychiatric hospital was recommended. On 7 January 2002 the District Court Košice I convicted A. The court decided not to impose a prison sentence on him and held that he should undergo psychiatric treatment. At the same time, the court released him from detention on remand. A. was then transported to a hospital in Košice. That hospital did not carry out the treatment which A. required, nor did the District Court order it to carry out such treatment. A. was released from the hospital on 14 January 2002. After his release from hospital, A. verbally threatened the applicant and her lawyer. On 14 and 16 January 2002, respectively, the applicant's lawyer and the applicant herself filed criminal complaints against him. They also informed the District Court about his behaviour and of the new criminal complaints they had filed. On 21 January 2002 A. visited the applicant's lawyer again and threatened both her and her

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<sup>92</sup> See the finding of the Constitutional Court of 12 October 2005.

employee. On the same day he was arrested by the police and accused of a criminal offence. On 22 February 2002 the District Court arranged for psychiatric treatment of A. in accordance with its decision of 7 January 2002. He was consequently transported to a hospital in Plešivec. The applicant filed a complaint with the Constitutional Court. under Article 127 of the Constitution. The Constitutional Court rejected the applicant's complaint claiming that the applicant should have pursued an action for the protection of her personal integrity before the ordinary courts.

The Court in its judgment of 30 November 2010 held violation of Article 8 of the Convention. As for application admissibility, the Court considers that the Government have failed to show, with reference to demonstrably established consistent case-law in cases similar to the applicant's, that their interpretation of the scope of the action for protection of personal integrity was, at the material time, sufficiently certain not only in theory but also in practice and offered at least some prospects of success. In making this conclusion, the Court has also taken into consideration the applicant's personal circumstances, the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection. The Court did not accept the Government's objection as to the exhaustion of domestic remedies in the form of an action for the protection of the applicant's personal integrity. As for the merits, having regard to the relevant facts of the case as well as the Government's acknowledgement that the application is not manifestly ill-founded, the Court finds that the lack of sufficient measures taken by the authorities in reaction to A.'s behaviour, notably the District Court's failure to comply with its statutory obligation to order his detention for psychiatric treatment following his conviction on 7 January 2002, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life.

As for just satisfaction, the Court awarded the applicant EUR 4,000 in respect of compensation of non-pecuniary damage and EUR 1,000 in respect of legal costs and expenses.

In the case *V. C. vs. Slovak Republic* (judgment of 8 November 2011) The applicant maintained that the respondent State had failed to comply with its obligation under the procedural limb of Article 3 to carry out an effective investigation into her sterilisation. A criminal investigation into the case should have been started at the initiative of the authorities after they had been informed about the interference. The general investigation into the sterilisation of Roma women which the Government had initiated could not be considered effective in respect of the applicant's own case. Similarly, the civil proceedings brought by the applicant had not complied with the requirements of Article 3. In particular, the applicant had been placed in a difficult position as the courts had been bound to examine the case only in the light of the parties' submissions, and the burden of proof had lain on the latter. Those proceedings had not led to the identification and punishment of those responsible. The Government disagreed with the applicant's arguments. In their view, there had been no breach of Article 3 under its procedural limb, given that the alleged practice of forced sterilisation of Roma women had been thoroughly examined in the context of the criminal proceedings initiated by the Government Office and a group of experts established by the Ministry of Health. Any specific obligations incumbent on the State in respect of the applicant's case had been complied with in the context of the civil proceedings initiated by her.

The Court has found above that the way in which the hospital staff acted was open to criticism, given that the applicant had not given her informed consent to the sterilisation. However, the information available does not indicate that the doctors acted in bad faith, with the intention of ill-treating the applicant. In this respect the present case differs from other cases in which the Court held that the domestic authorities should start a criminal investigation of their own initiative once the matter had come



to their attention. The applicant had the possibility of requesting a criminal investigation into her case but did not avail herself of it. She sought redress by means of an action under Articles 11 et seq. of the Civil Code for protection of her personal integrity. In the context of the civil proceedings she was entitled to submit her arguments with the assistance of a lawyer, indicate evidence which she considered relevant and appropriate and have an adversarial hearing on the merits of her case. The civil proceedings lasted for two years and one month over two levels of jurisdiction, and the Constitutional Court subsequently decided on the applicant's complaint concerning her relevant rights under the Convention within thirteen months. Hence, the applicant had an opportunity to have the actions of the hospital staff which she considered unlawful examined by the domestic authorities. The domestic courts dealt with her case within a period of time which is not open to particular criticism. In view of the foregoing, the applicant's argument that the respondent State failed to carry out an effective investigation into her sterilisation, contrary to its obligations under Article 3, cannot be accepted. There has therefore been no procedural violation of Article 3 of the Convention.

In the case *Zubaľ vs. Slovak Republic* (judgment of 9 November 2010) the applicant claimed a violation of Article 8 of the Convention due to a house search of the applicant's home. In this regard the applicant alleged, in particular, that his house had been searched in breach of Art. 84 of the Code of Criminal Procedure and that the house search had been unfounded. The Constitutional Court addressed the applicant's individual objections based on a complaints lodged under Art. 127 of the Constitution. The Constitutional Court dismissed the applicant's complaint in March 2006. The Government objected that, as regards the justification for the search order and the search of the applicant's house on the basis of it, it was open to the applicant to seek redress before the criminal court dealing with the case, as indicated in the Constitutional Court's decision. The Court notes that the original criminal proceedings were discontinued at the pre-trial stage. It was therefore impossible for the applicant to claim any redress before a criminal court as suggested in the Constitutional Court's decision.

As regards the merits of the application, the Court found that the search had a basis in the domestic legal system, namely Articles 82 et seq. of the Code of Criminal Procedure.. Moreover, that it was conducted in connection to a crime investigation, i.e. the search had pursued the legitimate aim of preventing crime. The Court noted that the applicant was in the position of an injured party in the context of criminal proceedings. The Court is not persuaded by the government's argument for the house search, namely that the authorities presumed that the applicant might decline to submit the painting out of fear that he would be unable to obtain damages from the perpetrators of the crime. The applicant had no apparent reason for refusing to co-operate with the prosecuting authorities and thus exposing himself to the risk of a sanction, possibly a criminal one. The Court noted that the subsequent developments are in line with the above consideration because one and a half months later the police contacted the applicant and requested, under Article 78 of the Code of Criminal Procedure, that the painting be handed over to them. The applicant complied with the request immediately. The Court noted that the scope of the search was limited to a visual examination of the premises, and that it was carried out in the presence of a third person who was not involved in the case. The Court nevertheless considers relevant the applicant's argument that the presence of the police at his house could have repercussions for his reputation. The Court concluded that the search of the applicant's house, carried out without sufficient grounds, when the applicant was not suspected of any criminal offence but was an injured party in the criminal case in issue, was not "necessary in a democratic society". There has accordingly been a violation of Article 8 of the Convention.

### Some rights of crime victims under Article 6 of the Convention (right to a fair trial)

Only the accused person may be the subject of the rights of the “criminal part” under Article 6 of the Convention. The injured party (crime victim) does not have any rights in the criminal proceedings under Article 6, insofar as its applicability is based on a “criminal accusation” of a third person, and not even the right to instigate the prosecution of a third person. If a private legal action is admissible by the legal system concerned, in which damages in connection with the criminal offence may be claimed concurrently or if such claims may be raised in adhesive proceedings, Article 6 section 1 is applied in respect to the injured party in the “civil part”.

In the case *Loveček and others vs. Slovak Republic* (judgment of 21 December 2010) the applicants were clients of a private non-banking investment company SUN, a.s. and sued the Slovak Republic for a violation under Article 6 section 1 of the Convention in respect of undue delays in the criminal proceeding, in which they claimed compensation of damages as aggrieved persons. The applicants’ individual claims to damages were later excluded by the Supreme Court from the criminal proceeding and they were referred to civil proceedings. In terms of the incompatible length of the criminal proceedings with the “reasonable time” requirement, the applicants objected under Article 13 of the Convention that they did not have any effective remedy available on the national level. The applicants lodged a complaint with the Constitutional Court on a violation of their right to a hearing “without unjustified delay” and “within a reasonable time”. In August 2002 the Constitutional Court declared the complaint inadmissible. It observed that the primary aim of criminal proceedings was to detect criminal offences and to punish perpetrators and not to determine aggrieved parties’ claims for damages. Aggrieved parties’ claims for damages were of a private-law nature and were predominantly to be asserted before the civil courts.

In its judgment of 21 December 2010 the Court declared admissible the applicants’ complaint concerning the unreasonable length of proceedings. The remaining part of the application was declared inadmissible. The Court disagreed with the government’s argument that Article 6 section 1 of the Convention was inapplicable to the present case due to the fact that the applicants had been excluded with their individual claims for damages from the criminal proceedings. In this regard the Court noted that until a decision was adopted by the Supreme Court to exclude the injured parties from the criminal proceedings, the applicants had a right to have their individual claims for damages resolved within a reasonable time. Furthermore, the Court considered that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 § 1 of the Convention. Having examined all the material submitted to it, the Court considers that although the length of the criminal proceedings has been in part due to the complexity of the case, the Court cannot disregard the fact that it took over two years and three months to set up a special investigation unit. Delays in the pre-trial stage were also acknowledged by the Bratislava V District Office of Public Prosecution. The Court awarded the applicants a total of 56,150 EUR in respect of compensation of non-pecuniary damage and 63.50 EUR in respect of administrative expenses. The Court dismissed the remainder of the applicants’ claim for just satisfaction.

**JUDr. Marica Pirošíková, agent of the Slovak Republic before the European Court of Human Rights**

## **Śławomir Buczma, Rafał Kierzyńska: Protection of victims of crime in the view of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union and the Directive 2011/99/EU on the European protection order**

### **Introduction**

Protection of the victims of crime has been recently become one of the most outstanding issues relating to the evolution of the criminal proceedings in the fields of legislation and practice. Strengthening of the victims' protection has become subject of standard-setting in domestic legal system, as well as on the UE level. In the latter respect attention must be paid to two directives: Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA<sup>93</sup> and Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order<sup>94</sup>.

The in-depth analysis of both of aforementioned legal acts, as well as others instruments for protection of victims, has to take into consideration a basic fact, that the criminal proceedings, as traditionally understood, has not been tailored for protection and support for the victims. Its first and main goals are focused on collection and verification of evidence, the findings relating to the deed in question as to the person of the perpetrator, fixing the guilt and – potentially – the penalty. The protection of victims has used to be deemed a secondary purpose of the criminal proceedings. Thus, it should be considered whether it can become its equivalent goal, together with all the issues relating to the perpetrator. Bearing in mind that these goals require sometimes specific approach and measures, applied during the proceedings, it should be also examined if the protection of victim can be exercise without prejudice to efficient counteracting and fighting criminality.

### **The EU's legal environment in relation to protection of victims of crime**

The need of setting the standards for protection of victims of crime at the EU level, is deemed a side-effect of successful establishment an area of freedom of movement and residence, from which citizens benefit by increasingly travelling, studying and working in countries other than those of their residence. The removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have led as a consequence to an increase in the number of people who become victims of a criminal offence and become involved in criminal proceedings in a Member State other than that of their residence.<sup>95</sup>

First comprehensive standard-setting instrument in this field was the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>96</sup>. Nonetheless, time has shown that this pioneer endeavor to introduce common UE standards of protection of victims of crime did not succeed. The report prepared by the Commission<sup>97</sup> pointed out that the aim of harmonizing legislation in the field of victims' rights had not been achieved due to the wide disparity in national laws. Moreover, in

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<sup>93</sup> OJ L 315, 14.11.2012, p. 57.

<sup>94</sup> OJ L 338, 21.12.2011, p. 2.

<sup>95</sup> S. Buczma, An overview of legal acts on protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union, ERA Forum, Vol. 14, Issue 2, p. 235, September 2013.

<sup>96</sup> OJ L 82, 22.3.2001, p. 1.

<sup>97</sup> COM (2009) 16 final, 20.4.2009.

many cases the Member States tried to transpose the Framework Decision using non-binding instruments, such as: guidelines, charters and recommendations. Therefore, the effect of the implementation of the Framework Decision of 2001 was deemed unsatisfactory.<sup>98</sup>

Outside of the judicial cooperation in criminal matters, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims<sup>99</sup> introduced a system, which allows victims to obtain compensation in another Member State<sup>100</sup>. However, this afford itself, as covering merely one specific respect of the victims' protection, was obviously not sufficient to deal with in a satisfactory manner with such complex and multifaceted question.

In 10 and 11 December 2009 the European Council adopted so called Stockholm Programme. The official title of that document was "An open and secure Europe serving and protecting citizens". In this paper, the Commission and the Member States were requested to examine possible improvement legislation and practical support measures for the protection of victims, including for victims of terrorism, as a priority<sup>101</sup>.

The need to take specific action in order to establish a common minimum standard of protection of victims of crime and their rights in criminal proceedings throughout the European Union was highlighted also in the Resolution of the European Parliament to the Council on the development of a European Union criminal justice area<sup>102</sup>. In this paper the European Parliament called for the adoption of a comprehensive legal framework offering victims of crime the broadest protection, including adequate compensation and witness protection, notably in organised crime cases. Moreover, in the Council Conclusions on a strategy to ensure fulfillment of the rights of, and improve support to, persons who fall victim to crime in the European Union<sup>103</sup>, adopted in 2009, the necessity to develop victim support was stressed. Finally, the Resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, adopted by the Council, during the Hungarian Presidency in 2011, provided for a list of concrete actions to be undertaken in the EU to that end<sup>104</sup>. The following measures were provided in this document:

Measure A: Directive replacing Council Framework Decision 2001/220/JHA;

Measure B: Recommendation or recommendations on practical measures and best practices in relation to the Directive set out in Measure A;

Measure C: Regulation on mutual recognition of protection measures for victims taken in civil matters;

Measure D: Review of the Council Directive 2004/80/EC (in order to assess whether existing procedures for the victim to request compensation should be revised and simplified, and to present any appropriate legislative or non-legislative proposals in the area of compensation of victims of crime);

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<sup>98</sup> S. Buczma, *ibidem*.

<sup>99</sup> OJ L 261, 6.8.2004, p. 15.

<sup>100</sup> See: H. Kuczyńska H., *Wspólny obszar postępowania karnego w prawie Unii Europejskiej*, Wyd. Naukowe Scholar, Warszawa 2008, p. 64.

<sup>101</sup> OJ C 115, 4.5.2010, p.1.

<sup>102</sup> Document INI/2009/2012.

<sup>103</sup> Published on the website of the Council:

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/110726.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/110726.pdf)

<sup>104</sup> Published on the website of the Council:

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/122529.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122529.pdf)

Measure E: The Commission has been invited to propose through Recommendations practical measures and suggest best practices to provide guidance to Member States in the process of dealing with the specific needs of victims.

Taking due account of the urgent need to make the rights of suspects and accused on one side and victims on the other side, the European Commission submitted on 18 May 2011 a package of instruments aimed at improving the current system of protection of victims. The package included a Communication on protection of victims of crime as well as the Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime<sup>105</sup> and the Proposal for a Regulation on mutual recognition of protection measures in civil matters (hereinafter referred to as EPO in civil matters)<sup>106</sup>. The package poses necessary component which aims to supplement the horizontal mechanism to protect victims and strengthen their rights. It supplemented the initiative taken by the Member States for a Directive on the European Protection Order, which concerns the mutual recognition of protection measures taken in criminal matters. The Directive of the European Parliament and of the Council 2011/91/EU of 13 December 2011 on European Protection Order, adopted under the Polish Presidency in 2011, established a mechanism allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act endangering his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection, following criminal conduct, or alleged criminal conduct.

### **The main features of the Directive establishing minimum standards on the rights, support and protection of victims of crime**

#### Definitions

Article 2 contains definitions applicable for the purpose of this Directive, such as the definition of a victim (Article 2.1 letter a and of family members in Article 2.1 letter b).

In addition, a distinction is made between family members of a victim whose death has been directly caused by a criminal offence and who has suffered harm as a result, and family members of victims who do not fall within the definition of victim, but still are granted a number of the rights under this Directive.

During the working group meetings a majority of Member States agreed that family members should be defined by national law. This view was strongly opposed by the Commission.

Since the very beginning of negotiations, delegations have stressed the need for limiting the number of family members of victims pointing out that the notion of "family members" would potentially include a large number of persons. Member States' concerns were related to, in particular, that the course of criminal proceedings might be affected, the likely delay of proceedings and the additional administrative burden and increased costs. In cases of large families, internal conflicts of interests between family members, cases concerning sexual abuse involving family members, the number of family members who would be granted the rights under this Directive might have to be limited.

The compromise worked out by the Council and approved by the European Parliament allows Member States to establish procedures aimed at determining which family members of deceased victims may have priority in relation to the exercise of the rights under this Directive. This means that Member

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<sup>105</sup> COM(2011) 275 final, 2011/0129 (COD).

<sup>106</sup> Document 10613/11 COPEN 123.

States may additionally establish procedures limiting the number of family members who otherwise would have rights under this Directive (for instance the right to access victim support services).

### **Access to specific rights depending on the role of victims in the criminal justice system of Member States**

The role of victim in the criminal justice system varies in each Member State, depending on the national system. There are namely Member States where the victim plays an important role in criminal proceedings and where their status is equal to quarantines granted for suspects or accused. Nevertheless, there are also systems where the role of the victim is rather poor and may be limited only to the role of witness or to a participant in the proceedings, excluding the position as a party. Therefore, to cover the solutions provided for in the legislation of all Member States there were described some criteria in order to define the role of the victim. The criteria are as follows:

- the national system provides for a legal status as a party to the criminal proceedings;
- the victim is under a legal requirement or is requested<sup>i</sup> to actively participate in criminal proceedings, such as witnesses; or
- the victim has a legal entitlement under national law to actively participate in criminal proceedings and is seeking to do so, where the national system does not provide for a legal status as a party to the criminal proceedings.

Thus it was possible to reach the compromise on the definition of the role of the victim in relation to the following rights: right to information about the case (Article 6), to interpretation and translation (Article 7), right to have any decision not to prosecute reviewed (Article 11), right to reimbursement of expenses (Article 14), right to appoint a special representative for the child victim if the holders of parental responsibility are precluded from representing the child (Article 24 let.b

### **Definition of vulnerable victims**

This definition and scope of rights granted to this specific category of victims caused intense discussion since the very beginning as to whether establishing a presumptive list of vulnerable victims was the right approach. The necessity to establish an individual assessment to include specific victims in the above mentioned category was mostly the preferred solution for the Member States. It had been stressed that any victim could be vulnerable, and a mechanism of individual assessment to determine whether this was the case should be established.

The Commission proposed to make a presumptive list of vulnerable victims. Nevertheless, many delegations objected strongly to having any categories - which criteria were to be used, some wanted to include victims of terrorism or victims of domestic violence as well as victims of other types of crime just as severe. Many supported the individual assessments as a basis, to be carried out in accordance with national procedures on a case-by-case basis. The latter position was the ground for the compromise reached by the Council. No exemplification of vulnerable victims was specified in the operative part of the text and the specification of them was inserted in the preamble.

This approach had been changed in trilogue with the European Parliament due to the strong opposition of the European Parliament and led to the change of the notion of this category of victims. The term *vulnerable victims* has been replaced by the notion of *victims with specific protection needs*. Also the categories of victims who may be covered by this notion were specified. ***In this regard were mentioned***

*victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close-relationship, sexual violence, exploitation or hate crime; and victims with disabilities.* Nevertheless, the mechanism of individual assessment remained unchanged and it should be based on:

- (a) the personal characteristics of the victim;*
- (b) the type or nature of the crime; and*
- (c) the circumstances of the crime*

*In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability.*

#### **Gender – based violence and violence in close relationship**

In the opinion of the European Parliament the protection of victims of gender-based violence and violence in close relationship was very important. In this respect the Stockholm programme had been revoked as both categories of victims were mentioned as the most vulnerable victims.

The Stockholm programme mentions this category of victims explicitly in section 2.3.4, stating that those who are most vulnerable or who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents, are in need of special support and legal protection.

In order to reach the compromise with the EP, there had to be found a solution on how to deal with victims of gender-based violence in the context of the Directive. In the preliminary part of the trilogue the European Parliament insisted on having a definition of ‘gender-based violence’ and of ‘violence in close relationship’ included in the operative part of the text (Article 2). The Member States strongly opposed this approach. In the course of the negotiations the European Parliament agreed on having the definition of both categories of victims mentioned elsewhere in the Directive as long as the issue would be sufficiently covered and the necessary assistance, support and protection to this type of victims is provided.

The European Parliament’s request had been met by inserting a reference to victims of gender-based violence and violence in close relationship in Article 9.3 dealing with “Support available from victim support services” (targeted and integrated support for victims with specific needs), in Article 22.3 which exemplifies victims with specific protection needs, in Article 26.2 which relates to the obligation imposed on the Member States to provide the co-operation that aims at reducing the risk of secondary and repeat victimisation in particular concerning victims of gender-based violence” and of violence in close relationship as well as by adding explanatory recitals describing the phenomenon of gender-based violence” and of violence in close relationship (recital 17 and 18). The recitals had been aligned to the Council of Europe Convention of 7 April 2011 on preventing and combating violence against women and domestic violence.

### The main achievements resulting from the adoption of the Directive 2012/29/EU<sup>107</sup>

*The above presented rights were of particular importance to the Member States, to the Commission and to the European Parliament. However, it does not mean that the other rights set out in the Directive were less crucial. Notwithstanding, during the negotiations they had not caused so much problems as those specified above.*

*In general all rights covered by the Directive are targeted to all victims. Nonetheless, there are some examples where only specific types of victims may be provided with some of those rights. Their application may be limited due to the following reasons:*

free of charge access to interpretation and translation granted to victims who do not understand or speak the language of the criminal proceedings concerned, upon their request (**Article 7 of the Directive 2012/29/EU**). However, access to interpretation and translation may be applied in case a victim requested to do so as well as be limited to the specific information such as in case of translation to a final judgment in a trial or to information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification;

*right to legal aid is restricted only to victims having status of parties to criminal proceedings which means that this right applies only to those Member States where exists a possibility to be a party to the criminal proceedings exists under the national law (Article 13 of the Directive 2012/29/EU);*

the legal possibility to be reimbursed of expenses incurred as a result of participation in criminal proceedings is limited only to victims playing an active role (**Article 14 of the Directive 2012/29/EU**). This means that Member States are required to reimburse only necessary expenses of victims in relation to their participation in criminal proceedings and should not be required to reimburse victims' legal fees. The Member States may also impose conditions in regard to the reimbursement of expenses in national law, such as time limits for claiming reimbursement, standard rates for subsistence and travel costs and maximum daily amounts for loss of earnings (recital 47 of the preamble to **the Directive 2012/29/EU**);

*some rights are designated only to victims who are residents in other Member State than that where the criminal offence was occurred. This gives rise to make a complaint to the competent authorities of the Member State of residence in case a victim has not done it in the Member State where the offence occurred (if they were unable to do so in this Member State or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so). Those victims shall have recourse to the provisions laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000<sup>108</sup> on hearing to be provided with use of video conferencing or telephone conference calls (Article 17 of the Directive 2012/29/EU);*

*Although there have been mentioned some limitations in the applications of specific rights to all victims, the general assessment of the content of the Directive 2012/29/EU is obviously positive. The comparison with the Framework Decision 2001/220/JHA does not leave any space for doubts that the Directive 2012/29/EU is a modern and an effective tool to strengthen victims' rights throughout EU. Awareness of rights covered by the Directive allows a victim to understand the criminal proceedings and to be understood. This may be achieved also by the access to the interpretation and translation. All those rights are particularly important for victims travelling throughout Europe. We have to bear in mind that everybody might fall into crime in a foreign country. Therefore, the awareness of being treated in a*

<sup>107</sup> S. Buczma, op. cit. passim

<sup>108</sup> OJ C 197, 12.7.2000, p. 3.



respectful and sensitive manner in the host country in the same way as in the country of origin facilitates the quality of travelling and of living in different EU countries.

The Directive improves not only the rights of EU citizens but also all victims of crimes committed within the EU even if they come from other countries. So the higher standards of victims' treatment will also positively change the view of how the EU is perceived outside of Europe<sup>109</sup>.

### **The main features of the Directive on European protection order**

The European protection order (EPO) Directive has been the initiative of the group of the Member States, namely Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden. The original idea came up from Spain and the work started under Spanish presidency. It was completed under Polish presidency with adoption Directive 2011/99/EU of The European Parliament and of the Council of 13 December 2011 on the European protection order.

### **The scope of the EPO Directive**

The EPO Directive does neither create obligations to modify national systems for adopting protection measures nor does create obligations to introduce such measures into domestic laws of the Member States. It introduces the mechanism for mutual recognition of the measures already existing in the national legal systems. The European legislators were fully aware that the models of protection of victims in the EU Member States differ, as they stem from different legal traditions. Nevertheless, every single Member State developed its own procedures for protection of victims, by application so – called protection measures, aim specifically to protect a person against a criminal act which may, in any way, endanger that person's life or physical, psychological and sexual integrity, as well as that person's dignity or personal liberty and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts. These personal rights of the protected person correspond with fundamental values recognized and upheld in all Member States.

The EPO Directive applies to protection measures adopted in criminal matters, and does not therefore cover protection measures adopted in civil matters. This solution was adopted after in-depth discussion, resulting in the concept of introducing two separate instruments – EPO and civil EPO, now covered by the Regulation (EU) No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters<sup>110</sup>. Tackling a great diversity of protection measures systems in the Member States, the European legislator provided that the Directive should apply to any protection measure, if available during criminal proceeding. For a protection measure to be executable in accordance with this Directive, it is not necessary that given measure was adopted by criminal court. Just the opposite, nor is the criminal, administrative or civil nature of the authority adopting a protection measure relevant. Thus, the nature of the proceeding has solely the decisive influence on possibility of issuing the EPO, no matter which authority is competent to impose protection measure under domestic law.

According to Article 5 of the Directive, an EPO may be issued when a protection measure has been previously adopted in the issuing State. It creates complex three – steps procedure, consisting of (1) adoption of a protection measure, (2) issuing an EPO and (3) recognizing and executing it by executing

<sup>109</sup> See: S. Buczma, *Europejskie standardy postępowania z ofiarami przestępstw – nowe rozwiązania*, Na wokandzie 7(10) 2011, p. 23.

<sup>110</sup> OJ L 181, 29.6.2013, p. 4.

state. Nonetheless, the Directive does not cover all the protection measures, existing in the Member States. Its scope is confined to the following prohibitions or restrictions:

(a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits;

(b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or

(c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

It must be stressed that – however the Directive was adopted as the instrument of judicial cooperation in criminal matters – the authorities involved at all three steps of the procedure need not to be merely the courts competent in criminal matters. The aforementioned rule of the irrelevant nature of the body adopting a protection measure, applies also to all further steps of the EPO procedure. It means that EPO can be issued and recognized not only by criminal court, but also by a civil one, as well as by an administrative body – depends on the institutional structure of protection of victims in the given Member States. Therefore, in relations between some EU States it may occur, that only connector between the EPO procedure and the criminal justice system is that the protection measure was adopted in respect the ongoing criminal proceeding, however none of the typical criminal justice bodies, as police, prosecution service or judiciary, were involved. It is clearly explained in Article 9(1), which if fine reads as follows: “The executing State may apply, in accordance with its national law, criminal, administrative or civil measures.”.

### **EPO follows a victim**

One of the most important feature and peculiarity of EPO is that the order follows a victim. So far, the instruments basing on the mutual recognition of the criminal decision provided the transmission of the decision or order after the perpetrator, to the state where he or she moved to, intended to move or was supposed to be moved. In this case however this model has been entirely altered, which implies serious consequences for the general concept of the instrument and a relevant procedure.

Firstly, EPO may be transmitted to more than one executing state. It may be caused by living conditions of the victim, while he or she moves to one country and – for instance – works in the other. This can be an issue especially in the border cities like Cieszyn / Těšín. In such case the protection should be provided in both countries (in the given example – Poland and Czech Republic).

Secondly, EPO may be issued basing on the decision which was not originally rendered by the authority of the issuing state. EPO mechanism covers also the situation when the judgment comprising given protection measure was delivered by one state, and then transferred to the other one, who decides afterward to issue EPO on its basis. Thus, the source of the protection measure may be the decision which is as well either delivered or solely executed by the issuing state.

### **The grounds for issuing of EPO.**

According to Article 6(1) of the Directive, a European protection order may be issued when the protected person decides to reside or stay or already resides or stays in another member state. The competent authority in the issuing state shall take into account, inter alia, the length of the period that the protected person intends to stay in the executing state and the seriousness of the need for protection. It must be however considered, that aforementioned conditions are solely demonstration, therefore the

issuing authority may decide upon issuing EPO on the basis of different premises too, if they imply a need for doing so.

EPO cannot be issued *ex officio*, on the own motion of the issuing authority. As the protection measures cannot be executed against the will of protected person, his or her motion is needed in any situation.

### **Execution of EPO and breaching its conditions**

The EPO is generally executed under the laws of executing state. The laws of various member states are however different, that may cause specific problems, especially in the case of breaching of the obligation imposed in the protection order. The result of breach may significantly vary in the Member States, depends on their legal standards. Therefore the Directive provides for the general cluster of feasible solutions, that can be applied in such case (see Article 11). The executing authority may then

(a) impose criminal penalties and take any other measure as a consequence of the breach, if that breach amounts to a criminal offence under its the law of the executing state

(b) take any non-criminal decisions related to the breach, or

(c) take any urgent and provisional measure in order to put an end to the breach, pending, where appropriate, a subsequent decision by the issuing State.

If however there is no available tool at national level in a similar case that could be taken in the executing state, its competent authority shall at least report to the issuing authority of the any breach of the protection measure described in the EPO of which it is aware. This option should be considered as the last resort measure, bearing in mind that exchange of information, even the swiftest one, will not provide real and material protection for the protected person pending quite a period of time.

### **V. Conclusions**

The need of increasing standards for protection of victims in respect of criminal proceedings is out of discussion now. Aforementioned instruments are ones of many possible and required steps in this direction. The protection of victims should become an essential element of operation of judicial authorities, both at national and at European level. The way the victims are treated by the authorities will often determine the perception of effectiveness of the EU justice systems in the eyes of the public. Taking into account that already nearly 12 million EU citizens live in another Member State than their country of origin, this is of crucial importance. Hence, by proper implementation of the Directives the Member States shall demonstrate to their citizens that the new standards of their treatment established by them were worth waiting for. The Directive itself may boost the protection of victims but a significant improvement of victims' protection will not be possible until there is a complete implementation of this Directive as well as the Directive on EPO. Only then we can expect the establishment of a consistent and comprehensive mechanism of the protection of victims which enables them to be provided with access to the same rights irrespective of their nationality and their place of residence.

Having said that it has to be pointed out at this point that if the expiry date for the implementation of a directive has passed and the directive is clear and unconditional, an individual may rely on the directive against the state<sup>111</sup>. This is another aspect of the responsibility of the Member State concerned in case it has not transposed or applied the Directives correctly. The Lisbon Treaty has strengthened the EU's

<sup>111</sup> P. Craig, G. De Búrca, EU Law. Text, cases and materials, Oxford 2008, p.280-281.

competence in the criminal justice area. This means that the Commission can bring an infringement case against that Member State. Any citizen can complain about poor application of the rules and this makes this instrument a very strong tool for victims to enforce their rights<sup>112</sup>.

Setting-out of common minimum standards of victims' protection will result in an increase of trust to the national justice systems of the Member States in criminal matters which may give rise to more effective cooperation in criminal matters in the EU. Therefore, the standards laid down in both Directives should also imply more efficient combating of trans-border criminality<sup>113</sup>.

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<sup>112</sup> See speech of F. Le Bail, *Strengthening victims' rights in Europe*, SPEECH/2011/11/08 - provided at the Victim Support Europe conference "Putting victims' rights into practice – How to implement the EU directive on victims' rights across the EU", held in Brussels on 26 November 2012,.

<sup>113</sup> See: A. Grzelak, T. Ostropolski, *System prawa Unii Europejskiej. Podręcznik, Współpraca policyjna i sądowa w sprawach karnych*, t. XI., Warszawa 2011, p. 141.

## Martin Bargel: Satisfaction and its Importance for the Victim in Criminal Proceedings

The term satisfaction is not directly found either in the Criminal Code or in the Code of Criminal Procedure. It is, however, an inseparable part of court proceedings and it is most markedly manifested in cases when the court has to decide about punishment and compensation for damage.

**Satisfaction is a certain redress for the victim for the suffering caused to them by the criminal offence.** It can be expressed as:

**Moral satisfaction** of the victim in the form of a court decision finding the offender guilty, however, in particular in the form of imposing a just punishment;

**Moral conduct** of the crime offender towards the victim (e.g. apology, pleading guilty and sincere expression of remorse over the crime and its consequences, etc.);

**Pecuniary damage compensation** to the victim who incurred bodily harm as a result of the crime, in the form of pecuniary compensation for the harm and compromising of social position;

**Pecuniary damage compensation** to the victim, who incurred property damage as a result of the crime, in the form of its pecuniary compensation or restoration of the thing into its original condition (e.g. if the crime involved theft or inflicting damage upon a thing belonging to another person, etc.),

**Pecuniary damage compensation** to the victim who incurred moral or other damage, in the form of non-pecuniary damage compensation within the scope as stipulated by the judgment in the statement on damage compensation (e.g. if the crime involved rape, etc.).

### 1. Moral satisfaction of the victim by imposing a just punishment

I know from my many years of courtroom experience what a huge meaning the imposition of a just punishment upon the offender has for the victim, in particular in cases when the victim suffered moral or other harm.

This mostly involves cases of survivors of the deceased who was killed in a violent crime, or victims of sexual crimes, victims of abuse or victims of defamation or perjury, etc. To put it simple, victims of crimes not involving property damage. For such victims, satisfaction in the form of imposition of a just punishment acquires an extraordinary, if not the most important, meaning. In many cases, however, the victims' expectations as for the type and duration of punishment that should be imposed upon the offender are inappropriate, as their view, especially with regard to the duration of the prison sentence, is mostly unilateral and influenced by the biblical "an eye for an eye, a tooth for a tooth". In imposing the punishment, however, the court has to take all criteria set forth by the law into consideration, and in doing so it shall consider both the interest of the victim as well as appropriateness of the punishment for the offender from the aspect of its tailoring as well as proportionality to the actual crime and its consequences.

The Slovakian Criminal Code defines the purpose of punishment in the provision of Section 34(1), pursuant to which punishment shall ensure protection of the society against the offender by preventing them from committing further crimes and by establishing conditions for educating the offender to lead a decent life, and at the same time by deterring others from committing crimes; the punishment at the same time expresses the moral condemnation of the offender by the society.

Punishment is a measure of state force imposed upon the offender for the crime they committed by competent courts on behalf of the state, on the basis and within the limits of the law, following a

prescribed procedure. This definition expresses the principle of „*nulla poena sine lege, sine crimine, sine iudicio*“. Punishment as a legal consequence of crime may directly affect the crime offender only (principle of personality of punishment) to ensure the least impact on their family (Sec. 34(3) of the Criminal Code).

Punishment is one of the means of meeting the purpose of the Criminal Code. This also determines its function in those directions where the law for protection of the society shall operate, both with regard to protection against the crime offender being the subject of the repression element (prevention of criminal conduct) and of the individual prevention element (education to lead a decent life – rehabilitation), as well as with regard to other members of the society – potential offenders, with regard to whom the general prevention element is applied (educational impact of the punishment on other members of the society).

Thus, protection of the society is ensured via two elements - the element of force (repression) and the element of education. As a matter of principle, both elements come into play simultaneously in each punishment, provided that the importance of proportionality between criminal repression and prevention shall be kept in mind.

Protection of the society against crime offenders, including protection of rights and freedoms of citizens, makes the punishment a means of self-defence of the society against crimes. At the same time, punishment must not be a means of addressing other societal challenges. Therefore, the Criminal Code is grounded on the idea that the fundamental purpose and goal of punishment is to protect the society against crimes and their perpetrators.

Individual prevention rests upon creation of conditions for education of the convict to lead a decent life. General prevention shall ensure both deterring of other potential offenders from committing crimes, as well as reassurance of the feeling of legal certainty and justice in other members of the society. A just and timely imposition of punishment communicates to other members of the society that the conduct for which the punishment was imposed is unlawful and undesirable, it warns them against committing crimes and enhances the feeling of legal certainty and of the rule of law. The Criminal Code is based on the unity of individual and general prevention, assuming that both of these elements complement and condition each other. As a matter of principle, any disproportion between the different types of prevention results in insufficient educational effect of the punishment both with regard to the crime offender as well as with regard to other members of the society.

Of course, punishment shall also express the moral condemnation of the offender by the society. Thus, punishment includes both the social condemnation, negative assessment of the offender and their offence, both in legal and ethical terms.

Another provision to be applied by the court in its considerations regarding the imposition of punishment is Sec. 34(4) of the Criminal Code, pursuant to which, in determining the type and scope (duration) of punishment, the court shall consider in particular the manner of committing the crime and its consequence, fault, motive, aggravating circumstances, mitigating circumstances and the person of the offender, their situation and the possibility of their correction.

The scope of punishment shall refer both to stipulation of the punishment within the limits of severity of sentence where the punishment is quantified in this way, as well as to stipulation of various modalities or content of the punishments, if the court is tasked with such stipulation (e.g. determination of the type and scope of unlawful conduct, scope of assets to be confiscated by the state, stipulation of

conditions, restrictions for a punishment expressed as prohibition of stay/residence, for conditional sentence). It is the very range of the statutory severity of sentence for certain punishments that allows and at the same time obligates the court to tailor the punishment to be imposed. In stipulating the severity of the sentence imposed, the court shall consider any and all circumstances set forth in the provision of Sec. 34(4), (5) of the Criminal Code.

There is a strict duty imposed upon the court by the Slovakian Criminal Code to consider mitigating and aggravating circumstances as regulated in Sec. 38 of the Criminal Code in connection with stipulating the severity of the sentence. This duty is not only formally declared. As a matter of fact, the court shall impose the punishment in regulated degrees of severity of sentence in such way that if mitigating circumstances prevail, the upper threshold of the statutory severity of sentence shall be reduced by one third (Sec. 38(3) of the Criminal Code) and if aggravating circumstances prevail, the lower threshold of the statutory severity of sentence shall be increased.

„It shall be pointed to the fact in this regard that actually all aggravating circumstances are already given by completing the crime, while the offender may create mitigating circumstances also after the crime has been committed (pleading guilty of committing the crime and sincere remorse, participation in rectification of harmful consequences of the crime, damage compensation, etc.). The mitigating and aggravating circumstances of the punishment are an important means of tailoring the punishment and they are at the same time significant for achieving the purpose of the punishment, as they express the possibility of correction of the offender or the situation of the offender, and thus influence the type and severity of the punishment to be imposed in favour or to the detriment of the offender. As legally material facts they are generally aggravating or mitigating circumstances, as they may be used in imposing any punishment, unless it is a punishment for a crime which has the mitigating or aggravating circumstances as its constitutive elements.“<sup>114</sup>

„The person of the offender shall be assessed in all relations. The possibilities of correcting the person of the offender cannot be evaded in assessing them. The court arrives at its conclusion on the possibility of correction of the offender for most part already based on assessing the nature and severity of the committed crime (i.e. whether it is a minor offence, a crime, a grave crime (felony)), while reasonably assessing the person of the offender. The possibility of correction of the offender specifies their person in all major regards. The primary goal is to determine the outlook of future development of the offender's conduct based on clarification of their personality traits and their associations with the committed crime, including the influence of their social microstructure. What is of major importance for assessing the possibility of correction of the offender is their overall lifestyle and their behaviour/conduct prior to committing the crime and their attitude towards the committed crime.“ (Rt 23/1967) The court's conclusion on the possibility of correction of the offender shall always be in full alignment with the protection provided by the court via the imposed punishment to the interests of the society, the state and the citizens against the attacks of the crime offenders, as well as with the educational effect on other members of the society.

What shall also be taken as a basis in imposing punishments is at the same time the connection and mutual balance of the principle of lawfulness of the punishment and the principle of tailoring of the punishment.

<sup>114</sup> Trestné právo s vysvetlivkami a judikatúrou [Criminal Law with Explanatory Notes and Case Law]. 1st volume – Trestný zákon [Criminal Code] – IURA EDITION, 2006, pp 89-90

Punishment shall be proportionate to the committed crime (principle of proportionality of punishment). The proportionality of punishment is, besides others, also determined by the motive of the offender and by the possibilities of their correction.

„The purpose of punishment is not expressed *expressis verbis* in the Czech Criminal Code. It is replaced by formulations of general penalisation principles directly applicable to the concrete case, which are set forth both for all penalties (Sec. 36 to 38), as well as particularly for punishments (Sec. 39 to 45) and injunctions (Sec. 96 and 97). The purpose of punishment shall be derived both from these general principles that set the basic legal background for imposing penalties, as well as from the particular provisions governing the imposition of penal sanctions and from overall understanding of the Criminal Code.”<sup>115</sup>

„The meaning and purpose of punishment in the most general sense is protection of the society against crime. Punishment must not be a means of addressing other societal challenges. Punishment imposed upon the offender combines both the element of penal repression and prevention in relation to the person of the offender (individual repression and individual prevention), as well as the element of educational effect on other members of the society (general prevention). Both prevention and repression shall be understood in a balanced way in each individual case, as only then does individual prevention work as a means of general prevention. The matter is that general prevention, deriving from individual prevention, shall ensure a protective effect in relation to other potential offenders, and that individual prevention is understood as an instrument of general prevention. The said proportion between individual and general prevention shall not be reversed. If so, the unity or balance between prevention and repression would be disturbed, and the general prevention backed by deterring by strict repression would become a means of individual prevention. If the element of penal repression prevailed, this would in fact mean exemplary punishment, which is contrary to these principles.” (Constitutional Court of the Czech Republic, case ÚS ČR 47/1998-u)

Although the provisions governing punishment in either the Slovakian Criminal Code or the Czech Criminal Code do not explicitly refer to the term „satisfaction“ as a fact of importance for the victim in imposition of punishment, theoretical and academic interpretations also count on such purpose of punishment.

„The requirement to consider the interests of the victim protected under the law in imposing the punishment comes to the forefront of attention in particular in connection with assertion of ideas of “restorative justice”, which puts emphasis on conciliation of the offender with the victim and on restoration of the social relations disrupted by the crime, attempting to strengthen the rights of the victim in criminal proceedings and looking for a way of facilitating damage compensation and redress of the harm caused to the victim.”<sup>116</sup>

„The restitution theory of the purpose of punishment develops the idea of satisfying the interests of the victim in the form of both the damage compensation as well as satisfaction. This is of importance from the viewpoint of achieving the general prevention effect of punishment, as it contributes both to satisfaction of the victim as well as to that of the general public and thus suppresses the urge to punish by taking justice into one’s own hands.”<sup>117</sup> „It is undoubtedly the purpose of punishment to also achieve

<sup>115</sup> Šámal a kol.: Trestní zákonník I – komentář [Criminal Code I – Commentary], C. H. BECK, 1st edition, 2009, p. 412

<sup>116</sup> Šámal a kol.: Trestní zákonník I – komentář [Criminal Code I – Commentary], C. H. BECK, 1st edition, 2009, p. 429

<sup>117</sup> Šámal a kol.: Trestní zákonník I – komentář [Criminal Code I – Commentary], C. H. BECK, 1st edition, 2009, p. 429



restoration of peace in the society and to achieve the general prevention effects also by providing appropriate satisfaction to the victim. The necessity to also take the protection of the crime victims' interests into consideration in imposing punishment under the Czech Criminal Code derives from the provision of Sec. 39(3), pursuant to which the interests of crime victims protected under the law shall also be considered in imposing penal sanctions. Thus, punishment should make the offender try and redress the damage or possibly try and provide other forms of reasonable satisfaction.<sup>118</sup>

Moral satisfaction of the victim by imposing a just punishment upon the offender apparently equals to the highest possible form of satisfaction that can be received, in particular for those victims who suffered moral damage.

## **2. Moral damage compensation by the crime offender in relation to the victim**

What is the precondition for satisfaction of the victim and for achievement of just satisfaction in the victim's eyes are neither the activities nor the decision of the court (imposition of a punishment or duty to compensate the damage incurred) in this case, but active conduct of the offender in terms of the basic ethical and moral rules of decent conduct. In many cases, when the victim already received the damage compensation in terms of the criminal proceedings, e.g. the insurance company paid the insurance benefit in case of a major traffic accident, the victim seeks apology from the offender, which the offender has not yet expressed. It is mostly up to the offender themselves whether and when they show their willingness to satisfy the victim also in the intangible way. However, the offender is motivated. Motivation is provided by the provision of Sec. 36(k),(l) of the Criminal Code, pursuant to which the mitigating circumstances include if the offender participated in rectification of the harmful consequences of the crime or if they voluntarily compensated the damage incurred and pleaded guilty of committing the crime and sincerely expressed their remorse with regard to the crime.

If the offender actively acts by pleading guilty, rectifying the harmful consequence, expressing sincere remorse for the crime, and, of course, apologises to the victim, this will always have a positive impact on the victim's view of the actual harm inflicted upon them by the crime and also of the person of the offender, and in turn also on the actual court verdict concerning the punishment.

## **3. - Pecuniary damage compensation to the victim who incurred bodily harm as a result of the crime, in the form of pecuniary compensation for the harm and compromising of social position**

For the purposes of the Criminal Code, bodily harm shall refer to any damage to health (Sec. 123(1)). The general term of bodily harm has been defined for the needs of the Criminal Code from the aspect of consequences of the crime to the victim's health. It is the umbrella term and it also includes bodily injury and grievous bodily harm as more severe degrees of harm or injury to health. The conditions for awarding and disbursing damage compensation for pain and damage compensation for compromising of social position are regulated in Act no. 437/2004 Coll. on Damage Compensation for Pain and on Damage Compensation for Compromising of Social Position and on Amendments to Act of the Slovak Parliament no. 273/1994 Coll. on Health Insurance, Funding of Health Insurance, Establishment of the General Health Insurance Company and Establishment of Departmental, Industrial, Corporate and Civic Health Insurance Companies as amended.

Pursuant to the said law, pain shall refer to any harm caused by bodily injury, its treatment or elimination of its consequences. Compromising of social position is a condition in connection with bodily

<sup>118</sup> Šámal a kol.: Trestní zákonník I – komentář [Criminal Code I – Commentary], C. H. BECK, 1st edition, 2009, p. 415

harm, which has provably adverse consequences for life arrangements of the victim, for meeting their life and social needs or for performing its social tasks. The damage compensation for pain as well as for compromising of social position shall be granted as a one-off payment on the basis of a medical expert opinion.

#### **4. Pecuniary damage compensation to the victim who incurred property damage as a result of the crime, in the form of pecuniary damage compensation of the same or by restoring the thing to its original condition**

Damage pursuant to Sec. 124 of the Criminal Code shall refer to damage to property or actual reduction in the property or rights of the victim or another harm being in a cause-and-effect relation with the crime, regardless of whether it is a damage to a thing or to rights. For the purposes of this law, damage shall also refer to obtaining of any benefit in a cause-and-effect relation with the crime.

Damage pursuant to Sec. 124(1) of the Criminal Code shall also refer to any harm to profit whereto the victim would otherwise be entitled or that they could reasonably achieve with regard to the circumstances and their situation.

In crimes against the environment, damage shall refer to the total of the environmental harm and pecuniary damage, provided that pecuniary damage also includes the costs of restoration of the environment into its previous condition. In the crime of unlawful waste disposal pursuant to Sec. 302 of the Criminal Code, the extent of the crime shall refer to the price for which the waste is normally collected, transported, exported, imported, recycled, liquidated or dumped at the time and place of identification of the crime, and the price for removal of the waste from the location, which is not intended for its disposal.

A common precondition for pecuniary damage compensation to the victim who suffered bodily harm, but also in cases if they suffered pecuniary damage or moral damage, another damage, or whose rights or freedoms protected under the law were infringed or compromised, is the commencement of adhesion proceedings. Adhesion proceedings constitute a part of the criminal proceedings and shall be commenced upon the victim's damage claim. The adhesion proceedings are regulated in the Code of Criminal Procedure in the provisions of Sec. 46(1), (3), (4), Sec. 256(2), Sec. 287 and Sec. 288 of the Code of Criminal Procedure.

The purpose of the adhesion proceedings is in particular to facilitate the damage compensation and to save the litigation costs of the parties to the dispute. It is not an independent part of criminal proceedings, however, it coincides with the criminal proceedings. It addresses the compensation of the damage incurred by the victim as a result of the crime. On the basis of its outcomes, the court shall decide, unless prevented from doing so by statutory obstacles, on damage compensation, or it shall refer the victim to civil damage proceedings or to proceedings before another competent authority.

If the victim incurred damage as a result of the crime, they may claim damage compensation directly in the criminal proceedings against the indicted person. If the court finds the person guilty and the damage claim follows from such guilt, the criminal court shall decide on the damage claim along with the decision on the crime, unless prevented from doing so by statutory obstacles.

The victim may also claim in the criminal proceedings that the court imposes a duty upon the indicted person in the convicting judgment to compensate the damage caused by the crime; the victim shall lodge such claim no later than by the end of the investigation or abbreviated investigation. It shall be apparent from the claim what are the reasons for the same and what is the amount of the damage claim.

The basic condition allowing the victim to claim damages in the adhesion proceedings is that the damage must have been caused by the crime committed by the accused. It is a requirement that there is a cause-and-effect relation between the damage and the committed crime for which the accused is prosecuted. This implies that a damage caused by a different crime for which the offender is not prosecuted cannot be claimed in the adhesion proceedings, even though it was related to the crime being the subject-matter of the criminal proceedings. What is decisive here is the statement of the crime in the indictment or in the proposal for approval of an agreement on crime and punishment, as it is the court that decides on the damage claim.

Pursuant to Sec. 46(1) of the Code of Criminal Procedure, the victim is a person that suffered **bodily harm, pecuniary, moral** or **other** damage or whose **other rights or freedoms protected under the law** were infringed or compromised as a result of the crime.

**Bodily harm** shall refer to such harm that means a damage to normal bodily or mental functions, makes the performance of usual activities more difficult, or has another impact on the usual way of life of the victim and requires medical treatment, even though it does not cause permanent health consequences.

**Pecuniary damage** shall refer to a damage incurred in the property domain of the victim, and which can be objectively expressed in monetary terms. An actual damage to a thing shall refer to such damage that means a reduction in the property balance of the victim compared to the balance before the damage event, and represents property values that need to be expended to put the thing into its prior state.

**Moral damage** is a damage incurred by infringement of the right to human dignity. It is expressed by psychic trauma, stress, anxiety, frustration, etc.

**Another damage** is a damage that can be caused with regard to other rights of the victim e.g. infringement of copyright or rights under contracts – licence contract, work contract.

In deciding about damage compensation to the victim by the accused, the court usually applies the provisions of civil substantive law, most frequently those of the Civil Code governing damage compensation (Sec. 420 et seq.), to the damage claim, however, for the procedural part, it still applies the Code of Criminal Procedure.

If the court convicts the indicted person for a crime whereby damage set forth in Sec. 46(1) of the Code of Criminal Procedure was caused to a third party (pecuniary, moral or another damage, or other rights or freedoms of that person protected under the law were infringed or compromised), the court will usually impose in the judgment to compensate the damage to the victim, if the claim was made duly and in time. If there is no statutory obstacle, the court will always impose a duty upon the indicted person to compensate the damage, if its amount is included in the description of the crime stated in the guilty verdict.

The statement on the duty of the indicted person to compensate the damage shall precisely identify the person of the beneficiary and the claim awarded to such person. In justified cases, the court may state that the liability shall be met in instalments, and it shall at the same time set the repayment terms, also taking into account the victim's statement.

The judgment statement on damage compensation may be expressed in means of payment in a foreign currency upon the victim's proposal, unless this is contrary to the circumstances of the case and if the damage was incurred to means of payment in a foreign currency or to things bought for such means of payment, or if the indicted person or the victim are foreign nationals.

If the outcome of the evidence procedure does not provide a background for imposition of the damage compensation duty or if further evidence would be required to decide on the damage compensation duty, where such production of further evidence goes beyond the needs of the criminal prosecution and would prolong it, the court shall refer the victim to the civil court procedure or to a procedure before another competent authority. The victim shall be identified by their name and surname, date and place of birth and place of residence. If the victim is a legal entity, it shall be identified by its trade name or commercial name, registered office and identification number as per the record in the commercial register, register of small traders or in a different register.

The court shall also refer the victim to civil proceedings or to proceedings before another competent authority with regard to the rest of their claim, if it only awards a part of their claim on any grounds.

If the court acquits the indicted person, it shall always refer the victim to civil proceedings or to proceedings before another competent authority with regard to their damage claim.

### **5. Pecuniary damage compensation to the victim who suffered moral or another damage, in the form of non-pecuniary damage compensation within the scope as stipulated by the judgment in the statement on damage compensation**

Moral damage from the viewpoint of our Code of Criminal Procedure shall refer to a damage incurred as a result of infringement of the right to human dignity (psychic trauma, stress, anxiety, frustration) and may concern in particular crimes against human dignity and crimes against other rights and freedoms (crimes of rape, sexual violence, sexual abuse, incest, dangerous threats and other crimes - Sec. 359 to 378a of the Criminal Code).

„Moral damage shall refer to damage incurred by the victim usually as a result of interference with their personal sphere. The term „moral damage“ in relation to the harmful effect caused by a deliberate violent crime pursuant to a specific law (Act no. 215/2006 Coll. on Damage Compensation to Violent Crime Victims) shall, in cases of death, rape or sexual violence be interpreted in accordance with interpretation of the term „non-pecuniary damage“ in civil proceedings.“<sup>119</sup>

Another damage is damage incurred as a result of the crime, which is not a pecuniary damage, moral damage or bodily injury. It can be e.g. bodily harm not achieving the intensity of bodily injury. Another damage may be caused with regard to other rights of the victim (e.g. infringement of copyright or rights under contracts – licence contract).

It shall be stated in connection with exercising of the victim's non-pecuniary damage claim in the adhesion proceedings that the criminal court applies the provisions of the Code of Criminal Procedure for the procedural aspect, however, as for the conditions of the actual claim, it applies the provisions of civil substantive law, in particular the provisions governing personality rights of individuals included in the Civil Code under personality protection in the provisions of Sec. 11 to 16.

In one of its decisions (resolution, file no. **5 Cdo 265/2009 dated 17/02/2011**) concerning non-pecuniary damage compensation, the Supreme Court of the Slovak Republic stated the following:

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<sup>119</sup> Minárik Š. a kol.: Trestný poriadok – Stručný komentár [Code of Criminal Procedure – Brief Commentary]. Iura Edition, 2006. p. 731. Please also refer to Section (§) 287(1) of the Code of Criminal Procedure. Burda, E. – Gaňa, S. – Tobiášová, L.: Odškodňovanie osôb poškodených násilnými trestnými činmi [Damage Compensation to Violent Crime Victims]. In.: Justičná revue, 59, 2007, no. 4, pp 503-526.

*„The intrinsic features of personality rights are their absolute nature, intangible character, generality and exclusiveness, principal non-transferability, no limitation in time and exemption from the statute of limitations. They act towards an unlimited or uncertain circle of other subjects of law, their subject-matter includes exclusively non-pecuniary values (personality), they pertain to each and every individual „a priori“, (they are an expression of the human personality in relation to other subjects, i.e. be it individuals or legal entities) with the same legal status, the exclusive entitlement to use the various aspects of their personality during a person’s entire life within the limits set by law is held by the individual, these rights cannot be alienated, separated from their bearer, they attach to the individual during their physical existence in the society (they are unlimited in time during the life of the individual), they cannot be inherited (they are not part of the decedent’s estate), they are exempt from the statute of limitations, they cannot be precluded and be subject to the enforcement (bailiff) procedure. Contrary to them, property rights can be separated from their bearers, they can be transferred (alienated), they are subject to the enforcement procedure, statute of limitations and preclusion. The specificity of the subjective personality rights rests upon their subject, being directly the personality of a human being, an individual in their integrity. The right to personality protection (a subjective, purely personal or personality right) is regulated in the Civil Code as a uniform right (quoted wording „an individual shall have a right to protection of their personality“). As a result, the individual rights emerging in this unified framework shall be understood as partial rights, differing from each other by their relation to different values, aspects of personality, however, stemming from the personality constituting a physical and moral unity. The fundamental personality values of each individual include, as per the Civil Code, Sec. 11, explicitly, life, health, civic honour and human dignity, as well as privacy, reputation and expressions of personal nature.*

*Pursuant to the provisions of Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Rights and Freedoms (published under no. 209/1992 Coll.), everyone has the right to respect for his private and family life, his home and his correspondence. The provisions of Article 17 of the International Covenant on Civil and Political Rights (published under no. 120/1976 Coll.) imply that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, and everyone has the right to the protection of the law against such interference or attacks.*

*The right to privacy in various forms may include both the protection of family life, privacy of residence, privacy of correspondence, as well as the protection of honour, reputation of the person, or protection against unauthorised collection of data about a person. On the constitutional level, it is set forth in Article 16 of the Constitution of the Slovak Republic – the integrity of a person and their privacy is guaranteed, it may only be restricted in cases set forth by the law; in Article 19(1) – everyone has the right to protection against unauthorised interference with their private and family life, (2) – everyone has the right to protection against unauthorised collection, disclosure or other abuse of data of their person, in Article 21 guaranteeing the integrity of residence; in Article 22 guaranteeing the protection of privacy of correspondence, privacy of delivered reports and other documents and the protection of personal data.*

*In its judgment of 16 December 1992 in the case of Niemetz against Germany, the European Court for Human Rights stated that „...it does not deem it possible or necessary to attempt to word an exhaustive definition of the term “private life”. However, it could be too restrictive to limit this term "by the exclusive circle", in which an individual may live their own personal life as they may choose, and fully exclude the outer world not included in this circle from the same. Respect for private life shall, to a certain extent, also contain the right to enter into and develop relations with other people.”*

*The right to privacy also includes the right to family life. In its judgment of 21 June 1988 in the case of Berrhab against the Netherlands, the European Court for Human Rights concluded: „The term family, on which Article 8 is based, implies that a child born out of such relation is ipso iure a part of such relation. For this reason, a relation equalling “family life” does exist from the moment of birth of the child and with regard to the actual existence of this fact between the child and its parents, even if the parents later do not live together anymore.“ The essence of family life is the individual’s right to enter into, maintain and develop relations between family members founded on strong emotional ties.*

*If there are social, moral, emotional and cultural relations between individuals established in terms of their private and family life, an infringement of the right to life of any of them may result in unlawful infringement of the right to privacy of the other of these persons. Such unlawful infringement of the right to privacy or the right to family life by a third party may cause such damage to the other party to the relation, which partially or fully prevents them from fully meeting their emotional needs, i.e. a non-pecuniary damage affecting another than the pecuniary sphere of personality, the personality sphere, which undoubtedly also includes emotional harm. In case of death of any of the members to the family relation, the surviving person may suffer emotional harm in the form of shock, grief over the loss of a close person and also over the loss of partnership (relation) with a close person.*

*The personality protected under the general personality right may, in case of any infringement of such right, take advantage of the legal remedies for personality protection, which are detailed in the provision of Sec. 13 of the Civil Code. They come into question, if there is a threatening or actual harm in the non-pecuniary personality sphere, and they are of different natures. Which of these legal remedies the respective individual will apply to protect their personality will above all depend on their will influenced in particular by the intensity and nature of the infringement. An infringement of the emotional sphere of an individual caused by unlawful conduct of a third party and resulting in death of a close person establishes the right to seek personality protection under the personality protection provisions of the Civil Code. Seeking of such protection is in the exclusive interest of persons having such a close relation with the affected individual that integrity protection of their personality even after their death (“post-mortem protection”) is in their personal interest; these involve the closest relatives, in particular the spouse and children, and the parents, if there are no children.*

*The various personality protection remedies are relatively independent. They can be used individually or cumulatively, also depending on the intensity of the unlawful interference with the individual’s personality sphere. The law explicitly allows the option of lodging a claim for refraining from the infringement (action to repel a claim); what is also explicitly admissible is the claim for rectification of consequences of already effected infringement (action for restitution) and a claim for reasonable satisfaction (action for satisfaction), not having the nature of pecuniary compensation, i.e. it is not a monetary compensation, but it is exclusively a means of moral, intangible effect. By its nature, it is not a means of repression or reparation, but it is a special means of personality protection with a satisfaction nature, which is not immediately reflected in the pecuniary sphere of the affected individual, therefore, it cannot be expressed and stated in terms of money. If moral satisfaction would not seem sufficient, the Civil Code allows, in Sec. 13(2), to award monetary compensation of non-pecuniary damage, with the purpose of balancing and alleviating the non-pecuniary damage in monetary form, and it also meets the satisfaction function. The above implies that also actions seeking another form of protection are admissible besides actions for refraining from infringements and actions for rectification of consequences of an infringement. This is implied by the word „in particular“ used in the first sentence of the provision of Sec. 13 of the Civil Code. This other form of protection includes actions for declaration that the personality rights of the plaintiff*

*were infringed in a certain way, or actions for declaration that certain statements are not true. These actions are not declaratory actions pursuant to the provisions of Sec. 80(c) of the Code of Civil Procedure. It is not necessary therefore to prove a legal interest in such declaration.*

*In some instances of infringements of personality rights, e.g. the right to life, personal freedom and safety, the right to privacy and family life, the European Court for Human Rights concluded that the actual declaration that the right was infringed is a sufficient satisfaction for the applicant (judgments *Český vs. Czech Republic* dated 6 June 2000, *Malhous vs. Czech Republic* dated 12 August 2001, *Pavletič vs. Slovakia* dated 22 June 2004, *Indra vs. Slovakia* dated 1 February 2005). In other cases, besides concluding that these rights were infringed, the court at the same time awarded compensation to the successful applicants for the harm suffered (judgments *Kučera vs. Slovakia* dated 17 July 2007, *Babylonová vs. Slovakia* dated 20 June 2006, *Turek vs. Slovakia* dated 14 February 2006).“*

The single personality protection right applicable to an individual is ensured by a series of partial remedies that can be perceived as relatively fully independent. The right to non-pecuniary damage compensation in monetary terms pursuant to the provisions of Sec. 13(2) of the Civil Code represents one of the partial and relatively independent means of protection under the single personality protection right with regard to an individual. It is established when moral satisfaction as a purely personal right is not sufficient to balance and alleviate the harmful effects of the infringement of the personality rights. Although it is a satisfaction under intangible personality rights (similarly as in case of reparation payment and compromising of social position or right to compensation of non-pecuniary damage caused by an unlawful decision or wrong official course of procedure pursuant to the provisions of Sec. 17(2) of Act no. 514/2003 Coll. on Liability for Damage caused in the Execution of Public Power), its expression in monetary terms makes it a personality right of pecuniary nature. Against the background of the above, the Supreme Court of the Slovak Republic adjudicated that **the right to monetary compensation of non-pecuniary damage – monetary satisfaction - is, pursuant to the provisions of Sec. 13(2) of the Civil Code, a personal right of pecuniary nature that can be expressed as a money equivalent and subject to the statute of limitations in the general three year period commencing from the moment of infringement of the individual’s personality protection rights (resolution, file no. 5 Cdo 265/2009 dated 17 February 2011).**

„The right to monetary satisfaction, **intended** to balance and alleviate the non-pecuniary damage in monetary terms, is subject to the statute of limitations, as this satisfaction function, similarly as in case of compensation for suffered pain and for compromising of social position“ (R 28/1970) comes close to the reparation function, as in case of damage compensation, as far as possible to redress by providing money.

What also comes into consideration in connection with the assessment of a reasonably raised objection of the time bar against the asserted claim for monetary compensation of non-pecuniary damage, is the issue of collision of raising the time bar objection with the provision of Sec. 3 of the Civil Code, pursuant to which the exercise of rights and duties under civil-law relations shall not, without a legal ground, interfere with the rights and legitimate interests of others and shall not be contrary to good morals. The provision of Sec. 3 of the Civil Code is a general substantive-law provision granting the authorisation to the court to assess whether the exercise of the subjective right is in compliance with good morals, and if not, to refuse the requested protection. Although good morals are not defined in any statutory provision, what can in general be considered as good morals is a sum of social, cultural and moral standards that manifested a certain degree of stability (unchanging nature) throughout history, that express material historical tendencies and a relevant part of the society identifies with them.

In relation to accepting the time bar objection as well as from the viewpoint of its compliance with the provision of Sec. 3 of the Civil Code, the Supreme Court of the Slovak Republic stated in the already mentioned resolution, file no. **5 Cdo 265/2009, dated 17 February 2011 that: „It can generally be reasoned without doubt that raising a time bar objection against the claimed receivable by a party to the proceedings in the proceedings cannot be deemed a conduct contrary to good morals, as the institute of good morals is a statutory institute and contributes to certainty in legal relations.** Under specific circumstances, however, the exercise of the right to object against the time bar of a raised claim could be a conduct allowing damage to be incurred by the other party to the legal relation who has not caused the expiration of the period of limitation in vain and against whom the time-barring of the raised claim as a result of expiration of the period of limitation would be an unreasonably harsh sanction compared to the extent and nature of the right exercised by them and compared to the reasons for which they have not exercised their right in time. The distinctive features of a conduct manifesting a direct intention to harm the other party shall be derived from these circumstances under which the objection of time bar on such claim was raised, and not from the circumstances and reasons from which the establishment of the exercised claim is derived, in other words, what is decisive (determining) for rejection of the effects of the time bar objection are circumstances that existed at the time of raising the time bar objection. These circumstances shall be met in such an extraordinary intensity that justifies such a major interference with legal certainty as not allowing the right to raise the time bar objection.“

**In criminal proceedings**, with regard to the definition of the term damage (Sec. 46(1) of the Code of Criminal Procedure), the duty to decide on its compensation in the convicting judgment, if the damage claim was duly made, relates both to pecuniary, moral as well as another damage, as well as to infringement or compromising of other statutory rights or freedoms of the victim, provided that the term „moral damage“ in relation to the harmful effect caused by a deliberate violent crime shall, in case of death (e.g. also rape, sexual violence, damage to reputation in case of perjury), be interpreted in compliance with interpretation of the term „non-pecuniary damage“ in civil proceedings.

It is evident that the criminal-law term „damage“ is much broader and more embracing in terms of its content than the term „damage“ in private law. As a matter of fact, criminal law, in particular in the said provision of Sec. 46(1) of the Code of Criminal Procedure, is based on the term of damage, or, as applicable, it defines its content not in terms of the idea of damage as an interference exclusively with the property rights of the victim, which idea has gradually been overcome in Europe to date, but it treats damage with a more contemporary, more advanced European understanding as an infringement of both tangible as well as intangible rights, provided that such infringement can logically result in both tangible damage (damage to property or pecuniary damage) as well as intangible damage, i.e. harm or damage not manifested in the tangible sphere, but in a different sphere, constituted by all other rights of a different – intangible nature, which enjoy legal protection under the law and their infringement or interference with the same is penalised under the law. Thus, the Code of Criminal Procedure perceives damage as pecuniary, moral and another damage, while referring in terms of content to infringement or compromising of other statutory rights or freedoms of the victim, provided that the terms „moral damage“ and „another damage“ shall, in relation to the harmful effect caused by the deliberate unlawful conduct be penalised by the standards of criminal law, be perceived as terms standing in direct relation with the general term „non-pecuniary or intangible damage“ in civil law, i.e. with a term so diverse in terms of its content, as diverse the statutory rights and freedoms are in terms of their content, which rights and freedoms enjoy protection under the law and any infringement of the same is penalised under the law (usually in the form of an order to



remove/redress/discontinue such infringement). With regard to these facts, i.e. above all with regard to the intangible nature of these protected rights, such (non-pecuniary) damage incurred as a result of such infringement, may only be alleviated in monetary terms, it cannot be redressed in any case, as this is not possible with regard to the nature of these rights (infringement resulting in compromising of health or honour of an individual cannot be redressed by money or by any financial reparation, the monetary compensation is only intended to alleviate the consequences of such conduct, if any).

In deciding about the damage claim in adhesion proceedings, the substantive law provisions of specific legal regulations on which the lodged claim is based and which also govern it shall be respected. These regulations specifically regulate the establishment of a damage claim, its content and the scope and the manner of compensation. Thereafter, as already stated also for decision-making on infringements of personality rights and on legal remedies, decisions are made pursuant to the provisions of Sec. 11 et seq. of the Civil Code.

Pursuant to Sec. 11 of the Civil Code, an individual shall be entitled to the protection of their personality, in particular their life and health, civic and human dignity, as well as privacy, their reputation and expressions of personal nature.

What is subject to the protection pursuant to Sec. 11 of the Civil Code are such purely personal rights of the citizen that impact the development of their personality and are closely connected with them. Overall development and assertion of a person's personality is the main purpose and goal of this protection under civil law. This viewpoint is essential in assessing the question of whether and which rights are protected by the provision of Sec. 11 of the Civil Code.

Pursuant to Sec. 13(1) of the Civil Code, an individual has the right particularly to seek discontinuation of infringements of the right to protection of their personality, rectification of the consequences of such infringements, and to receive reasonable satisfaction.

What is a reasonable satisfaction depends on the circumstances under which the infringement occurred, and it will rest upon a moral performance, e.g. apology or taking back of offensive statements, etc., usually where they were made (in the work team, in the newspaper, etc.).

Pursuant to Sec. 13(2) of the Civil Code, unless a satisfaction pursuant to Sec. 13(1) of the Civil Code is deemed sufficient, in particular as the dignity of the individual or their esteem in the society have been considerably jeopardised, the individual also has a right to monetary compensation of non-pecuniary damage.

Unless moral satisfaction is sufficient, the victim also has a right to monetary satisfaction. An individual shall also be entitled to monetary compensation of non-pecuniary damage, if the **moral satisfaction** is no longer applicable.

Pursuant to Sec. 13(3) of the Civil Code, the amount of compensation pursuant to Sec. 13(2) of the Civil Code shall be determined by the court with consideration of severity of the damage incurred and of circumstances under which the right was infringed.

The court shall determine the amount of monetary satisfaction at its discretion, which, however, cannot be arbitrary. The law stipulates a duty for the court to consider two aspects in this determination, being the severity of the damage incurred as well as the circumstances under which the infringement occurred. Determination of the monetary satisfaction amount shall be made with regard to the circumstances of each particular case in line with the requirement of fairness. Although the court applies its

discretion in determining the amount of monetary satisfaction, it shall be apparent from the action (from the claim in adhesion proceedings) what amount is sought by the victim. As a matter of fact, the court cannot go „*ultra petitem*“ and adjudicate more than sought by the victim. **However, it is not possible to also award interest on arrears on the monetary amount awarded**, as the debtor did not fall into arrears until the court decision.

The regulation of protection of privacy, including family privacy, is based on the principle of no unlawful interferences with the private life of a person and inflicting of no harm upon their private life. As a matter of fact, it is a function of the right to privacy to ensure that the private sphere of an individual where they may develop their personality in diverse ways is kept undisturbed. The constitution at the same time associated family life with private life, with this association to be interpreted in such way that family life and the right to its protection are part of privacy. The Constitution also protects the privacy of an individual in their family relations from other individuals, which includes social, cultural as well as moral or material relations. Unlawful interferences with these relations may be qualified as interferences with family life – with family privacy. If the interpersonal relations constituting the basis and framework of an individual’s private life achieve a certain intensity and manifest certain other distinctive features, such destruction of relations can result in an unlawful infringement of the right to protection of privacy as a partial right to protection of personality under the condition that the conduct of the initiator of the infringement is unlawful, it is objectively capable of interfering with the right to protection of personality and there is a cause-and-effect relation between the unlawful interference with the personality of the individual that is objectively capable of causing non-pecuniary damage resting upon the infringement or compromising of the individual’s personality and the origination of such non-pecuniary damage. It shall also be noted that the legal remedy to seek protection against such infringement is the very claim, whereby the individual seeks reasonable satisfaction under the provisions on personality protection, which satisfaction can also be in the form of monetary compensation of non-pecuniary damage.

It shall be concluded with reference to the above that the provisions of Sec. 11 et seq. of the Civil Code provide the legal basis for the claim for compensation of non-pecuniary – intangible damage caused to an individual by killing of their close person. Respect for private life shall, to a certain extent, also include the right to enter into and develop relations with other human beings. The private life includes the family life, also including relations among close relatives, especially the social and moral relations.

The case law of domestic courts admitted actions for monetary compensation of non-pecuniary damage brought by affected close persons whose right to private and family life was infringed by death of a close person. It is without doubt that the death of a close person represents a major interference with the right to privacy of the affected individual as one of the partial personality rights of the individual.

Monetary compensation of non-pecuniary damage sought by the victims in adhesion proceedings may be awarded by the court pursuant to Sec. 13(2) of the Civil Code, if moral satisfaction would not seem sufficient, especially if the dignity of the individual or their esteem in the society were compromised to a considerable degree. The reasons for admitting compensation are only set forth in a demonstrative way in this provision. The law sets forth a single condition for awarding monetary compensation of non-pecuniary damage, which will be met if the intangible (moral) satisfaction does not seem sufficient.

The existence of a severe damage is always – depending on the individual circumstances of the case in question - a condition for awarding monetary compensation of non-pecuniary damage (i.e. tangible satisfaction). What shall be considered a severe damage is a damage considered as a major damage by the individual with regard to the circumstances under which the right was infringed, the intensity of the

infringement, its duration or impact and consequences. However, what is decisive in this case are not their subjective feelings, but an objective viewpoint, i.e. whether also every other individual would perceive the damage in question in this way at the given place and time (in the same situation).

„The actual severity of the damage incurred as a result of the unlawful infringement of the right to protection of personality is not the only and exclusive criterion for determination of the amount of monetary compensation of non-pecuniary damage. In determining this amount, the court shall also consider the circumstances under which the right was infringed. These circumstances may be significant both for the affected person as well as for the person who caused the unlawful infringement.“ (R 29/2001)

Although the actual distinctive parts of an individual's personality and personality rights protected under Sec. 11 of the Civil Code (human dignity, honour, reputation, esteem, privacy, etc.) are values that can essentially not be expressed in monetary terms, this does not mean that money could not be used to express the amount of compensation of non-pecuniary damage caused by an unlawful interference with the personality. The award of monetary satisfaction presupposes meeting of certain statutory conditions. The amount of compensation to ensure such satisfaction shall be determined by the court with consideration of severity of the damage incurred and of circumstances under which the right was infringed. The Civil Code does not set any upper or lower threshold for the amount of monetary satisfaction. The provision of Sec. 13(1) of the Civil Code only stipulates that the satisfaction shall be reasonable. Stipulation of the amount of monetary compensation of non-pecuniary damage is a matter of consideration for the court, which shall consider two criteria set forth in the law in its decision making (Sec. 13(3) of the Civil Code – severity of the damage incurred and circumstances under which the right was infringed), and the court shall take these criteria as its starting point in its decision making on the amount of monetary compensation of non-pecuniary damage. The court cannot take other than the aforementioned criteria into consideration in deciding on this issue. In this regard I shall point to the decision of the Supreme Court of the Slovak Republic, file no. 3Cdo/137/2008 of 18 February 2010, where it is stated that in case of an infringement of the right to privacy, considerable compromising of dignity or esteem in the society is not the only relevant form of severity of damage incurred by an individual in respect of their protected rights.

I shall note that the monetary damage compensation to the victim for moral damage and suffering (or for death of a close person due to a violent crime) can never on its own sufficiently compensate the loss of a close person, however, it can to a certain extent compensate the emotional harm of the victim caused by the crime. If the financial satisfaction is also accompanied by a just punishment for the offender, it can really happen that the victim will leave the courtroom with a good feeling and with trust in justice in the broadest sense of the word.

With regard to the above, it is appropriate to say that penal courts in the Slovak Republic have sufficient statutory means available in terms of adhesion proceedings to also decide on non-pecuniary damage compensation in judgments of conviction. It is probably just a question of time when the courts will start applying these means to a greater extent. This would complete the satisfaction process for the victim already in the criminal proceedings without the victim having to seek satisfaction of their claim in different, civil proceedings. I trust that education on this subject as part of the training of judges will contribute to comprehensive satisfaction of all rights of the victim in criminal proceedings

JUDr. Martin Bargel

## Andrea Kenéz: European Union framework for victims' protection in the criminal proceedings. What the judicial practitioner should know?

### I.) Strengthening victims' rights in the European Union

As it is stated in the Resolution of the Council on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have led as an inevitable consequence to an increase number of people who become victims of a criminal offence and become involved in criminal proceedings in a Member State other than that of their residence.

The conclusions of the European Council meeting in Tampere in 1999 stipulate that minimum standards should be drawn up on the protection of the victims of crimes.

These days in the light of the Stockholm Programme to consolidate the area of freedom, security and justice, to strengthen the rights of victims of crime and to ensure their need for protection, support and access to justice have identified as a strategic priority.

Is this a claim or a fact?

The *active protection* of victims of crime is a high priority for the European Union and its Member States. Although several legal instruments and non-legislative actions have been adopted both at EU and national levels, more over Article 82(2)(c) TFEU is a legal base for the EU to establish minimum rules on the rights of victims of crime to facilitate mutual recognition of judgements and judicial decisions, these are still not effective and the national laws and policies on victims' rights and the role of victims in criminal proceedings differ considerably from one Member State to another.

### II.) Definition of victim

a natural person who suffered harm, including physical or emotional harm or economic loss which was directly caused by a criminal offence

family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death

„family members” means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim

„people close to victim” means relatives and other persons in a close relationship to them, such as partner, (grand)children, parents and siblings

„child” means any person below 18 years of age (where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of the Directive 2012/29/EU, be presumed to be a child)

### III.) (Cross-border) offences raise the question of victim protection

(transnational) organised crimes

terrorism

trafficking in human beings

sexual abuse, sexual exploitation of children and child pornography

road accidents

fraud

cybercrimes violating property rights

#### **IV.) The victims' needs**

recognition and respectful treatment

protection

support

access to justice

compensation and restoration

#### **V.) Framework for victims' rights and protection**

##### **Non-legislative actions**

Mainly training programmes for professionals, such as

##### **Justice Programme (2014-2020)**

This programme shall contribute to the further development of a European area of justice based on mutual recognition and mutual trust by promoting – inter alia - judicial cooperation in criminal matters, judicial training (including language training on legal terminology, with a view to fostering a common legal and judicial culture), effective access to justice in Europe (including rights of victims of crime and procedural rights in criminal proceedings).

##### **Daphne III.**

It aims to contribute to the protection of children, young people and women against all forms of

violence and attain a high level of health protection, well-being and social cohesion, to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings, to take preventive measures and provide support and protection for victims and groups at risk.

It builds on the achievements of the previous Daphne (2000-2003) and Daphne II (2004-2008) programmes.

##### **Rights, Equality and Citizenship Programme (REC ) (2014-2020)**

This programme shall contribute to the further development of an area where equality and the rights of persons, as enshrined in the Treaty, the Charter and international human rights conventions, are promoted and protected, specifically: promote non-discrimination, combat racism, xenophobia, homophobia and other forms of intolerance, promote rights of persons with disabilities, promote equality between women and men and gender mainstreaming, prevent violence against children, young people, women and other groups at risk, promote the rights of the child, ensure the highest level of data protection, promote the rights deriving from Union citizenship and enforce consumer rights.

##### **Legislative instruments**

## International legal instruments defining EU legislation

### UN

- Convention on the Rights of the Child (1989)
- Convention against Transnational Organised Crimes (2000)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)

### CoE

- Convention on Action against Trafficking in Human Beings (2005)
- Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)
- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)
- Recommendation Rec (2006)8 on assistance to crime victims

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## EU framework

- **Charter of Fundamental Rights of the European Union**

Human dignity (Article 1), Right to life (Article 2), Right to the integrity of the person (Article 3), Right to liberty and security (Article 6), Respect for private and family life (Article 7), Protection of personal data (Article 8), Freedom of expression and information (Article 11), Right to property (Article 17), Equality before the law (Article 20), Non-discrimination (Article 21), Cultural, religious and linguistic diversity (Article 22), Equality between men and women (Article 23), The rights of the child (Article 24), The rights of the elderly (Article 25), Integration of persons with disabilities (Article 26), Freedom of movement and residence (Article 45), Diplomatic and consular protection (Article 46), Right to an effective remedy and to a fair trial (Article 47).

### **Minimum standards of victims' rights and protection**

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Transposition by 16 November 2015) (*see details in lecture of Mr Kuba Sękowski*)

Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (Transposition by 11 January 2015)

According to the Stockholm Programme mutual recognition should extend to all types of judgements and decisions of a judicial nature, being either criminal or administrative one. The Stockholm Programme also points out that victims of crime can be offered special protection measures which should be effective within the European Union.

In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved. It should also be ensured that the legitimate exercise by citizens of the European Union of their right to move and reside freely within the territory of Member States does not result in loss of their protection.

The Directive applies to protection measures which aim specifically to protect a person against a criminal act of another person, which may, in any way, endanger that person's life or physical, psychological and sexual integrity, dignity or personal liberty and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.

The recognition of the European protection order by the Executing State implies – inter alia – that the competent authority of that State, subject to the limitations set out in the Directive, accepts the existence and validity of the protection measure adopted in the Issuing State, acknowledges the factual situation described in the European protection order, and agrees that protection should be provided and should continue to be provided in accordance with its national law.

The Directive applies to protection measures adopted in favour of victims or possible victims of crimes (and a relative of the main protected person), in *criminal* matters, taking into appropriate consideration to the needs of victims, including particularly vulnerable persons (e.g. minors, person with disabilities). However, it should not apply to measures adopted with a view to witness protection.

Any request for the issuing of a European protection order should be treated with appropriate speed, taking into account the specific circumstances (e.g. urgency, the date of the arrival of the protected person, degree of risk).

The Directive contains an exhaustive list of prohibitions and restrictions which, when imposed in the Issuing State and included in the European protection order, should be recognised and enforced in the Executing State:

- a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits,
- b) a prohibition or regulation of contact, in any form, with the protected person (by phone, electronic or ordinary mail, fax etc.)
- c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

The Directive provides a high degree of flexibility in the cooperation mechanism between Issuing and Executing States.

When the competent authority in the Issuing State withdraws the European protection order, the competent authority in the Executing State should discontinue the measures which was adopted in order to enforce the European protection order. However, the competent authority in the Executing State may – autonomously and in accordance with its national law – adopt any protection measure under its national law in order to protect the person concerned.

As a kind of balance between victims' and defendants' rights, in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47(2) of the Charter of Fundamental Rights of the European Union, the person causing danger should be provided with the possibility of being heard and challenging the protection measure.

Denmark and Ireland are not taking part in the adoption of this Directive.

There has not been any practical experience in Visegrad countries yet.

{Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (It is applicable from 11 January 2015 to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted).

This Regulation establishes rules for a simple and rapid mechanism for the recognition of protection measures in *civil* matters ordered in Member States. The scope of the Regulation is within the field of judicial cooperation in *civil* matters within the meaning of Article 81 TFEU.

The Regulation should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk (e.g. in order to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion).

This Regulation complements Directive 2012/29/EU. The fact that a person is the object of a protection measure ordered in civil matters does not necessarily preclude that person from being defined as a 'victim' under that Directive.

This Regulation applies only to protection measures ordered *in civil matters*. Protection measures adopted in criminal matters are covered by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.}

### **Minimum rules concerning specific criminal offences**

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Transposition by 6 April 2013)

Preventing and combating trafficking in human beings is a priority for the European Union and the Member States being is a serious (often organised) crime, and explicitly prohibited by the Charter of Fundamental Rights of the European Union.

The Directive adopts an integrated, holistic and human rights approach and establishes minimum rules concerning the definition of criminal offences concerning trafficking in human beings and sanctions.

The Directive also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof, by:

non-prosecution or non-application of penalties to the victim,

investigations into or the prosecution of the offence are not dependent on a report or accusation being made by the victim or by his/her representative, and that criminal proceedings may continue even if that person has withdrawn his/her statement,

prosecution for a sufficient period of time after the victim has reached the age of majority,

rules of jurisdiction and coordination of prosecution,

without delay and free of charge access to legal counselling and legal representation,





individual risk assessment,  
preventing secondary victimisation by receive specific treatment (to avoid unnecessary repetition of interviews during investigation, prosecution or trial, use of appropriate communication technologies, avoid giving of evidence in open court, unnecessary questioning concerning the victim's private life),  
provisions on assistance, support and protection measures for child victims of trafficking in human beings,  
right to compensation to victims.

The United Kingdom and Denmark are not taking part in the adoption of this Directive.

Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Transposition by 18 December 2013)

Sexual abuse and sexual exploitation of children (including child pornography) constitute serious violation of fundamental rights (the rights of children to the protection and care necessary for their well-being) as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter of Fundamental Rights of the European Union.

The Directive complements the Directive 2011/36/EU.

It establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes.

The Directive also introduces provisions to strengthen the prevention and protection of the victims thereof, by:

non-prosecution or non-application of penalties to the victim,  
investigations into or the prosecution of the offence are not dependent on a report or accusation being made by the victim or by his/her representative, and that criminal proceedings may continue even if that person has withdrawn his/her statement,  
prosecution for a sufficient period of time after the victim has reached the age of majority,  
rules of jurisdiction and coordination of prosecution,  
special representative,  
without delay and free of charge access to legal counselling and legal representation,  
the accompanied child victim interviewed without unjustified delay and as limited as possible in premises designed or adapted for this purpose, carried out by or through the same professionals trained for this purpose,  
audio-visually recorded interviews, may be used as evidence in criminal court proceedings

hearing without the presence of the public, through the use of appropriate communication technologies

protection of the privacy, identity and image of child victims and prevention the public dissemination of any information that could lead their identification

Denmark is not taking part in the adoption of this Directive.

Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,

Council Framework Decision 2008/919/JHA of 28 November 2008 amending FD 2002/475/JHA on combating terrorism

Terrorism constitutes one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, human rights and fundamental freedoms. It also represents one of the most serious attacks on democracy and the rule of law. The terrorist threat has grown and rapidly evolved in recent years (see 9/11, London, Madrid, Paris, Copenhagen).

This Framework Decision and amending decision require Member States to align their legislation and introduce minimum penalties regarding terrorist offences and to establish jurisdictional rules to ensure that the terrorist offence may be effectively prosecuted. The decisions define terrorist offences, as well as offences related to terrorist groups or offences linked to terrorist activities.

Regarding victims' rights and protection: According to the Article 10 Member States shall ensure that investigations into, or prosecution of, offences covered by the Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

### **Rules relating to compensation to victims of crime**

#### **Council Directive 2004/80/EC of 29 April relating to compensation to crime victims**

Victims of crime should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Union the crime was committed. It is often difficult to obtain compensation for victims either because the offender does not have the necessary financial resources or because it has not been possible to identify or prosecute the offender. Most Member States are aware of this fact and have already introduced state-funded compensation schemes. However, these schemes differ greatly.

This Directive requires Member States to provide in their national legislation for a compensation scheme for victims of violent intentional crime committed in their territories and sets up a system facilitating access to compensation for victims of crimes in cross-border situations (possibility of making an application in the Member State of residence, designation of central contact points in Member States, etc.), irrespective of the victim's country of residence or the Member State in which the crime was committed.

The amount of compensation to be paid to individual victims is left to the discretion of the Member State in which the crime was committed, but it must be fair and appropriate.



The Commission has established standard forms for the transmission of applications and decisions relating to compensation to victims.

With a view to implementation, the Directive made provision for the drawing up and publishing of a manual for the assisting authorities on the internet. The Directive also provides for the setting up of a system of central contact points in each Member State to facilitate cooperation in cross-border situations. Additional information is available on the website of the European Judicial Atlas in Civil Matters.

There has not been any experience in Visegrad countries yet, at least practitioners (judges, prosecutors) dealing with criminal cases.

**Andrea Kenéz, judge at Metropolitan Court in Budapest (Fővárosi Törvényszék)**

## Rafał Kierzyńka: Rights of the victims in the Charter of Fundamental Rights of the European Union

The protection of fundamental rights has become one of the European distinctive features. However, if the Council of Europe has been for years recognized as a main of the world's key players in this field, for the European Union this role seems to be rather new. The questions regarding protection of fundamental rights were certainly arisen both in the Treaties and in the secondary law, however they were not very visible. The things have rapidly changed after adoption of the Lisbon Treaty and of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"). The latter very soon has been promoted as a major benchmark of human rights' protection, almost comparable to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "ECHR" or "the Rome Convention").

According to the Charter's preamble, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. It is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. To this end, EU found it necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in the Charter.

This document reaffirms the human rights as they result from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of EU and of the European Court of Human Rights.

The standards enshrined in the Charter have been generally adopted in favor of any individual, not only a victim of crime. Some of them however seem to be especially relevant from the point of view of the person affected by the criminal activity. They will be described under the 1<sup>st</sup> part of this essay.

The Charter encompasses also some provisions which have been tailored for the persons involved into criminal proceedings, with respect to their specific needs during it. Among these principles there are some, which are dedicated directly to the victims of crime. They will be covered by the 2<sup>nd</sup> part of the article.

### 1. General rights

#### 1.1. Dignity

Article 1 relates to the protection of human dignity. It is enshrined that human dignity is inviolable and it must be respected and protected.

This right "number one", technically fallen outside any precise definition, is not only a right in itself but constitutes the real basis of other, derivative fundamental rights. The 1948 Universal Declaration of Human Rights describes human dignity in its preamble:

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Since the times of European Renaissance, thru all the ages, human dignity has been regarded as a morally related issue. Notwithstanding, in our times it is more and more concerned as covered also other aspects of human life, including man's biology. The Council of Europe invoked dignity in its Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the

Application of Biology and Medicine of 1997. Some of the preamble's recitals contains following statements:

“Convinced of the need to respect the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being;

Conscious that the misuse of biology and medicine may lead to acts endangering human dignity;

Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine.”.

In the same context human dignity is invoked as a safeguard but also a subject of the legal protection in the latest Council of Europe instrument, to wit Convention against Trafficking in Human Organs of 2015. One of its preamble's recital reads as follows:

“Considering that the trafficking in human organs violates human dignity and the right to life...”.

This broad understanding of human dignity has been also adopted in EU. In case C-377/98 Netherlands v European Parliament and Council, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law, and endorsed its comprehending as the factor relating to all aspects of human life, including such apparently remote fields like the need to ensure that the human body effectively remains unavailable and inalienable for commercial and industrial purposes. Actually, this new perspective can be relevant for the victims of crime, despite that the notion in question has been usually understood as a source of protection against humiliation, threat or physical and psychological violence. Of course this second, more traditional understanding has not been terminated, thus the term “dignity” must be deliberated in comprehensive and holistic way.

In the context of the Charter it results that none of the rights laid down in it may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right itself is restricted.

## 1.2. Security

Article 6 provides for the right to liberty and security, including also a personal security, which can be especially important with respect to the victims. Accordingly with this Article, everyone has the right to liberty and security of person.

The rights in Article 6 are the same as guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5. The latter concerns mainly the rights of persons under detention or arrested. However the notion “security” has definitely broader meaning and doubtlessly may regards also other persons, inter alia victims of crime. It seems that this right in such sense has been also reflected in the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L UE 315 of 2012, p. 5, hereinafter referred to as the Directive 2012/29/EU). In its preamble, recital 52 says that the measures should be available to protect the safety and dignity of victims and their family members from secondary and repeat victimization, from intimidation and from retaliation, such as interim injunctions or protection or restraining orders. This concept, developed in Article 18, shall be regarded directly with the commented provision of the Charter. The obligation for the Member States to protect victims and their family members from secondary and

repeat victimization, from intimidation and retaliation, concerns the risk of emotional or psychological harm as well as the physical protection.

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union (hereinafter referred to as “TFUE”), notably to define common minimum provisions as regards the categorization of offences and punishments and certain aspects of procedural law.

### 1.3. Property

According to Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

This Article is based on Article 1 of the Protocol to the ECHR:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

According to the official Explanations to the Charter (OJ C 303 of 2007, p. 17, hereinafter referred to as “the Explanations”), this is a fundamental right common to all national constitutions. The wording has been updated but, in accordance with Article 52(3) of the Charter, the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

This specific right has been recognized on numerous occasions by the case-law of the Court of Justice, initially in the Hauer judgment of 13 December 1979. It should be however mentioned, that in the Luxembourg Court’s jurisprudence it has consistently been held that in Union law this fundamental rights do not have absolute protection, but must be viewed in relation to their function in society. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Union and do not constitute a disproportionate and intolerable interference, impairing the very substance of the right guaranteed. Thus, for case-by-case assessment of the commented right and its alleged breach, the key factor is the principle of proportionality, as one of the general principles of EU law which requires that measures implemented through provisions of EU law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (see cases C-84/95 Bosphorus, T-202/12 Bouchra Al Assad and joined cases C-539/10 and C-550/10 Al-Aqsa v Council and Netherlands v Al-Aqsa,).

From the point of view of victim protection this right could be analyzed in the context of the specific instrument of the EU cooperation in criminal matters, namely the Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ UE L 76 of 2005, p. 16). This instrument applies to financial penalties imposed by judicial or administrative authorities

for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties are imposed. According to its Article 1(b)(ii) for the purposes of this Framework Decision “financial penalty” shall mean also the obligation to pay compensation imposed for the benefit of victims. However its Article 13 states that the monies obtained from the enforcement of decisions shall accrue to the executing State. It means that, when such financial penalty is transferred to other Member State in purpose of its execution, all the money obtained in this way go directly to the budget of the executing state, not to the victim who has a clear legal title to it. Actually it seems just deprivation of the possession in the meaning of Article 17 of the Charter, as there is apparently no interest pursued by the Union behind such construct. Oppositely, introducing and upholding this provision surely does constitute a disproportionate and intolerable interference, hampering the very substance of the fundamental right in question. And last but not least, this solution is apparently contrary to the concept lied behind Article 16 of the Directive 2012/29/EU, providing the right to decision on compensation from the offender in the course of criminal proceedings and obliging Member States to deliver such a decision in purpose of effective compensation.

#### 1.4. Equality before the law

Article 20 provides that everyone is equal before the law. This Article corresponds to a general principle of law which is included in all European constitutions. Within EU law this principle is obviously elder than the Charter itself. It was recognized by the unitary and coherent jurisprudence of the Court of Justice (see cases 283/83 Racke, 203/86 Spain v Council, C-15/95 EARL, C-292/97 Karlsson, C-351/92 Graff v Hauptzollamt Köln-Rheinau, C-2/92 The Queen v Ministry of Agriculture, Fisheries and Food ex parte Bostock). In these indicative judgments it has been cleared that any provisions of the European law, the aim of which is to prohibit discrimination in the field of the common EU policy, is merely a specific expression of the general principle of equal treatment, a fundamental principle of Community law, which requires that comparable situations are not to be treated differently and different situations are not to be treated alike unless such treatment is objectively justified. The Court has also consistently held that, since Member States are bound by the fundamental principles of Community law when they implement Community legislation, that rule applies to national provisions, which determine, pursuant to the Community legislation, various fields of life.

#### 1.5. Non-discrimination

Article 21 sets forth the prohibition of any discrimination. The prohibition is of absolute nature if concerns discrimination based on ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (paragraph 1). This paragraph should be read together with Article 19 TFUE which confers power on the Union to adopt legislative acts, including harmonization of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) of the Charter does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

On the other hand, due to the specificity of nationality as a differentiation factor, the prohibition on this ground is relative, in the sense that it shall be executed within the scope of application of the Treaties and without prejudice to any of their specific provisions (paragraph 2). This provision strictly corresponds to the first paragraph of Article 18 TFUE and must be applied in compliance with that Article.

The principle of non-discrimination on grounds of nationality, applicable as it is within the scope of the EC Treaty, is regarded in the doctrine of EU law as clearly developing into a core component of European Union citizenship. The moving European citizen is protected from all nationality-based discrimination, whatever the motive for moving. This concept of EU citizenship, and its underlying rationale, will no doubt pull at the Charter, and there will be pressure to confer all the Charter rights on the moving European citizen (Eeckhout P., p.945).

This intuition, given more than 10 years before, has been fully confirmed by the development of EU law within the area of protection of the victims. The Directive 2012/29/EU provides for that Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality (recital 10 of the preamble). This idea has been developed in Article 17, which obliges Member States to ensure that their competent authorities can take appropriate measures to minimize the difficulties faced where the victim is a resident of a Member State other than that where the criminal offence was committed, particularly with regard to the organization of the proceedings. This specific rule should be comprehended as a direct result of aforementioned non-discrimination principle.

### 1.6. Protection of children

Article 24 (2) of the Charter stipulates that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. The Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States. By the way it must be considered that a child means any person below the age of 18 years (Article 2(a) of Directive 2012/29/EU). Obviously, the system regards also the protection of the child's interests within criminal proceedings, both when the child is a perpetrator and a victim.

If concern the latter, the attention must be paid to Regulation (EU) no. 1382/2013 of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020. In accordance with recital 12 of its preamble, pursuant to Article 3(3) of the TEU, Article 24 of the Charter and the 1989 United Nations Convention on the Rights of the Child, the Programme should support the protection of the rights of the child, including the right to due process, the right to understand the proceedings, the right to respect for private and family life and the right to integrity and dignity. The Programme should aim, in particular, to increase child protection within justice systems and access to justice for children, and should mainstream the promotion of the rights of the child in the implementation of all of its actions. This principle can be regarded in respect of the child being the party to the proceedings generally as well as he or she being the victim.

Article 5 of this Regulation says that the Programme shall seek to promote inter alia the rights of the child, also by means of child-friendly justice, which must mean also promoting child victim friendly justice as well.

The aforementioned principle has been expressly reflected in the Directive 2012/29/EU. Its Article 1(2) reads as follows:



“Member States shall ensure that in the application of this Directive, where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child.”

Doubtlessly the child victim should be in principle always deemed a vulnerable one in the meaning of this Directive. Therefore he or she could enjoy specific protection measures as provided in Article 23. There are, inter alia, special regime of interviews, carried out in the premises adapted for that purpose, conducted by duly trained professionals and – unless this is contrary to the good administration of justice – by the same persons. If concern court proceeding, the special measures consist of avoiding visual contact between victims and offenders, being heard in the courtroom without being present and without the presence of the public or avoiding unnecessary questioning concerning the victim's private life. It must be pointed that the Directive does not oblige the Member States to use all these measures in any case of victim's vulnerability, but to provide their availability in need. However, regarding the child victim, this is to believe that in the specific case the judicial authority should at least thoroughly consider using the measures in question if not use them, fully or partly, automatically. In practical terms, especially if the child victim is heard as a witness, non-use of these special measures could be regarded a basis for challenging a final decision, as delivered in consequence of breaching the procedural rules.

Last but not least, the aforementioned principle shall be considered the benchmark of utmost importance in respect of the offences specifically addressed against a child, namely pedophilia, sexual abuse or other crimes against child's physical or mental integrity. One of the most important legal means in this field is the Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ. L. UE 335 of 2011, p. 1). Its 1<sup>st</sup> recital reads as follows:

“Sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights, in particular of the rights of children to the protection and care necessary for their well-being, as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter of Fundamental Rights of the European Union”.

Then again, in recital 6:

“Serious criminal offences such as the sexual exploitation of children and child pornography require a comprehensive approach covering the prosecution of offenders, the protection of child victims, and prevention of the phenomenon. The child's best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. Framework Decision 2004/68/JHA should be replaced by a new instrument providing such comprehensive legal framework to achieve that purpose.”

These provisions reflect the principle enshrined in the Charter, having although regard to the legal background as worked out thru the years of activity of different public bodies in this respect. Furthermore, the Directive 2011/92/EU sets down the subject of the fundamental right in question, saying that the measures to protect child victims should be adopted in their best interest, taking into account an assessment of their needs. Child victims should have easy access to legal remedies and measures to address conflicts of interest where sexual abuse or sexual exploitation of a child occurs within the family. When a special representative should be appointed for a child during a criminal investigation or

proceeding, this role may be also carried out by a legal person, an institution or an authority. Moreover, child victims should be protected from penalties, for example under national legislation on prostitution, if they bring their case to the attention of competent authorities. Furthermore, participation in criminal proceedings by child victims should not cause additional trauma to the extent possible, as a result of interviews or visual contact with offenders. A good understanding of children and how they behave when faced with traumatic experiences will help to ensure a high quality of evidence-taking and also reduce the stress placed on children when carrying out the necessary measures.

## 2. The rights specific for justice

The fundamental rights relevant within administration of justice are provided for in Title IV of the Charter. They are mostly adopted as the safeguards for suspects and accused persons, however one is also relevant in respect of the position of victim. This is to wit Article 47, providing 4 different measures of utmost importance for victims of crime acting as the parties to the criminal proceedings.

### 2.1. Effective remedy

Article 47(1) stipulates the right to an effective remedy, saying that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. This rule, both if concern its matter and its wording, is based on Article 13 of the ECHR, which reads as follows:

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

However, in the Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.

As many of the fundamental rights provided for in the Charter, the right to an effective remedy has been primarily recognized by the Court of Justice. In case 222/84 Johnston, concerning the discrimination issues, the Court said that the requirement of judicial control stipulated by secondary EU law reflects a general principle of law which underlies the constitutional traditions common to the Member States. In this light all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principles laid down in the Union law. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of EU law and of national legislation intended to give effect to the rights for which the Union law provides. In case 222/86 Heylens, the Court decided that with respect to fundamental rights conferred in the Treaties, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right (see also case C-97/91 Borelli). According to the Court, that general principle of the Union law also applies to the Member States when they are implementing the Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. Article 47 (1) applies to the institutions of the Union and of Member States when they are implementing the Union law and does so for all rights guaranteed by it.

It might be needed to mention that providing the right to effective remedy on EU level does not itself determine the need of its adopting and specifying on the same level. Oppositely, it is left to the domestic

systems according to the principle of the procedural autonomy of the Member States. This principle results from the absence of a comprehensive set of EU procedural rules governing the enforcement of rights derived from EU law at Member State level on the one hand and the correlative duty of each Member State to provide, in accordance with the principle of sincere cooperation, an adequate procedural framework for their enforcement on the other. This duty is quite obviously closely connected with the full effectiveness of EU law and can also be seen as a manifestation of the general principle of effective judicial protection (Beysen E., Trstenjak V., p. 95).

See also cases C-415/11 Aziz, C-539/14 Morcillo and Garcia, T-593/11 Al-Chihabi, C-562/13 Abdid, in which the Court decoded the feature of “effectivity” of the legal remedy.

## 2.2. Fair trial and legal assistance

Article 47 (2) provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

The second paragraph obviously corresponds to Article 6(1) of the ECHR which reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Accordingly with the Explanations to the Charter, in the Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

It is settled case-law of the Court that the right to be heard constitutes relevant element of the rights of the defense, set forth among the fundamental rights forming an integral part of the European Union legal order. However, the Court has held that fundamental rights, such as observance of the rights of the defense, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see case C-383/13 M.G, N.R., C-28/05 Dokter and Others, joined cases C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi).

In joined cases C-129/13 and C-130/13 Kamino and Datemathe Court recalled the objective pursued by the principle of the right to be heard. According to the Court, the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before the decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favor of the adoption or non-adoption of the decision, or in favor of its having a specific content. The right to be heard guarantees every person the opportunity to make known his views effectively during a procedure and before the adoption of any decision liable to affect his interests adversely. That right is required even where the applicable legislation does not expressly provide

for such a procedural requirement. Accordingly, in cases C-349/07 Sopropé and C-277/11 M.M., the Court added that respect for the rights of the defense implies that, in order that the person entitled to those rights can be regarded as having been placed in a position in which he may effectively make known his views, the authorities must take note, with all requisite attention, of the observations made by the person or undertaking concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (see also cases C-287/02 Spain v Commission, C-141/08 P Foshan ShundeYongjian Housewares & Hardware v Council, C-27/09 P France v People's Mojahedin Organization of Iran, C-269/90 Technische Universität München).

This fundamental right strictly corresponds with Article 10 (1) of Directive 2012/29/UE, which reads as follow:

“Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity”.

According to the second sentence of Article 47 (2), everyone shall have the possibility of being advised, defended and represented. Although this right is primarily addressed to the suspect or accused person, it can show relevance also with respect to victim of crime, especially when he or she acts as a party to the criminal proceedings. This fundamental right itself has not been yet duly recognized and interpreted either by the Court of Justice or by the doctrine. Technically it is considered one of the rights of defense and an element of the right to fair trial.

### 2.3. Legal aid

According to Article 47 (3), legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. With regard to the third paragraph, it should be noted that in accordance with the case-law of the ECHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice. However, for practitioners the most interesting issue is implementation of this fundamental right in domestic cases.

It should be useful to mention that, as far as victims are concerned, this right has been specified in the Directive 2012/29/EU. Its Article 13 provides that Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.

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## Slávka Karkošková: What makes child sexual abuse victims especially vulnerable?

### 1. Vulnerability factors are based on the Directive 2012/29/EU and specific features of CSA cases

Child sexual abuse (hereinafter referred to as “CSA”) is an especially serious socio-pathological phenomenon. From the legal perspective, CSA is a crime, and from the point of view of intensity of mental harm, it is a specific trauma, in which the process of the victims’ psycho-social recovery is especially demanding. The manner, in which both layman and professionals handle CSA cases, oftentimes amounts to *secondary victimization*.

Due to the above facts, the Directive 2012/29/EU provides CSA victims with the **status of especially vulnerable victims**<sup>120</sup>, based on which they are entitled to a special level of protection and support in all stages of the criminal proceeding and also once it is over. In the CSA context, factors of especial vulnerability of victims include mainly: young age of the victims, the perpetrator’s supremacy, relationship to the perpetrator or dependence on the perpetrator, communication difficulties, and the fact in itself that it is a sexual crime.

CSA has a number of specific features that require a specific response by the criminal justice system – such that reflects and does not ignore these features.<sup>121</sup> Main features of CSA cases are the following:

- a) The victim is usually **the only witness** and what’s more, the victim is usually **exposed to massive manipulation** (and silencing) on the hand of the perpetrator and also by the surrounding environment.
- b) Young **age** of the victim that can be misused to undermine the credibility of the victim’s testimony despite the fact that the child is more vulnerable to sexual victimization exactly due to his/her young age and is entitled to a special level of protection.
- c) **Lack of forensic evidence** – even in cases of penetration there may be no medical evidence available (due to tissue flexibility and fast healing).
- d) **Counterintuitive reactions** (of both primary and secondary) **victims** – i.e. reactions that do not correspond with the expectations of the average person concerning how a victim should correctly or logically react. Reactions of CSA victims are highly justified in relation to the context of the situation and trauma mechanisms, but the average person (both laymen and professionals) lacks the knowledge about the specificities of CSA trauma, and therefore is biased in assessing the victims’ behavior.
- e) **Multiple assaults**, i.e. the fact that CSA may last days, weeks, months, years. Due to the number of assaults it may be difficult for the child to remember accurately the details of every individual assault.
- f) **Emphasis on the child’s credibility** – a combination of counterintuitive reactions, missing witnesses and/or forensic evidence lead to challenges of the victim’s credibility, which is the core of the defense of the accused.<sup>122</sup>

<sup>120</sup> Compare: Directive of the European Parliament and Council 2012/29/EÚ, par. 38, 55 - 57, art.. 22.

<sup>121</sup> Compare: COSSINS, A. Prosecuting Child Sexual Assault Cases, art. 10.

<sup>122</sup> Compare: COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006; Compare also with: The Crown Prosecution Service: Guidelines on Prosecuting Cases of Child Sexual Abuse, 2013.

## 2. Misunderstood counterintuitive reactions as a factor of especial vulnerability of CSA victims before law enforcement authorities (not only) in criminal proceeding

A frequent determinant of the failure in the process of clarification, investigation and prosecution of CSA cases is the focus on the investigation of the credibility of the victim without a due consideration of the so-called counterintuitive reactions. Therefore we will try to explain the most frequent forms of counterintuitive reactions that include mainly the following: 1) “passiveness” of the victim, 2) a delay in the disclosure, 3) inconsistent testimony, 4) recantation of the testimony, 5) positive attitude to the perpetrator, 6) absence of trauma symptoms and 7) inconsistent reactions on the hand of the protective parent.

### 2.1 The victim is “passive”

The average person would expect that a “normal” reaction when someone is assaulted by an aggressor is a visible and loud defense – a fight or flee reaction, shouting, protest. If the victim does not show such signs of resistance, the average person might believe that it was not a sexual assault.<sup>123</sup> In this context it is worthwhile mentioning that the typical list of circumstances that must be clarified and proven in the criminal proceeding involving sexual abuse includes **whether the victim defended him/herself**, what was the extent and intensity of the defense, whether there are traces left behind as a result of the defense on the clothes and on the body of the perpetrator.<sup>124</sup>

Such expectations and/or so strictly defined tasks for the investigators may lead to biased conclusions because they don't consider all the options of an organism's instinctive defense. A traumatic stimulus basically leads to **two types of automatic defense reactions** of the organism: 1. **hyperarousal** – overall excitement enabling the organism to actively fight or flee and 2. **hypoarousal** – an overall paralysis, “freezing” of the organism, in which it is impossible to show any kind of an active external reaction. It is important to know that instinctive defense of the organism is not **controlled by the person's will** and does not tell anything about the character and value orientation of a person. This fact is of vital importance to understand the victim's reactions in CSA context.

Based on research, factors automatically inducing a freezing reaction include e.g. fear, perceived helplessness, and mainly the concept of **betrayal** – a child who is abused trusts the perpetrator.<sup>125</sup> CSA is a specific form of violence, in which an assault may not be aggravated by the use of physical force. The assault has rather unclear contours, since the perpetrator may treat the victim nicely, gently, and kindly<sup>126</sup> and use various forms of manipulation in order to make the victim cooperate. This fact is emphasized also in CSA definitions in important international documents: Criminal acts shall be considered such intentional actions that involve “sexual activities with a child if pressure, force or threats are used” or if the acknowledged **trust, authority or influence** on the child and his/her family is misused; or if an especially

<sup>123</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse, Annex C.

<sup>124</sup> Compare: CHMELÍK, J. et al. Morality, pornography and moral crimes, p. 116 - 117.

<sup>125</sup> Compare: FREYD, J., BIRRELL, P. Blind to betrayal, p. 26, 57. The authors of the publication note that traditionally, mental trauma was understood as a result of terrorizing, life threatening events that induce extreme fear. But it was found that events including a low degree of terror and fear, but a **high degree of social betrayal** (which is the case in CSA) may be far more devastating for the psyche than other traumas that don't include the element of betrayal. Betrayal trauma is a specific category of trauma that in a completely special way **complicates to the victims the process of evil identification, disclosure (confrontation) and psycho-social recovery.**

<sup>126</sup> Only 2-5% of CSA perpetrators fall in the category of so-called sadistic individuals, those who intentionally inflict to the child pain and experiences of terror. Victims of sadistic perpetrators are more capable of identifying the perpetrator's action as evil because it has clear contours. (Compare: SALTER, A. C. Transforming Trauma, 1995.)

vulnerable situation of the child is misused, especially due to mental or physical handicap or due to the child's dependence."<sup>127</sup> "Many children experience sexual victimization that is not accompanied by physical force (...), despite it has a disturbing impact on their psyche, it is predatory and traumatizing"<sup>128</sup>.

If law enforcement authorities don't have an insight in the dynamics of CSA, they can overlook manipulation techniques used by the perpetrator and the victim's commonplace reactions to abuse can be incorrectly interpreted as evidence of the victim's insufficient credibility. Therefore, the list of strategies that should be applied in a criminal proceeding against CSA perpetrators who are the victim's family members includes in the first place **identification of the perpetrator's manipulation techniques**.<sup>129</sup>

The perpetrator's primary weapons in committing CSA are trust and love that the victim and the other family members feel for the perpetrator. Individuals who commit CSA in the household are often perceived as less dangerous. Yet they are the more experienced ones, they trespass more limits, they are more protected from disclosure, they betray more and create more family conflicts, they are more mentally and emotionally involved in the abuse. It is very important to realize that the perpetrator manipulates the victim as much as the victim's family members. Besides love and trust, the perpetrator uses also other untraditional weapons. A powerful weapon is e.g. a pleasant demeanor. When people are nice, it is difficult to confront them, set the limits or mistrust them. The perpetrator counts on the fact that the society believes that kindness cannot coexist with violence, evil or a deviation. The perpetrators use love and trust that are inherent to a relationship to break all the limits and to turn their roles of caregivers into an opportunity for abuse. By using various manipulation techniques they progressively standardize their sexual behavior and intentions, desensitize the child to the trespassing of sexual limits and strengthen the victims' loyalty to them.<sup>130</sup>

A *victim's passive reaction* is usually interpreted (not only) by the perpetrators as a sign of the victim's consent and at the same time as evidence that the suspected behavior was nothing serious or harmful. But the difference in power (consisting mainly in rich manipulation possibilities) and knowledge between the perpetrator and the victim are so great that even if the child "cooperated" and even if the child gave some kind of "consent" to the sexual activity, in no way was it a free or informed consent, and thus it was not a valid consent. Consent means nothing and is out of the question if *no* is not one of the options to choose from.<sup>131</sup>

It must be remembered that a lack of external signs of defense does not mean that the defense did not take place inside the organism. As will be explained below, in the state of *hypoarousal* (as well as inside the existence trap victims find themselves in), highly complex mental defense mechanisms are activated (*dissociation* among others) that make sense of the victim's behavior that is seemingly illogical.

<sup>127</sup> Convention of the Council of Europe on Child Protection from Sexual Exploitation and Abuse, 2007, art. 18, par. 1).

<sup>128</sup> United Nation's Convention on the Rights of the Child: General Commentary No. 13, art. 25.

<sup>129</sup> Compare: LONG, J. et al. 10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member, 2011; Compare also: COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006; The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse, 2013, Annex C.

<sup>130</sup> Compare: LONG, J. et al. 10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member, 2011; The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse, 2013, Annex C; COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006.

<sup>131</sup> Compare: KARKOŠKOVÁ, S. CSA victims among us, p. 17.



## 2.2 Delay in disclosure

The average person expects that a “normal” reaction after being assaulted by an aggressor is an immediate search for help. Yet CSA research findings do not correspond with these expectations.

In the EU 20% of children are victims of some form of CSA, whereas approximately 70 to 85% of CSA cases are committed by someone whom the child knows and trusts.<sup>132</sup> Despite the large prevalence of CSA, it is crime with an especially high degree of latency. Law enforcement authorities are never notified about most CSA cases.<sup>133</sup> Only 4 - 10% of CSA cases are reported to an authority and/or law enforcement authorities.<sup>134</sup> Spontaneous and relatively fast disclosure (i.e. made at the time of the abuse or shortly thereafter) occurs seldom.<sup>135</sup> Less than 1 out of 4 victims disclose CSA immediately<sup>136</sup>, **a large number of victims disclose their CSA experience only after some time** (if ever). Researchers found that the typical time span between abuse and disclosure is from 8 to 15 years.<sup>137 138</sup> Therefore, a short time span between CSA and its disclosure to authorities is not a reliable credibility indicator.<sup>139</sup> Or else a delayed disclosure is not necessarily an indicator of a false accusation.<sup>140</sup>

In the context of the above facts it is not surprising that the list of strategies to be applied in criminal proceedings against CSA perpetrators includes the recognition, understanding and explanation of the reasons why the victim disclosed the experience with a delay or refuses to testify (if the CSA case was disclosed by a third party). A CSA victim may have **numerous valid reasons to keep silent**.<sup>141</sup>

Some of the reasons to keep silent relate to the **risks** of disclosure – victims may fear that if they speak up, the threat of violence may materialize, they will get in trouble or the disclosure might hurt the perpetrator or the entire family. Another factor that plays a prominent role in silencing CSA victims is the **distortion of reality**<sup>142</sup> through manipulation on the hand of the perpetrator and also by an inadequate attitude of the surrounding environment (that is unable to correctly diagnose the situation because it is

<sup>132</sup> Compare: Council of Europe. One in Five: Council of Europe campaign to stop sexual..., 2012; CHEUNG, M. Child Sexual Abuse : best Practices for Interviewing and Treatment, 2012.

<sup>133</sup> Compare: LEVENTHAL, J. M. Epidemiology of sexual abuse of children, 1998; HANSON, R. F. et al. Factors Related To The Reporting Of Childhood Rape, 1999; MAY-CHAHAL, C. a HERCZOG, M. Child sexual abuse in Europe, 2003.

<sup>134</sup> Compare: KELLOGG, N. The evaluation of sexual abuse in children, 2005; CHEIT, R.E. a FREYD, J. J. Let's have an honest fight against child sex abuse, 2005; LONDON, K. et al. Disclosure of Child Sexual Abuse, 2007; BOTTOMS, B. L. et al. A Retrospective Study of Factors Affecting the Disclosure of Childhood Sexual and Physical Abuse, 2007; LYON, T.D. a AHERN, E.C. Disclosure of child sexual abuse, 2011.

<sup>135</sup> Compare: HERMAN, J. Father-daughter incest, 1981; SAUZIER, M. Disclosure of child sexual abuse, 1989; LAWSON, L., CHAFFIN, M. False negatives in sexual abuse disclosure interviews, 1992; BRADLEY, A. R. a WOOD, J. M. How do children tell? The disclosure process in child sexual abuse, 1996; SMITH, D. et al. Delay in disclosure of childhood rape, 2000.

<sup>136</sup> Compare: HÉBERT, M. et al. Prevalence of childhood sexual abuse and timing of disclosure., 2009.

<sup>137</sup> Compare: SOMER, E., SZWARCBERG, S. Variables in delayed disclosure of childhood sexual abuse, 2001.

<sup>138</sup> However, a significant portion of the victims keep silent about CSA also in adulthood: several retrospective researches have shown that approximately 30% of respondents had never disclosed to anyone their traumatic experience prior to the research interview (Compare: FINKELHOR, D. et al. Sexual abuse in a national survey of adult men and women, 1990; SPRINGS, F. E. a FRIEDRICH, W. N. Health risk behaviors and medical sequelae of childhood sexual abuse, 1992; SMITH, D. et al. Delay in disclosure of childhood rape, 2000.

<sup>139</sup> The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse, 2013.

<sup>140</sup> Compare: COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006.

<sup>141</sup> Compare: LONG, J. et al. 10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member, 2011; COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006.

<sup>142</sup> I.e. distortion of reality, reality defined through the optic, needs and wishes of the perpetrator.

subject to manipulation as well).<sup>143</sup> An important factor contributing to the silencing of CSA victims are **unsupportive reactions of the nonoffending parent (parents)**. Researchers found that in cases where the perpetrator is a person known to the child, there is an 89% probability that, upon disclosure, the victims will face unsupportive parental reactions; whereas children abused by strangers will face inadequate parental reactions only in 25% of cases.<sup>144</sup> In some families the CSA reality is a family secret, a **taboo topic**, which should not be discussed. As if CSA took place in another dimension that is separated from the reality felt by the uninvolved family members. While the trauma takes place in some kind of a “*world of trauma*”, the family has also another “*shared world*”. These two realities are positioned in parallel, but they are divided by clear borderlines that prevent them from merging.<sup>145</sup> Family members make efforts to keep at any cost the status and/or the ideal of a good and decent family, therefore they act as if they didn't see anything, they deny the existence of the problem, its severity and their responsibility. “Taboo areas and afflicted persons are surrounded by a wall of silence. In this way, the taboo topics are supposed to remain out of reach of perception: we are not supposed to see them or hear them or feel them. It is “inappropriate” to talk about them – and only those who obey this moral appeal may stay within the community. Those who disobey the order to keep silent will become untouchable as a result of their own actions, i.e. they will be a taboo – they will become something inhuman: nobody will pay attention to them, listen to them and most importantly, nobody will sympathize with and the others will view them as someone they are not (...). And the less of an opportunity to correct such assessment such a person deprived of (...) the feeling of their own value as a perceiving human being (the less they get to talk, the less they are being heard, the less of a chance they have to be recognized), the more the person gets “mutilated” as a result of unilateral pressure (...)”<sup>146</sup>.

An important role in silencing the victims is played by **ambivalent feelings**. Feelings experienced by CSA victim may not be purely *negative* – it is much more probable that they will be *ambivalent*.<sup>147</sup> Especially if the perpetrator is a close person for the child, most child victims are torn between ambivalent feelings. This is one of the primary differences in CSA dynamics if the perpetrator is a parent or a person (known to the child) who is trusted by the child – compared with CSA dynamics when the perpetrator is a person who is a stranger to the child.<sup>148</sup> CSA victims are unable to take a decisive action to seek help if they have ambivalent feelings for the perpetrator.<sup>149</sup> On the one hand the perpetrator may (within the manipulation tactics) treat the victim nicely, gently and kindly and provide the victim with some privileges, meanwhile the offered “love” is contaminated with betrayal. On the other hand, the victim may be actually dependent on the perpetrator, which makes an open confrontation too risky (and thus unacceptable). If the perpetrator provides the victim with room and board, clothes and other basic needs, then **keeping the relationship bond is a priority need** and the victim's psyche is forced to activate defense mechanisms that

<sup>143</sup> Since manipulation is a common feature of CSA, it is difficult for the victim to understand what's going on. Perpetrators can manipulate not just the child, but also the surrounding environment, as a result of which the parent or another caregiver of the child trusts the perpetrator. (Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse. London, 2013, art. 12) .

<sup>144</sup> Compare: LAMB, M.E. et al. Tell Me What Happened: Structured Investigative Interviews..., 2008, p. 201.

<sup>145</sup> Compare: IDISIS, Y., OZ, S. Disclosing the Secret: Working with Families..., 2011, p. 402 - 403.

<sup>146</sup> PERNEROVÁ, R. A. Taboo in family communication, p. 122.

<sup>147</sup> Ambivalence means duality, internal split. In psychological language it designates a special state of the mind when a person has completely contradictory feelings at the same time in relation to the same person, e.g. feelings of love and hatred at the same time.

<sup>148</sup> Compare: RYAN, B. et al. Treatment of Intrafamilial Crime Victims, 2001.

<sup>149</sup> Compare: CHEUNG, M. Child Sexual Abuse: best Practices for Interviewing and Treatment, 2012; RYAN, B. et al. Treatment of Intrafamilial Crime Victims, 2001.

will enable the victim to function in an environment oversaturated with betrayal. In these cases, **dissociation** appears to be the basic mental defense mechanism, which enables information that is too threatening to be pushed out from one's consciousness.<sup>150 151 152</sup>

**Feelings of guilt and shame** are other important factors contributing to silencing CSA victims.<sup>153</sup> Manipulation techniques used by the perpetrator, experience of sexual excitement (which is a natural physiological reaction to the stimulation of erotogenous body parts), as well as a paralyzing instinctive reaction may cause the victim to feel guilty of not having "defended" oneself. If the victim makes self accusations, it is natural that the victim is ashamed of disclosure.

(Non)disclosure is strongly connected with the fact whether the victim perceives his/her experiences as abuse; in victims that see themselves as victims, the probability that they will disclose CSA doubles. It is alarming that **as many as 40% of all victims fail to see themselves as victims**, and that applies also to cases where their experiences are considered abusive by CSA researchers and experts and they fit the legal definition of abuse. This implies that the perpetrators are quite successful at confusing their victims.<sup>154</sup> The victim may not have sufficient information to be able to recognize that what is happening is of abusive nature. What's more, the perpetrator within the manipulation process diligently reassures the victim about the fact that this behavior is normal and harmless. Victim may have difficulties to perceive their experiences as abuse also due to the fact that the perpetrator (contrary to stereotypical believes) does subject the victim to physical violence, but uses rather subtle, manipulative strategies. Despite the victim may experience distress in the context of the abuse, the victim will realize only after some time that it was abuse, usually during adolescence.<sup>155</sup> In many cases victims need support to recognize the abusive nature of the relationship.<sup>156</sup>

Despite research has identified CSA dynamics and contributed to identifying the causes of delayed disclosure, professional and lay public alike continues to nurture bias that needs to be removed by explaining the relevant correlations. Understanding the factors contributing to silencing the victims is of critical importance to understanding CSA dynamics and creating an adequate case theory. Clarification of the phenomenon of delayed disclosure may be used to support the victim's credibility – after all, the victim has nothing to gain by opening up about CSA, to the contrary – at least in the victim's perception – the

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<sup>150</sup> Compare: FREYD, J. a BIRRELL, P. Blind to betrayal, p. 53 - 54.

<sup>151</sup> In approximately 20% of CSA victims there is even so-called **dissociative amnesia** – a phenomenon of suppressed/forgotten and later renewed memories (Compare: LOFTUS, E. F. et al. Memories of childhood sexual abuse, 1994; ELLIOTT, D. M., BRIERE, J. Posttraumatic stress associated with delayed recall of sexual abuse, 1995; MELCHERT, T.P., PARKER, R. L. Different Forms Of Childhood Abuse And Memory, 1997).

<sup>152</sup> In this context it is undoubtedly topical to state that in the crime of CSA in the criminal proceeding must be clarified and proven (on top of other circumstance) also the form of the victim's dependency of the perpetrator (CHMELÍK, J. et al. Morality, pornography and morality crime, p. 116 - 117). At the same time, to "clarify incest, it is necessary to conduct an **analysis of family relations**, relationship of the victim to the perpetrator and to the other parent and/or other persons. Analysis of these relationships provides a basis for a psychological interpretation of the victim's behavior and reactions" (CHMELÍK, J. et al. Morality, pornography and morality crime, p. 132).

<sup>153</sup> Compare: GOODMAN-BROWN T.B. et al. Why children tell: a model of children's disclosure of sexual abuse, 2003; FREYD, J., BIRRELL, P. Blind to betrayal, 2013.

<sup>154</sup> Compare: BOTTOMS, B. L. et al. A Retrospective Study of Factors Affecting the Disclosure..., 2007.

<sup>155</sup> Compare: CRISMA, M. et al. Adolescents who experienced sexual abuse, 2004.

<sup>156</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases of Child Sexual Abuse, 2013, art. 70.

victim has a lot to lose.<sup>157</sup> If a child discloses CSA at all, then probably to a person of trust and at a time when he/she feels it is safe to speak up.<sup>158</sup>

### 2.3 Inconsistent testimony

The average person expects the victims to narrate their experiences consistently and without any contradictions. However, inconsistent testimony is not a rare phenomenon in CSA victims.

The current English directive on the prosecution of CSA cases points out that **CSA victims may not provide their best and most complete testimony during the first (recorded) interview**. Reasons may range from loyalty to the perpetrator, fear for self and family, suspected CSA may have been disclosed by a third party and at this point the victim may refuse to cooperate, the victim does not see self as a victim, fear of distrust on the hand of the law enforcement authorities, initial distrust by the police, use of an interview as a credibility test by the police. Completion of testimony may require several interviews. Hearing process of CSA victims should be more adequately understood as a series of multiple subsequent interviews and/or one interview divided in several phases. The child may disclose the experiences piece by piece (gradually), leaving the worst for the end, once the child is reassured that the interviewer can be trusted. Thoroughly thought through and patient intervention of the police and other institutions can in the end break up the loyalty of the victim to the perpetrator. Seemingly contradictory initial statements are therefore in themselves not a reason to disbelieve the subsequent victim's statements. On the contrary, these contradictory statements should be perceived as symptomatic in relation to CSA.<sup>159</sup>

Children don't have the same standards of logic, understanding and consistency like adults do. They don't have the same life experience as adults do and they are less sophisticated in their understanding of what happened. Children may not fully understand the meaning of sexual activity – and this fact may be reflected in their way of remembering and describing things. Also the **process, in which traumatic information is stored in the memory, may influence the testimony's consistency**. The child might not be able to remember precisely when and in what sequence the events occurred, it may not be able to describe the context, in which the events took place.<sup>160</sup> What we remember and the way we remember it depends on which part of the brain is affected at the time, i.e. which part of the brain is forced to process the incoming information. Psychologists' experiences as well as research conducted by neurobiologists confirmed that traumatic events differ in terms of their quality from other personally significant events in the manner in which they are recorded and recalled in the brain.

Memories of non-traumatic events are explicit, this means that they consist of words and symbols. When people perceive sensorial stimuli, in general they automatically sum up this incoming information into a narrative form and they don't even realize the automatic process of translating (interpreting) these sensorial stimuli in their personal story. On the contrary, **memories of trauma are implicit, i.e. they consist of images, perceptions, emotions and behavioral states**. When an individual is being threatened, his or her consciousness is significantly narrowed and focused just on the perceivable details. Victims recall trauma in the form of sensorial bits of events, such as visual images, olfactory, sound and movement perceptions and intense waves of emotions. During a trauma, consciousness may be sometimes narrowed down to such extent that the memory of entire events or parts thereof is lost. Thanks to methods enabling to display

<sup>157</sup> Compare: LONG, J., WILKINSON, J. a KAYS, J. 10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member, 2011.

<sup>158</sup> Compare: COSSINS, A. Prosecuting Child Sexual Assault Cases, 2006.

<sup>159</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases..., 2013, art. 38 - 40.

<sup>160</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases..., 2013.

brain activity, it was found that at the time when people experience traumatic memories, there is decreased activity in that part of the brain that plays a significant role in translating subjective experiences into language – but there is significantly increased activity in those parts of the brain that process intense emotions and visual images. Trauma is thus recorded in that part of the brain that processes emotions and perceptions, but not language or speech. “Explicit” memory simply fails in conditions of high distress. The victim is missing accompanying words and symbols to describe what happened. That is one reason why traumatized individuals (at least initially) are unable to narrate a consistent story of what they experienced. Initially they live with implicit memories of fear, disgust, anger, sadness, confusion, etc., but they have just a few or no explicit memories to explain their feelings or behavior.<sup>161</sup>

Research focused on child testimony quality assessment reached conclusions that children do not necessarily provide a complete and coherent story of their victimization, despite the truthfulness of their sexual victimization. Their testimonies were characterized as **false denials in 20-60%**, and when they disclosed their experiences, oftentimes they minimized their sexual victimization. Hence, there is an evident risk that although the child is being interviewed by a CSA expert, in a large number of cases it will probably lead to a failure to disclose actual CSA or the disclosure will be less than complete. Denial of actual CSA appears to be a much larger problem than occasionally occurring false CSA accusations by children.<sup>162</sup>

<sup>163</sup>

Very interesting findings were reached by researchers who analyzed over 26,000 cases of physical violence and sexual abuse of children who were interviewed just based on the research-validated structured NICHD Protocol.<sup>164</sup> The overall degree of verbal disclosure during the interview was 65% and in CSA cases the disclosure rate was as high as 71%. However, the children’s willingness to disclose CSA in cases when the suspected perpetrator was a parent decreased to 20.9% in girls and 14.2% in boys. These findings confirm the hypothesis that a close relationship between a child and the perpetrator has a negative impact on the child’s willingness to speak up.<sup>165</sup> Prosecutors must understand the consequences that the child would face in case it revolts against the perpetrator – and this should be comprised in the strategies to resolve the detected non-conformances or anomalies found in the victim’s testimony within criminal prosecution.<sup>166</sup>

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<sup>161</sup> Description of further differences in memorizing and recalling traumatic and non-traumatic events may be found in: KARKOŠKOVÁ, S. Child sexual abuse victims among us, p. 96 - 99.

<sup>162</sup> Compare: LYON, T. D. 2007. False Denials..., 2007; MYERS, J. E. B. Expert Testimony in Child Sexual Abuse Litigation, 2010; BIDROSE, S. a GOODMAN, G. S. Testimony and evidence..., 2000; FALLER, K. C. Criteria for judging the credibility ..., 1988; LAWSON, L., CHAFFIN, M. False negatives in sexual abuse disclosure interviews, 1992; SORENSON, T., SNOW, B. How children tell..., 1991.

<sup>163</sup> In this context should be mentioned a unique research conducted by Sjöberg and Lindblad in 2002 with the aim to find out to what degree sexually abused children shall disclose information concerning their experiences. Ten children sexually abused by the same perpetrator a total of 102 times were studied. Videos recording CSA were found during a house search. The perpetrator was not a stranger to the children. No child disclosed its victimization prior to the police investigation. The average age of the children was 5.6 years at the time of the last assault and 6.9 years at the time of the police investigation. No child used false CSA testimony (i.e. no child described events that did not happen). The children had a strong tendency to deny or downplay their experiences, the reason of which seemed to be a lack of understanding of the abusive aspects of the events, amnesia and active attempts to forget or avoid CSA memories. Researchers state that professionals will probably never be able to identify all CSA victims through child interviews. (Compare: SJÖBERG, R.L. a LINDBLAD, F. Limited disclosure of sexual abuse..., 2002).

<sup>164</sup> National Institute of Child Health and Human Development (NICHD) Investigative Interview Protocol.

<sup>165</sup> Compare: HERSHKOWITZ, I. et al. Trends in children's disclosure of abuse in Israel, 2005.

<sup>166</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases..., 2013, art. 54.

## 2.4 Recantation

The average person would expect that if the victim has once said something they will insist on it under any circumstances. However, verbal disclosure must be viewed rather as a process than an event. It is usually not elegant, not brief or tidy; instead, it is oftentimes rather chaotic, entangled and filled with lack of clarity.<sup>167</sup> Some studies have identified the disclosure pattern, which includes stages of denial, hesitation, disclosure, testimony recantation (i.e. denial of abuse that comes after a previous disclosure) and testimony reaffirmation.<sup>168</sup>

Malloy et al. studied the incidence and **causes of testimony recantation** during a formal or informal interview using a sample of 257 CSA victims (aged 2 - 17 years), whereas all the cases were founded, excluding the possibility that testimony recantation could relate to the fact that the initial testimony was false. The testimony recantation phenomenon occurred on the whole in 23.1% of cases, whereas in the context of a formal interview it occurred in 18.9% cases. It was confirmed in a multidimensional analysis that **family pressure** is the strongest factor contributing to the victims recanting their testimony. Children are most vulnerable to family pressure when they are younger, if the perpetrator is a parent, and if after abuse disclosure the nonoffending parent does not provide the victim with sufficient support.<sup>169</sup>

Other studies show similar findings. Child testimony recantation is especially frequent in cases when the perpetrator is a person close to the victim.<sup>170</sup> Mainly pressure on the hand of the child's family and/or caregiver is the background of testimony recantation.<sup>171</sup> Probability that the victim will deny his/her victimization is higher if the child's caregiver doesn't support the child in the process of disclosure and case clarification.<sup>172</sup> Other authors include the following among the usual motives of testimony recantation: lack of support on the part of the family; family pressure or pressure of others; accusation on the part of the family or others; the victims feel that they are not believed; isolation; giving up on hope; unfair treatment; lack of help; disruption of quality of life; perception that recantation is a way to solve the problem.<sup>173</sup> One of possible explanations of the phenomenon of testimony recantation is also the fact that children suffering from *post traumatic stress disorder* (PTSD) symptoms who find themselves in the *phase of avoiding*, may in this phase deny or recant their original testimony because they can't stand the anguish induced by traumatic memories.<sup>174</sup>

The list of strategies to be applied in criminal proceedings against CSA perpetrators includes the need to explain and handle the recantation phenomenon. In describing this strategy it is emphasized that CSA perpetrators and unfortunately sometime also the nonoffending parent exert extraordinary pressure on the child victim after CSA disclosure. This **pressure** may be **obvious**, e.g. display of rejection, intimidation or influencing of witnesses. However, the pressure can also be **subtle**, not easily detectable or describable, such as when the nonoffending parent continues to keep in touch or stays in a relationship with the perpetrator or the perpetrator continues to have access to the child through the nonoffending parent.

<sup>167</sup> Compare: GOODYEAR-BROWN, P. et al. Child Sexual Abuse: The Scope of the Problem, 2012.

<sup>168</sup> Compare: SORENSON, T. a SNOW, B. How children tell..., 1991; SUMMIT, R. C. The child sexual abuse accommodation syndrome, 1983.

<sup>169</sup> Compare: MALLOY, L.C. et al. Filial Dependency and Recantation ..., 2007.

<sup>170</sup> Compare: FOYNES, M. M. et al. Child abuse: Betrayal and disclosure, 2009; LYON, T.D. 2007. False Denials..., 2007.

<sup>171</sup> Compare: SHIU, M. H. Unwarranted Skepticism, 2009; BRADLEY, A. R. a WOOD, J. M. How do children tell?, 1996.

<sup>172</sup> Compare: LAWSON, L., CHAFFIN, M. False negatives in sexual abuse disclosure interviews, 1992.

<sup>173</sup> Compare: MARX, S. P. Victim recantation in child sexual abuse cases, 1996; CHEUNG, M. Child Sexual Abuse: Best Practices for Interviewing and Treatment, 2012.

<sup>174</sup> Compare: KOVEROLA, C., FOY, D. Post traumatic stress disorder symptomatology..., 1993.

Regardless of the type of pressure the impact is the same: the child victim feels pressure to recant the testimony to keep the family together. Therefore, when recantation takes place, prosecutors should search for evidence to rehabilitate and confirm the original truthful statements of the victims. It is very important to submit evidence that explains the context of the child's recantation. E.g. the victim's mother said she doesn't believe the victim or that the family will be destroyed if the perpetrator goes to jail? Prosecutors can also try to submit a statement the child made in front of friends, siblings, relatives, health or social workers or the police.<sup>175</sup>

Next to the above strategy, there is a need to react to intimidation and influencing of witnesses and marring their participation in the proceeding.<sup>176</sup> Perpetrators, but also the nonoffending parent oftentimes directly threaten the child victim, prompting the child to recant the testimony, or they influence in a different way the child victim's ability to take part in the criminal proceeding. Perpetrators who are related to the victim have extensive access to the victim and information about the victim's person that they try to use to make the victim comply with the perpetrator's desires (either aimed at continuation of the abusive practices or prevention of disclosure and criminal prosecution). Commonplace tactics of the perpetrators include blackmail of disclosing information about the victim concerning some past mistakes, shaming or discrediting the victim. Therefore, in the interest of the victim's protection, systemic measures should be adopted, including, inter alia, **education of victims** and of all the **professionals** coming in contact with CSA victims **about the tactics used by the perpetrators to intimidate** victims and witnesses. This would reinforce the ability of victims and professionals to detect these efforts of the perpetrator and **keep evidence of intimidation** that should be subsequently used by prosecutors to rehabilitate the victim's credibility.<sup>177</sup>

## 2.5 Positive attitude towards the perpetrator

The average person would expect that a CSA victim will have clearly negative attitudes to the perpetrator. If the victim's attitudes are in contradiction with this expectation, it raises suspicions whether the victim is indeed a victim. These prejudices are common also among law enforcement authorities. The prosecutor in charge used the following argument: If the child had shown a positive relationship to the father prior to the filing of a criminal complaint by the child's mother, and/or also thereafter, then the father could not have sexually abused the child.

However, as was already stated above, in CSA victims (especially in cases when the perpetrator is a relative or a person close to the family) there are commonly **ambivalent** feelings and attitudes towards the perpetrator. Abuse on the hand of the perpetrator who is a stranger to the child does usually not cause ambivalent or confused feelings. The situation is clearer and the child can more easily rely on the fact that the surrounding environment will provide him or her with emotional support. It is also clear where feelings of anger should be directed. In intra-familial CSA cases however, the situation tends to be much more complex. Family relations are complex and most child victims have ambivalent feelings towards their parents (both positive and negative).<sup>178</sup> The same person who is harming the child may in many other respects provide the child with care, meet the child's basic subsistence needs and make a number of the

<sup>175</sup> LONG, J., WILKINSON, J., KAYS, J. 10 Strategies for Prosecuting Child Sexual Abuse ..., 2011.

<sup>176</sup> In this context, textbooks available in Slovakia on the issue of morality crime do state (but don't specify any further) that in the crime of sexual abuse the criminal proceeding must clarify and prove, among other circumstances, also the scope and form of influencing the victim to cover up the crime (CHMELÍK, J. et al. Morality, pornography and morality crime, p. 116 - 117).

<sup>177</sup> LONG, J., WILKINSON, J., KAYS, J. 10 Strategies for Prosecuting Child Sexual Abuse ..., 2011.

<sup>178</sup> RYAN, B. et al. Treatment of Intrafamilial Crime Victims, 2001.

child's small or big desires. It is very difficult to give up on the image of a "good" parent (no child wants to have a negative image of their parent). Considering the fact that there have been also good times in the relationship, the victim may doubt oneself whether he/she is not "overreacting" in respect to CSA. Or the abuse may have been the only time when the child was shown some affection. An individual who is thirsty will drink also poisoned water if no other water is available.<sup>179</sup>

A so-called **traumatic bond** may be established between the victim and the perpetrator. This phenomenon occurs in abused children and women, prisoners of war, but also in other situations when people find themselves trapped. The rapist may at the same time be a source of occasional rewards and comfort – and rapists know that this is an effective tool to exert control. An abused individual feels love, gratitude, empathy and loyalty towards the rapist.<sup>180</sup> If traumatic bond occurs in hostages who had never had any previous positive bond with their kidnappers, just imagine how much stronger the bond of a child will be towards a parent who is perceived as a source of life?<sup>181</sup> A victim who is exposed to massive manipulation on the hand of the perpetrator learns (without a conscious effort) to think in a way that fully meets the needs and the wishes of the perpetrator. So-called **cognitive distortions** develop,<sup>182</sup> the eradication of which may require long-term psychotherapy.

Factors contributing to silencing the victim (distortion of reality, missing support, surrounding environment being an accomplice in that CSA is a massive taboo, not seeing self as a victim, need to keep a relationship bond, dissociation), nourish also the victim's ambivalent feelings towards the perpetrator. Absence of negative manifestations in contact with the perpetrator may well be a sign that the victim has activated strong mental defense mechanisms, mainly *dissociation*.<sup>183</sup>

## 2.6 Absence of or indistinctive trauma symptoms

The average person would expect that a child who is a CSA victim will show distinctive trauma symptoms. Study of CSA consequences (including the type and the extent of victims' harm) is an inseparable part of what should be clarified and proven in this crime.<sup>184</sup> The question whether a suspected victim suffers from trauma symptoms is a chronic part of the set of questions that need to be answered by the sworn expert – psychologist.

Yet scientific research has found that **asymptomatic victims** make up 40% of all the CSA cases; another 30% of victims show very few symptoms.<sup>185</sup> The range of possible victims' reactions to CSA trauma is very broad – from a normal positive functioning in everyday life without any warning signals, little distinctive signals to obvious, extremely negative signals.

It is possible that at the time of ongoing CSA and *shortly* thereafter many victims show no and/or unnoticeable trauma symptoms and the depth of the trauma will surface only in late adolescence or in adulthood. In this context some authors describe so-called **sleeping trauma consequences**.<sup>186</sup> The phenomenon of delayed onset of trauma consequences may be explained by the fact that injuries inflicted

<sup>179</sup> Compare: PANDORA'S PROJECT. Adult Survivors Continuing Relationships With Abusive Family, 2010.

<sup>180</sup> Compare: HERMAN, J. Trauma And Recovery, p. 72.

<sup>181</sup> Compare: PANDORA'S PROJECT. Adult Survivors Continuing Relationships With Abusive Family, 2010.

<sup>182</sup> For a more detailed description see: KARKOŠKOVÁ, S. Child sexual abuse victims, p. 69 - 71.

<sup>183</sup> For a detailed description of various forms of dissociation see: KARKOŠKOVÁ, S. Child sexual abuse victims ..., p. 78 - 81.

<sup>184</sup> Compare: CHMELÍK, J. et al. Morality, pornography and moral crime, p. 116 - 117.

<sup>185</sup> Compare: FRIEDRICH, W. Developmental Perspectives on Sexual Behavior..., 2003; KENDALL-TACKETT, K. A. et al. Impact of sexual abuse on children, 1993.

<sup>186</sup> Compare: BRIERE, J. Methodological issues in the study of sexual abuse effects, 1992.



in the childhood and adolescence, i.e. during a critical period of personality shaping, will be displayed fully only after some time. On top of that, defense mechanisms that are activated under trauma in the victim's organism can "switch the victim into a functioning mode" for some time, during which the damage caused by the trauma is obfuscated, subconscious, in order to assure survival.

The failure to find (based on prejudice) expected trauma symptoms can lead to premature conclusions of the law enforcement authorities that the child suffered no harm. However, paradoxically, also the existence of symptoms can be used to undermine the victim's credibility. Sometime it seems that those assessing the evidence deliberately create their own categories of trauma symptoms – as a part of which they distinguish eligible/ineligible symptoms, tolerable/unacceptable symptoms and symptoms raising sympathy/antipathy. In this way, e.g. a boy who acts aggressively among his peers is not considered a credible victim.

## 2.7 Inconsistent reactions of the nonoffending parent

The average person would expect that a parent should have known what was happening to the victim and should have been able to stop it and/or should have immediately adopted a clearly protective attitude towards the child. If the parent failed to meet these expectations, it is the parent's fault. Yet what is being forgotten is the fact that if the nonoffending parent knows the perpetrator, if they have a close relationship of trust, then also the protective parent is betrayed and traumatized and is a secondary victim.

A parent might be unable to identify what is happening/what happened. Not only the child, but also the parent is exposed to the manipulation on the hand of the perpetrator, as a result of which the parent trusts the suspected individual. Even if they suspect that something is not quite right, their position may not allow them to protect the child (the perpetrator may control the victim). Even the nonoffending parent may be at risk when they try to protect the child and may need support similar to the child.<sup>187</sup>

The nonoffending parent may show similar mental defense mechanisms as the primary victims do, e.g. dissociation. It may take a long time until the nonoffending parent believes that CSA is reality in their own family. The instinct to protect one's own child may therefore be activated with a delay and may not be crystal clear. Ambivalent reactions are common. Research shows that parents who are trapped in ambivalent feelings towards the perpetrator may not be adequately supportive towards the victimized child. Ambivalent reactions are when the parent shows **inconsistent reactions** of dissent towards the perpetrator.<sup>188</sup> It was found that even mothers who were in general supportive and protective towards their sexually abused children sometimes showed inconsistent and ambivalent reactions.<sup>189</sup> **Ambivalence** and supportive attitude can coexist in a parent and create an opportunity for intervention from time to time.<sup>190</sup>

**Reactions of the nonoffending parent may differ depending on various factors**, such as their relationship to the perpetrator, their own history of CSA, the age and sex of the child. Research found that caregivers are less supportive in situations when there is a close relationship between them and the alleged perpetrator, in domestic violence situations or if the caregiver is depending or was neglected as a child.<sup>191</sup> It

<sup>187</sup> Compare: The Crown Prosecution Service. Guidelines on Prosecuting Cases..., 2013, art. 12, Annex C.

<sup>188</sup> Compare: BOLEN, R., LAMB, J. L. Can non offending mothers of sexually abused children be both ambivalent and supportive?, 2007.

<sup>189</sup> Compare: ELLIOTT, A., CARNES, C. Reactions of Nonoffending Parents to the Sexual Abuse..., 2001.

<sup>190</sup> Compare: LEVENSON, J. S., MORIN, J. W. Treating nonoffending parents..., 2001.

<sup>191</sup> Compare: OLAFSON, E. a LEDERMAN, J. C. S. The State of the Debate About Children's Disclosure..., 2006; PAINE, M. L., HANSEN, D. Factors influencing children to self-disclose sexual abuse, 2002.

was discovered that mothers were more likely to believe that CSA happened when they were no longer sexual partners of the perpetrator.<sup>192</sup> Adolescent victims viewed their mothers as less supportive if they lived with the perpetrator at the time of the abuse and more supportive if they lived separately from the perpetrator.<sup>193</sup> In describing the dynamics of partnership separations Klimeš states that although individuals “*naturally suffer from the negative characteristics of their partners, the degree to which they mind and whether they are considered bearable, depends on how much the individual accepts the option of separation*”.<sup>194</sup> It can be deduced from the above that the nonoffending parent may be also trapped in denial and ambivalence, unless he or she accepts the possibility of ending the relationship.

**Thoughts, emotions and reactions of the nonoffending parent often change overtime in any direction, depending on the circumstances.**<sup>195</sup> In practice unfortunately these changes are in a biased way interpreted as a sign of lack of credibility of the witness/of the person disclosing the crime. They are not credible if they filed a criminal complaint after some time from when they first learnt about CSA, or if they changed their testimony during the proceeding, or if they later defined the incriminated act using different terminology than initially, or if they failed to file a criminal complaint, or if the criminal proceeding is in parallel with a civil proceeding concerning child visitation arrangements, or if, despite the criminal prosecution has been dropped, they still try, in order to protect the child, to apply legitimate remedies after they learnt with delay information that was not disclosed to them as to the disclosing parent (who is not a party to the proceeding), etc. At times the attitude towards the child appears to be hypoprotective and at other times hyperprotective, in other words in the eyes of those who are not personally involved, the nonoffending parent’s attitude is never adequate or correct.

At the same time there is no doubt that also the nonoffending parent is a victim – a secondary victim. They are in a very difficult situation and they need support to even accept such an overly cruel reality in the first place, in order to subsequently handle it in a way that is in the best interest of the child. Most parents had never encountered CSA until it hit them. They have not been prepared to face such a situation by their upbringing, at school or by the media. Although as a part of their general legal awareness they know what actions probably constitute a crime, they have no idea what a criminal proceeding entails and what legal instruments they have/do not have available within the existing legal system to protect their child. They get acquainted with everything “on the go”, oftentimes they receive contradictory information or advice and they are lost and try to do their best at the time and under the given circumstances (in terms of finance, time and mental strength). Moreover, the system of socio-legal protection has a hard time coping with a situation when the nonoffending parent doesn’t want to initiate criminal prosecution against the other parent, yet wants to protect the child. Biased assessment of the disclosing parent’s reactions does definitely not help to clarify and solve CSA cases in a sensible way.

Since the lack of knowledge of counterintuitive reactions can lead to a biased assessment of CSA cases, to an unjustified questioning of the victim’s credibility and to secondary victimization, it is necessary to have CSA cases handled by experts who can explain seemingly inappropriate victims’ reactions to investigators, prosecutors and judges.<sup>196</sup> The principle of *presumption of victim status* must be respected

<sup>192</sup> Compare: ELLIOTT, A., CARNES, C. Reactions of Nonoffending Parents to the Sexual Abuse..., 2001.

<sup>193</sup> Compare: CYR, M. et al. Predictors of Maternal Support, 2003.

<sup>194</sup> KLIMEŠ, K. Partners and separations, p. 15 - 22.

<sup>195</sup> Compare: LEVENSON, J.S. et al. Experiences of nonoffending parents., 2012.

<sup>196</sup> Compare: LONG, J.G. Introducing Expert Testimony to Explain Victim Behavior..., 2007; MYERS, J.E.B. Expert Testimony in Child Sexual Abuse Litigation, 2010; The Crown Prosecution Service. Guidelines on Prosecuting Cases..., 2013; LONG, J., WILKINSON, J. a KAYS, J. 10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member, 2011.

regardless of whether the victim's reactions seem to us correct or not. Instructions to cope with trauma are not a part of school curricula or our upbringing. And after all, there is no standard manual to fit all. Reactions of CSA victims depend on the dynamics of the physiological, mental, social and cultural "trap" they are caught in.

### 3. Failures on the hand of professionals as a factor of especial vulnerability of CSA victims

Probably the most frequent failures on the hand of law enforcement authorities involved (not only) in criminal proceedings are the following: 1) failure to apply special protection measures, 2) inappropriately managed interviews of CSA child victims, 3) inappropriate formulation of questions and expectations addressed to sworn experts and 4) disrespect for the presumption of the victim status if the suspicion is not proven in the criminal proceeding.

#### 3.1 Failure to apply special protection measures

Pursuant to the Directive 2012/29/EU (57) in victims of (...) **violence on the hand of a close person, violent sexual crimes or sexual exploitation**, (...) and in **child victims** there is usually a higher level of secondary and repeated victimization, intimidation and revenge. Special care must be taken in assessing whether such victims are at risk of such victimization, intimidation and revenge based on **a fixed belief that special protection measures shall be useful for these victims**.

In this context, an especially critical situation is when the suspected CSA perpetrator is the child's parent and if he/she has access to the child also at the time when the case has not yet been duly investigated. After CSA case disclosure, the child in the family is exposed to further abuse, emotional torment and mainly **manipulation of the child** by the perpetrator so that abuse experiences in the child's memory be modified in terms of their meaning, questioned and the perpetrator be "acquitted of guilt".<sup>197</sup>

The above circumstances justify the application of the institute of preliminary injunction, by means of which the court may temporarily prevent child visitations by one of the parents or limit the visitations (by specifying the place of visitation and/or the presence of third parties). Neglecting or underplaying these legitimate measures aimed at protecting the child may lead to far-reaching adverse effects especially in cases when a criminal complaint was filed in connection with a justified CSA suspicion and the matter has not yet been duly investigated, and/or also in cases when the criminal proceeding was discontinued but there are reasons to file a remedy.

Unfortunately there are cases in practice when the child is not sufficiently protected by the competent authorities, whereas such attitude is based on **emphasizing the presumption of innocence**. Yet what they forget is the fact that **when rights collide** (mainly a parent's right to child visitations and the right to protection of good name *versus* the child's right for protection against all forms of violence), the **right of the child is hierarchically higher**. A court's action, by which the court rejects or abolishes a preliminary injunction during the investigation phase – and by doing so "hands the child over" to the parent against whom the criminal proceeding has been instigated, significantly contributing at the same time to marring

<sup>197</sup> Compare: CHMELÍK, J. et al. 2003. *Morality, pornography and morality crime*. Prague: Portal, 2003, p. 125. Compare also: KARKOŠKOVÁ, S. 2014. The issue of suspected CSA / CSA accusations in the context of decision making on arrangements of parental visitations with minor children. In: *Judicial revue*, 66, 2014, part 8-9, p. 957-979.

the investigation of the case – cannot be labeled otherwise than a gross breach of international obligations under the *Convention on the Rights of the Child*.<sup>198</sup>

### 3.2 Inappropriately managed interviews of CSA child victims

Although a forensic interview is just one piece of the investigation, it is undoubtedly the central piece in terms of importance. The scientific world (using English as the primary language of science) has for well 25 years systematically worked on the development of manuals to interview CSA child victims.

The most significant progress in the development of such manual is the so-called NICHD Protocol (*National Institute of Child Health and Human Development: NICHD Protocol*). This protocol was developed based on international cooperation between USA, Israel, England, Scotland, Canada and Sweden. Extensive research was conducted to develop the Protocol (using a sample of more than 40,000 forensic interviews). Finally this was a field research and not a lab research as before. Currently, there are some 100 articles and 5 books describing the research behind the NICHD Protocol. The Protocol has been translated into Chinese, Finnish, French, Georgian, Hebrew, Italian, Japanese, Portuguese and Spanish. It has influenced a number of other protocols implementing its components in the interview structure.<sup>199</sup>

The NICHD Protocol consists of eleven stages<sup>200</sup>. The reviewed version of the Protocol emphasizes on **building rapport with the child<sup>201</sup> and friendly demeanor**, the feelings of the child must be considered by the professional (without interpreting them though).

Both in the original and reviewed versions of the Protocol, **a break** is an important stage, during which the professional leaves the room and if needed formulates specifically focused questions to obtain additional details. This stage has a special importance also in terms of **ensuring the principle of a contradictory hearing<sup>202</sup>**.

Based on research, when NICHD Protocol is applied, many **children aged 4 or 5 are able** to describe and narrate in detail the substance of the events under investigation. These narrations often lead to the detection of a number of leads that may be used to confirm or overturn the child's testimony. Research shows that the current protocols of a structured interview (also those inspired by NICHD) work best in children who had previously disclosed abuse of their own will. Interviews are **less effective in children who are not yet in the stage of active disclosure**. Structured interviews are **least effective in children who have significant mental barriers or fear** in relation to disclosure. Population aged 3 years or younger cannot be effectively interviewed using the current forensic interview structure.<sup>203</sup>

<sup>198</sup> For more details concerning this issue, see the study: KARKOŠKOVÁ, S. 2014. The issue of suspected CSA / CSA accusations in the context of decision making on arrangements of parental visitations with minor children. In: *Judicial revue*, 66, 2014, part 8-9, p. 957-979.

<sup>199</sup> FALLER, K.C. 2015. Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974–2014: Historical Benchmarks. In: *Social Sciences*. 2015, 4, 34–65.

<sup>200</sup> The single phases are described in more detail in the Power Point presentation entitled "Interviewing a CSA child victim" (S. Karkošková), see the materials from the seminar in Omšenie, June 29-30, 2015.

<sup>201</sup> Building rapport with the child is more important than informing the child with the basic rules. This means that after introducing oneself and saying that the interview is being recorded, the professional asks the child what he or she likes to do and tries to get the child to talk. Only afterwards the child is informed about basic interview rules.

<sup>202</sup> For more details concerning the principle of contradictory interview see the article of M. Pirošíková entitled "Most Vulnerable Victims from the Perspective of ECHR Case Law" (prepared for the seminar in Omšenie, June 29-30, 2015).

<sup>203</sup> Compare: Everson, M.D: 2015. Child Forensic Interviewing: A 30-Year Perspective. In: *Children's Services Practice Notes*, v. 20, n. 2. Compare also: FALLER, K.C. 2015. Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974–2014: Historical Benchmarks. In: *Social Sciences*. 2015, 4, 34–65.

The current practice of interviews of CSA child victims in Slovakia has several serious shortcomings. Professionals who interview these suspected victims have not been specifically trained to interview suspected CSA victims, (which increases the risk of errors committed during the interview)<sup>204</sup> and don't have any structured protocol available, the application of which could contribute to conduct the interview effectively. Moreover, the interview is often conducted in inadequate premises, since in Slovakia there are no special interview rooms to interview children. The number of people present in the room where the child is interviewed would undoubtedly scare an adult, let alone a child. There are even cases when the CSA suspect himself was present in the room during the interview of a suspected child victim. A serious shortcoming is also the lack of specialization of investigators, insufficient preparation for the interview, failure to give the child enough time and the misunderstanding of the legislative principle that repeated interviews of the child should be prevented.

In this regard several researchers point out that the prevalent practice concerning the number of interviews (just one child interview) may not be appropriate in the investigation of many CSA cases. Trust in the effectiveness of a single forensic child interview appears to be overrated. Compared to the practice of a single interview applied insofar, the **model of several sequential child interviews is recommended**. Two or three interviews (conducted in a sequence) are recommended for children to be able to provide complete and valuable information. It is important for law enforcement authorities to be aware of this problem in interviewing children and in assessing the reliability of CSA allegations. We point out that when it comes to the number of interviews, it is important to **make a distinction between multiple interviews conducted by various professionals** (which is definitely to be avoided) **and multiple interviews conducted by the same professional**, which is appropriate in a high number of cases.<sup>205</sup>

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<sup>204</sup> Common failures of investigators interviewing victims include mainly:

1. imposing the "Me" theory of personality
2. misunderstanding memory
3. misunderstanding lying and truth telling
4. not being self aware
5. not considering multiple explanations
6. not planning ahead
7. not establishing rapport
8. not actively observing and listening
9. timing the questions wrongly
10. phrasing the questions wrongly

The single mistakes are described in more detail in the Power Point presentation entitled "Interviewing a CSA child victim" (S. Karkošková), see the materials from the seminar in Omšenie, June 29-30, 2015.

<sup>205</sup> Compare: EVERSON, M.D. 2015. Child Forensic Interviewing: A 30-Year Perspective. In: Children's Services Practice Notes, v. 20, n. 2., Compare also: FALLER, K.C. 2015. Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974–2014: Historical Benchmarks. In: *Social Sciences*. 2015, 4, 34–65., MELING, L. 2015. The Timing and Number of Interviews. paper presented at: *Conference on handling child evidence within the framework of a child-friendly justice system 19. – 20. February 2015 in Tallinn.*, HERSHKOWITZ, et al. "Dynamics of forensic interviews with suspected abuse victims who do not disclose." In: *Child Abuse & Neglect* 30 (2006): 753–70, LEANDER, L. 2010. Police interviews with child sexual abuse victims: Patterns of reporting, avoidance and denial. In: *Child Abuse & Neglect* 34 (2010) 192–205, LaROOY, D., & LAMB, M. (2008). What happens when young witnesses are interviewed more than once. *Forensic Update*. Retrieved from <http://www.laroooy.net/FU.pdf>, CARNES, C. N. et al. (2001). Extended forensic evaluation when sexual abuse is suspected: A multi-site field study. In: *Child Maltreatment*, 6, 230–242., DUNN, Sarah E., "Interviewing Pre-school Age Victims of Child Sexual Abuse: Interviewing Methods and Disclosure Outcomes" (2006). *Psychology Theses*. Paper 13.

### 3.3 Inappropriate formulation of questions and expectations addressed to sworn experts

A sworn expert's opinion has the nature of evidence. In proportion to the other types of evidence it doesn't have a privileged or superior status, and yet law enforcement authorities rely extensively on a sworn expert's conclusions in clarifying CSA cases. Among the questions that are expected to be answered by the expert in a way to provide "guidance" there are often questions such as: *Does the child show signs of a sexually abused child? What is the credibility of the child's testimony?* It is however questionable whether these expectations are realistic as they are exaggerated or even misleading.

Hoyano and Keenan, famous lawyers specializing in child abuse cases whose extensive publication entitled *"Child Abuse: Law and Policy Across Boundaries"*<sup>206</sup> was awarded the prestigious Inner Temple Book Prize in 2008 state that **expert evidence concerning mental signs of CSA or searching for credibility of CSA victims is a controversial topic.**

Using a psychological sworn expert's examination outcome as "**diagnostic evidence**" to confirm or overturn whether CSA took place or not is rather problematic. It is based on the premise that CSA victims show foreseeable behavioral/mental characteristics that may be accurately profiled. Research has shown however that there is no behavior or symptom observable in all or in most CSA child victims, there is not a single constellation of psychological symptoms or behavioral indicators that would be able to confirm that CSA took place. It was found that more than a third of actual CSA victims at least at the time of assessment do not show any external trauma symptoms. Nevertheless, the presence of certain behaviors and symptoms may provide some evidence that may justify the clinical opinion that the child was sexually abused. More reliable however are such symptoms that occur more frequently in CSA victims than in victims of other traumas, mainly sexualized behavior in combination with other symptoms. It must be remembered that in a forensic context, overestimation of the presence or absence of a certain behavior may lead to false positive or false negative conclusions.<sup>207</sup>

Similarly, expressing a direct opinion about the credibility of the child is viewed by most experts as inadmissible – due to the fact that psychological evidence must be based on factors independent of the child's testimony about the abuse. Moreover, reliability of the testimony may be distorted by inappropriate interview techniques or circumstances.

An inappropriate (and yet very frequently occurring) question (addressed to experts) is: *Does the suspected parent suffers from a sexual deviation?* The inappropriateness of this question is based on the fact that incidence of pedophilia in individuals committing sexual crimes involving children is approximately 50%. Paraphiliacs, i.e. individuals with a diagnosable sexual deviation represent a heterogeneous group and do not differ in any significant way from other people in most of their socio-demographic or personality characteristics. **Not diagnosing a sexual deviation is not evidence that an individual did not commit illegal sexual activities** nor is it a guarantee that this individual can be allowed (risk-free) unsupervised contact with children.<sup>208</sup>

### 3.4 Disrespect for the presumption of the victim status if the suspicion is not proven in the criminal proceeding

If through court authority the society clearly declares the victim to be the victim and the culprit to

<sup>206</sup> it compares legislation in the UK, USA, Canada, Australia and New Zealand

<sup>207</sup> Compare: HOYANO, L. a KEENAN, C. *Child Abuse: Law and Policy Across Boundaries*, 2010, p. 884-885.

<sup>208</sup> Compare: KARKOŠKOVÁ, S. 2014. CSA suspicions / accusations in the context of parental child visitation arrangements. In: *Judicial revue*, 66, 2014, no. 8-9, p. 957-979.

be the culprit, then the judgment is also an act of therapy.<sup>209</sup> Yet what is the act on the hand of the society and what is the impact of such act if the judgment frees the perpetrator or if the criminal proceeding is marred and discontinued? Truly absurd situations (with far-reaching adverse effects on CSA victims) occur when the state system responsible for protecting children from all forms of violence handles the situation unilaterally – by protecting the perpetrator through the **principle of presumption of innocence**, yet forgetting to protect the victim through the **principle of presumption of the victim status**.

The principle of *presumption of the victim status*<sup>210</sup> is based on the provision of the Directive 2012/29/EU of the European Parliament and of the Council, under which “a person should be considered a victim regardless of whether the perpetrator has been identified, detained, prosecuted or convicted and regardless of their family relation.”<sup>211</sup>

**Not proving guilt of a suspected perpetrator does not automatically mean zero risk for a suspected child victim.** In this regard, due attention needs to be paid to risk assessment procedures and appropriate child protection measures must be applied.<sup>212</sup>

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<sup>209</sup> Compare: BRICHČÍN, S. Priests as Seducers of their Wards? In AUGUSTYN, J. et al. Deeply Hurt: the Church and Sexual Abuse, 2003.

<sup>210</sup> Compare: JELÍNEK, J., GŘIVNA, T. et al. Crime victim from criminal law and criminological perspective, p. 26.

<sup>211</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of crime victims, point 19.

<sup>212</sup> For more details see the study: KARKOŠKOVÁ, S. 2014. CSA suspicions / accusations in the context of parental child visitation arrangements. In: *Judicial revue*, 66, 2014, no. 8-9, p. 957-979.

## Marica Pirošíková: Most vulnerable victims from the perspective of the case law of the European Court for Human Rights

### 1. Positive obligations resulting from the right to life, privacy and prohibition of degrading treatment

The European Court for Human Rights (hereinafter referred to as the “Court”) has drawn positive obligations of States resulting from the right to life, protection of privacy and prohibition of degrading treatment, based on which domestic authorities may be required to adopt measures in the sphere of the relations of individuals between themselves. States have an obligation to protect an individual’s life, physical and moral integrity from actions of other individuals and must adopt adequate measures aimed at preventing ill-treatment on the hands of private individuals if the state authorities know about it or should have known about it (e.g. judgment *Z. and Others v. the United Kingdom* of 10 May 2001, par. 73). In this regard they are obliged to maintain and apply in practice an adequate legal framework providing protection against acts of violence by private individuals (see e.g. judgment *X. and Y. v. the Netherlands* of 26 March 1985 and judgment *M.C. v. Bulgaria* of 4 December 2003). Mainly children and other vulnerable persons are entitled to effective protection. States’ positive obligations are formulated in the Court’s case-law both in the substantive limb, i.e. adoption of measures to ensure protection of life and individuals’ physical and moral integrity, as well as in the procedural limb, i.e. obligation to conduct an effective official investigation leading to the identification and punishment of those responsible.<sup>213</sup>

#### 1.1 Duty to protect the right to life (substantive limb)

As regards the right to life, the Court noted that the first sentence of Art. 2, section 1 imposes an obligation on the State not only to refrain from intentional and unlawful deprivation of life, but also to adopt appropriate measures to protect life of individuals who are subjects to its authority (see the judgment *L.C.B. vs. the United Kingdom* of 9 June 1998, par. 36). This commitment includes a State’s primary obligation to ensure the right to life by implementing effective criminal law provisions deterring from commitment of crimes against individuals and by having in place a law enforcement system to ensure prevention, suppression and punishment for the violation of the above provisions. At the same time, this commitment may under certain circumstances arise into a positive obligation of state authorities to adopt preventative operational measures to protect the life of an individual who is at real and immediate risk from the criminal acts of a third party (see the judgment *Osman v. the United Kingdom* of 28 October 1998, par. 115). In the cases *Kontrová v. Slovakia* (judgment of 31 May 2007) and *Opuz v. Turkey* (judgment of 9 June 2009), a positive obligation shall arise based upon the finding that the state authorities knew or should have known at the time about the existence of an actual and immediate threat posed onto the life of a specific individual due to the crime activities of a third party and they failed to adopt measures within their authority that are deemed reasonable and appropriate to prevent the threat.

#### 1.2 Duty to conduct effective official investigation when individuals have been killed as a result of the use of force (procedural limb)

The obligation to protect the right to life under Article 2 of the Convention also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective

<sup>213</sup> For more details see Pirošíková M.: Crime victim’s rights from the perspective of current ECHR case law, From Court Practice, 4/2013, p. 146 et seqq.



implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. Whatever mode is employed, however, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

### **1.3 Examples of violation of the States' positive obligations resulting from the right to life**

In the judgment *Kontrová v. Slovak Republic* (judgment of 31 May 2007) the Court noted that in the applicant's case the police had failed to meet its duties under the applicable criminal code provisions and service regulations, such as: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. The Court deemed proven that the shooting of the applicant's children by her husband had been a direct consequence of the police officers' failure to act. The above was de facto stated already by the Supreme Court upon abolishing the decision of the Regional Court of 21 January 2004 and the judgment of the District Court of 20 October 2003. The District Court dismissed the summons. It found that the criminal offence of dereliction of duty presupposed a complete or enduring failure to discharge the duty. Merely impeding the discharge of the duty was not enough. It found that in the present case the officers' actions did not amount to such a failure to discharge their duty and that the connection between their actions and the tragedy was not sufficiently direct. The Regional Court dismissed an appeal against the judgment. The Supreme Court took action on the merits based on a complaint in the interest of the law lodged by the Prosecutor General. The Supreme Court found that the lower courts had assessed the evidence illogically, that they had failed to take account of all the relevant facts and that they had drawn incorrect conclusions. The Supreme Court found that it was clear that the accused officers had acted in dereliction of their duties. It concluded that there was a direct causal link between their unlawful actions and the fatal consequence. The Supreme Court remitted the case

to the District Court for reconsideration and pointed out that, pursuant to Article 270 § 4 of the CCP, the latter was bound by its above legal views. The District Court found officers B., P.Š. and M.Š. guilty as charged and sentenced them to, respectively, six, four and four months' imprisonment. The Court held that the applicant had no effective remedy available on the national level, through which it would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death, which was the direct consequence of the Government's failure to meet its positive obligations under Article 2 of the Convention.<sup>214</sup>

The applicants in the case *Branko Tomašić and Others v. Croatia* (judgment of 15 January 2009) were the relatives of the two victims. On 15 August 2006 M.M. shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself just one month after his release from prison where he had served a sentence for repeatedly threatening M.T. that he would kill her, himself and their child. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence. The applicants complained, under Article 2 (right to life) and Article 13 (right to an effective remedy), that the State had failed to take adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths. The Court held that there had been a violation of Article 2 of the European Convention on Human Rights on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the mother and the child. The Court noted in particular that the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them. The Court furthermore noted several shortcomings in the actions of domestic authorities: although the psychiatric report drawn up for the purposes of the criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated; it resulted from the submitted documents that the treatment of M.M. in prison consisted of several sessions with the prison's staff members, none of whom was a psychiatrist; the relevant regulations nor the court's judgment specified what treatment should M.M. undergo; nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free. The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T.

#### **1.4 States' obligation to protect individuals from ill-treatment and violation of the right to respect for private and family life (substantive limb)**

Similar to the Right to life, the Court has formulated positive obligations also in the case of Article 3 (Prohibition of torture) and Article 8 (Right to respect for private and family life) of the Convention.

The Court has drawn an obligation under Article 3 of the Convention, based on which States are required 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. Based on the Court's case-law, States are obliged to ensure *inter alia* protection of children from abuse. It is therefore deemed a violation of the Convention when social workers or state authorities knew or should have known that the victim was at serious risk and failed to make the necessary

<sup>214</sup> For more details concerning the victims' possibilities to get non-pecuniary damage compensation, see Pirošíková, M.: Crime victims' rights from the perspective of ECHR case law, *From Court Practice*, 4/3013, p. 149-151.

actions to prevent violation of rights (see e.g. *A. v. the United Kingdom* (judgment of 23 September 1998). In the case *E. and Others v. the United Kingdom* (judgment of 26 November 2002) the Court laid down a standard for violation of a child's rights due to a failure to prevent sexual abuse that applies to social workers. In the Court's view, violation of a State's positive obligations occurs when a social worker fails to implement available adequate measures that may have actually changed or mitigated the damage. In the case *E. S. and Others v. Slovakia* (judgment of 15 September 2009) the Court extended this responsibility not only to the inaction of individual social workers, but also to processes within the system that had led to ineffective protection.

Similarly, States' positive obligations under Article 8 of the Convention inherent in effective "respect" for private and family life may involve the adoption of measures in the sphere of the relations of individuals between themselves. Albeit it is the government's discretion to choose the means to ensure compliance under Article 8 to provide protection against torture by private persons, an effective countering of serious criminal offences where basic values and private life elements are at stake, requires adequate criminal law provisions. In this regard the Court noted that in certain situations (e.g. bodily injury, rape, domestic violence), effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect (see the judgment in *Sandra Janković v. Croatia* of 5 March 2009, par. 36). In the case *M.T. and S.T. v. Slovakia* (decision on admissibility of 29 May 2012) the Court emphasized that this attitude in principle is not limited to cases of physical violence, but to the contrary, especially in domestic violence cases it may apply also to psychological violence. Due to the above reasons, the Court refused the Slovak Government's argument that the applicants failed to file a personal integrity protection claim as an effective remedy, by means of which in the Government's view the applicants could have demanded that violation of their personal integrity would stop.<sup>215</sup> Similarly in the case *M. C. v. Bulgaria* (judgment of 4 December 2003) the Court emphasized that effective protection against rape and sexual abuse requires measures of a criminal-law nature and refused the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators.

In the Court's view, States have an obligation to adopt legislative and other measures ensuring efficient violation prevention or having a deterrent effect on potential perpetrators.

### **1.5 Requirement to conduct effective official investigation of ill-treatment and violation of the right to respect for private and family life (procedural limb)**

If a person has an arguable claim that he or she was subjected to treatment that is illegal and contradictory to Article 3 of the Convention, then this provision in conjunction with a general obligation imposed on Contracting States by Article 1 of the Convention "everyone in their jurisdiction shall be granted the rights and freedoms set out in (...) of this Convention" means by implication a requirement to conduct effective official investigation. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This obligation may not be limited to cases of ill-treatment on the hand of State agents or bodies.

<sup>215</sup> In its deposition the Government noted the judgment 1 Co 25/94 of 19 April 1994 of the Supreme Court of the Slovak Republic that ruled that the fact that certain behavior of a physical person was subject to criminal proceedings or civil proceedings does not prevent a subsequent reaction of other persons to this behavior to become subject to personal integrity protection proceedings under § 11 et seqq. of the Code of Civil Procedure. The Government further noted the judgment of 20 June 2007 11 C 99/2006, in which the District Court in Čadca upheld the personal integrity protection claim filed by a divorced woman against her ex husband by issuing a restraining order banning violation of the applicant's personal integrity (making threats to her life and health and verbal assaults against her) and ordering her ex husband to stay at a minimum distance of 30 meters.

Based on the Court's case law, a State's positive obligation under Article 8 to guarantee an individual's physical integrity may be extended on issues concerning effective investigation.

### **1.6. Examples of violations of States' positive obligations resulting from the prohibition of degrading treatment and the right to respect for private and family life**

The Court's attitude in assessing whether States violated their positive obligation in handling cases falling under Articles 3 and 8 of the Convention are best shown on the following decisions.

#### **1.6.1 Physical punishment**

In the case *A. v. the United Kingdom* (judgment of 23 September 1998) the head teacher at A.'s school reported to the local Social Services Department that A.'s brother had disclosed that A. was being hit with a stick by his stepfather. The paediatrician considered that the bruising was consistent with the use of a garden cane applied with considerable force on more than one occasion. The stepfather of the applicant was charged with assault occasioning actual bodily harm and tried by a jury. It was not disputed by the defence that the stepfather had caned the boy on a number of occasions, but it was argued that this had been necessary and reasonable since A. was a difficult boy who did not respond to parental or school discipline. The jury found by a majority verdict that the applicant's stepfather was not guilty of assault occasioning actual bodily harm. Both the Commission and the Government accepted that there had been a violation of Article 3. Despite this, the Court considers it necessary to examine itself the issues in this case. The Court recalls that the applicant, who was then nine years old, was found by the consultant paediatrician who examined him to have been beaten with a garden cane which had been applied with considerable force on more than one occasion. The Court considers that treatment of this kind reaches the level of severity prohibited by Article 3. It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather. The Court recalls that under English law it is a defence to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement". The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment. In the Court's view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government have accepted that this law currently fails to provide adequate protection to children and should be amended. In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.

#### **1.6.2 Rape**

The case *M. C. v. Bulgaria* (judgment of 4 December 2003) concerned a disputed violation of the State's positive obligation to protect individuals' physical integrity and private life and secure effective remedy. The applicant alleged before the Court to have been raped twice (on 31 July 1995 and 1 August 1995), however Bulgarian law does not provide an effective protection from rape and sex assault because rape perpetrators are prosecuted only in the presence of evidence of significant physical resistance and that Bulgarian authorities failed to duly investigate the events of 31 July 1995 and 1 August 1995.

The Court observes that Article 152 § 1 of the Bulgarian Criminal Code<sup>216</sup> does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. What is decisive, however, is the meaning given to words such as “force” or “threats” or other terms used in legal definitions. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The Court recognizes that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little “direct” evidence. The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a “date rape”, in the absence of “direct” proof of rape such as traces of violence and resistance or calls for help. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centered on the issue of non-consent. That was not done in the applicant's case. The Court finds that their approach in the particular case was restrictive, practically elevating “resistance” to the status of defining element of the offence. The authorities may also be criticized for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors. Furthermore, they handled the investigation with significant delays.

Without making any statements concerning the issue of guilt of P. and A., the Court finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention.

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<sup>216</sup> This provision defines rape as sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled by the use of force or threats; (3) who was brought to a state of helplessness by the perpetrator.

### 1.6.3 Domestic violence

In the case *E.M. v. Rumania* (judgment of 30 October 2012) the applicant objected that the investigation of her criminal complaint filed in the matter of domestic violence committed in the presence of her daughter (who was 18 months old at the time) was ineffective. Rumanian courts turned down the applicant's petition on the grounds that her claims about her husband's violent behavior against her were not supported by sufficient evidence. The Court found violation of Article 3 of the Convention in its procedural limb because the manner, in which the investigation was conducted, did not provide the applicant with effective protection as required by Article 3 of the Convention. The Court mainly noted that the applicant, upon filing the first criminal complaint, had requested assistance and protection for herself and her daughter from her husband's aggressive behavior. Despite the legal framework provided for cooperation between various authorities and implementation of out-of-court measures in relation to domestic violence, and despite the fact that the applicant supported her claims with medical certificates, it did not appear that Rumanian authorities had implemented any measures aimed at investigating her allegations. As for just satisfaction, the Court awarded the applicant EUR 7,500 in respect of compensation of non-pecuniary damage and EUR 178 in respect of costs and expenses.

In the case *Bevacqua and S. v. Bulgaria* (judgment of 12 June 2008) the first applicant who claimed that she had been regularly beaten by her husband, left him and filed for divorce, taking their 3-year old son (second applicant) with her. Anyhow, her husband continued beating her. She spent 4 days in an asylum home for battered women with her son, but she was told that she might be prosecuted for child abduction, which might result in the court's decision to award joint custody. Filing a criminal complaint provoked further violence. Her application to have a preliminary injunction issued entrusting the son in her custody was not assessed with priority expedition and her son was entrusted in her custody only after the divorce more than a year later. The following year she was beaten by her ex-husband and her applications for criminal prosecution were turned down due to the reason that it was a "private matter" that required private criminal prosecution. In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life. The Court emphasized that the authorities' view that no assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.

The case *Eremia and Others v. the Republic of Moldova* (judgment of 28 May 2013) concerned the applicants' complaint about the Moldovan authorities' failure to protect them from the violent and abusive behaviour of their husband and father, a police officer. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) in respect of Ms Lilia Eremia, and a violation of Article 8 (right to respect for private and family life) in respect of her two daughters. The Court held that, despite their knowledge of the abuse, the authorities had failed to take effective measures against Ms Eremia's husband and to protect his wife from further domestic violence. It also considered that, despite the detrimental psychological effects of her daughters witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. Finally, the Court found a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3 in respect of Ms Lilia Eremia since the actions of domestic authorities were not mere failure in investigating the violence she had sustained, but the authorities' attitude had amounted to condoning violence and had been

discriminatory towards Ms Eremia as a woman. In this regard the Court noted that the conclusions of the United Nations Special Rapporteur on violence against women, its causes and consequences only further reinforced the impression that Moldovan authorities failed to fully appreciate the seriousness and scope of the problem of domestic violence in Moldova and its discriminatory effect on women.

## 2 Specificities in investigating sexual crimes

### 2.1 Rights of the defence versus the interests of victims of sexual abuse

When investigating sexual crimes, especially in child sexual abuse cases, it is necessary to adopt special measures aimed at protecting the victim during the criminal proceedings. In light of the Court's case law, a pre-trial interview may be used at the main court hearing in such cases. To prevent a violation of defence rights to such degree that it would amount to violation of Article 6 par. 3 (a) of the Convention, it is necessary to enable the defence already at this stage in the criminal proceedings to put questions to the victim e.g. by enabling the defendant's defence counsel to take part in interviewing the victim or enabling the defence counsel to ask questions indirectly through the investigator or the psychologist.

In the case *S. N. v. Sweden* (judgment of 2 July 2002) the applicant had been convicted of sexual abuse of a 10-year old boy. The victim's interview had been conducted by the police and videotaped. Upon the request of the defence, the child was interviewed again in the absence of the defence counsel who had had the opportunity to formulate questions that were asked of the witness. The second interview was audiotaped. The videotaped police interview with the victim was shown during the hearing and the record of the second interview was read out. The court also heard evidence from M.'s mother and his schoolteacher as witnesses. Their testimony concerned only the victim's behavioral changes. The Court did not find a violation of Article 6 par. 3 (d) of the Convention. The defence counsel had not requested to be present at the second interview of the child, and therefore there had been no violation of defence rights in this second interview. In the Court's view, Article 6 par. 3 (d) of the Convention cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel. The Court notes that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audiotape of that interview was played back before the Court of Appeal. In the circumstances of the case, these measures must be considered sufficient to have enabled the applicant to challenge the child victim's statements and the victim's credibility in the course of the criminal proceedings.

In the case *Eduardo González Nájera v. Spain* (decision of 11 February 2014) the applicant had been convicted of having sexually abused six 5-year old girls during a psychomotor development class. The interviews with the minors during the pre-trial proceedings were videotaped. The video recording was shown at the trial. The child victims were not heard at the trial. Their statements from the pre-trial proceedings were the only direct evidence, based on which the applicant was convicted. The applicant did not ask questions to the victims at any stage of the proceedings. The court found that the applicant's application under Article 6 par. 3 (d) of the Convention was manifestly ill-founded. The Court noted that the applicant did not request the victims to be heard at the trial. Nor did he ask to have questions put to the victims through the trial courts or an expert. He limited himself to challenging the admissibility of the minors' statements in evidence. Given the particular vulnerability of the victims, the Court considers that the domestic courts cannot be blamed for not having taken the initiative of calling them as witnesses to the hearing in the absence of any formal request from any of the parties. The Court notes that the victims' statements were taken by a forensic psycho-social team, a report was prepared by the experts, a copy of which was subsequently served on the applicant. The Court observes that the applicant did not raise any

objection to that report during the investigative stage of the proceedings. The Court further observes that the interviews with the minors were videotaped and that the video recording was shown at the trial in its entirety, thus enabling the domestic courts to obtain a clear impression of the minors' evidence and the defence to bring up any issues regarding the consistency and credibility of their statements; The Court further observes that the domestic courts also used in evidence the statements by some parents and by those of the children's tutors to whom the under-age victims had related the events at issue. These witnesses were heard at the trial and the applicant was able to provide his own version of the events and point out any discrepancy or inconsistency in those statements. Lastly, the Court notes that the domestic courts also relied on the written report prepared by the experts who had interviewed the minors during the pre-trial investigation. This report gave a detailed opinion of the victims' credibility

On the other hand, in the case *P. S. v. Germany* (judgment of 2 July 2002) the Court found violation of Article 6 par. 3 (d) of the Convention. The applicant was convicted of sexually abusing an 8-year old girl. The court did not hear the victim with a justification that it would be harmful from the psychological point of view. The court based the conviction on the statement of the police officer who had interviewed the victim during the pre-trial proceedings, and on the statement of her mother. The court turned down the applicant's request to have the victim examined by a psychologist. Albeit the appeal court executed evidence to confirm the victim's credibility in the form of a psychological assessment, it refused the applicant's request to hear the witness. The witness had never been heard by the court and the applicant had never had an opportunity to observe the victim's behavior and reactions to the questions asked in order to verify her credibility. The psychological assessment was submitted with a significant time delay from the occurrence of the event. The victim's testimony only interpreted by third parties could have never been verified by the defence although it was the only evidence to prove guilt.

The Court found violation of Article 6 par. 1 and 3 (d) of the Convention also in the case *Vronchenko v. Estonia* (judgment of 18 July 2013), in which the applicant had been convicted for sexual abuse of his minor stepdaughter. The victim was interviewed during the pre-trial proceedings. Experts in psychology and psychiatry did not recommend her hearing in court (nor did they recommend a remote examination). The Court stated that in the case of sexual criminal offences, especially if the victim is a child, special measures to protect the victim in the criminal proceedings must be adopted, which gave the court sufficient grounds to refuse the applicant's request to hear his stepdaughter in court. The Court further stated that the victim's testimony was the only direct evidence and that the other persons only made statements about what they had been told by the victim and the victim's behavior in general. Finally, the Court assessed whether there were sufficient balancing measures to ensure defence rights (including strong procedural guarantees enabling just and thorough assessment of evidence credibility). The victim had been interviewed 3 times during pre-trial proceedings. The last interview was video recorded as law enforcement authorities counted already on the possibility that the victim would not be heard in court. Nevertheless, they did not enable the defence to put questions at this stage of the proceeding, e.g. by enabling the applicant's defence counsel to take part in the interview, or by enabling the defence to put questions indirectly through the investigator or the psychologist. After the video recording from the victim's interview was shown in the main hearing, the defence requested that the victim be heard in court. In the Court's view, domestic courts may not be blamed for refusing the victim's hearing in court, because this decision was adopted in the child's best interest. In the Court's opinion it was therefore important to give the defence an opportunity to put questions in the pre-trial proceedings. The Court stated that experts in the field of psychology and psychiatry who interviewed the child did not state their opinions concerning



the credibility of the recorded testimony and were not heard during trial. The other expert evidence (including DNA and victim's internal examination) did not provide evidence against the applicant.

## 2.2 Situation in the Slovak Republic

### 2.2.1 Interviewing minors (persons younger than 18 years of age)

Forensic interviews of minors (persons younger than 18 years of age) in the Slovak Republic are governed by the provision of Art. 135 of the Code of Criminal Procedure, the provision of Art. 263 of the Code of Criminal Procedure and Art. 270 of the Code of Criminal Procedure. Law enforcement authorities must keep in mind that legally taken evidence (child interview) must not become inadmissible evidence and this evidence must be able to be used in court trial. Based on the Court's case law above, admissibility of evidence may be undermined if the evidence was not taken in adversarial manner, i.e. with respect to the defendant's right to defence.<sup>217</sup> With regard to the above, the prosecutor who bears the burden of proof must ensure that the hearing of a witness younger than 18 years of age (mainly if the witness is important for the prosecution) must be conducted during the pre-trial proceedings in compliance with the procedure under Art. 135 of the Code of Criminal Procedure in order for such evidence to be used in court trial. For this reason, the prosecutor must enable the alleged perpetrator to enforce his or her right to defence. With regard to the specificities of child interviews (mainly in the case of child victims of violent and sexual crimes), which does not always enable direct presence of the defence counsel at the interview, one of the options is indirect participation of the defence counsel that is governed by the provision of Art. 135 par. 3 of the Code of Criminal Procedure, i.e. video and audio recorded interviews.<sup>218</sup> If the child interview in pre-trial proceedings failed to be conducted in adversarial manner, and it is the only and/or decisive evidence against the alleged perpetrator, it is strictly necessary to repeat the hearing of the witness during the court trial to enable the defence counsel to hear the witness pursuant to Article 6 par. 3 (d) of the Convention. In such a case it is unavoidable to repeat the child interview even though the psychologist might be against it. The opinion of a sworn expert – psychologist has only the nature of recommendation and is not binding upon law enforcement authorities or the court.<sup>219</sup> With regard to the special vulnerability of child victims of criminal offences, the relevant authorities should ensure during pre-trial proceedings that the interview is conducted in such a manner that it needs not be repeated during the court trial. In Slovakia there is room for improvement as regards the manner in which child interviews are conducted<sup>220</sup> as well as the availability and use of special child-friendly interview rooms designed for the purpose.<sup>221</sup>

### 2.2.2 Child protection by means of civil court's preliminary injunctions

If the alleged perpetrator of a violent or sexually motivated criminal offence is one of the child's parents, then also civil courts have to be helpful in ensuring that due investigation of the events takes place. By means of a preliminary injunction the civil court may temporarily prevent the suspected parent

<sup>217</sup>Centés J., Kolcúnová M.: Child interviews in criminal proceedings, published at the online portal [www.paneuroni.com/files/sk/fp/casopis/1-2010-notifae.pdf](http://www.paneuroni.com/files/sk/fp/casopis/1-2010-notifae.pdf), p. 5.

<sup>218</sup>Centés J., Kolcúnová M.: Child interviews in criminal proceedings, published at the online portal [www.paneuroni.com/files/sk/fp/casopis/1-2010-notifae.pdf](http://www.paneuroni.com/files/sk/fp/casopis/1-2010-notifae.pdf), p. 7.

<sup>219</sup>For more details see Odaloš P.: Legal provisions concerning pre-trial child interviews in the context of international law, 2<sup>nd</sup> edition of the workshop "Human rights protection in pre-trial proceedings", 2014, p. 65 – 72.

<sup>220</sup>Riedlová M.: General notes on child protection from the perspective of the Prosecution Office and Prosecutor General's Office of the Slovak Republic, 2<sup>nd</sup> edition of the workshop "Human rights protection in pre-trial proceedings", 2014, p. 50 – 51.

<sup>221</sup>Lučanský M.: Human rights protection in the work of the police and protection of the rights of the child in pre-trial proceedings in the conditions of the police, 2<sup>nd</sup> edition of the workshop "Human rights protection in pre-trial proceedings", 2014, p. 37 – 42.

from visiting with the child. This shall prevent not only further sexual abuse, various forms of physical and emotional abuse after a criminal complaint has been filed, but it shall prevent mainly child manipulation by the perpetrator in the sense of changing the meaning of the child's memories of abuse in order for the child's credibility to be undermined and the perpetrator to be acquitted".<sup>222</sup> A contrary attitude of a civil court that fails to issue a preliminary injunction or of a higher instance court that abolishes the issued injunction with reference to the presumption of innocence of the alleged perpetrator is incompatible with Contracting States' positive obligations resulting from the Court's case law. Such approach not only exposes the child to the risk of further degrading treatment, but it may contribute significantly to marring the investigation. Slovak courts unfortunately adopt also such a restrictive approach in their practice. It is commonplace reality that when a child refuses visitations with the alleged perpetrator, the perpetrator is successful at obtaining an enforcement order or files a criminal complaint against the child's mother who is then convicted of the criminal offence of marring an official decision. In this regard I would like to remind of the Court's case law concerning the issue of child custody and visitations, based on which the decisive criterion in decision-making on these issues must be the best interest of the child. As a general norm, domestic authorities are required to make efforts to assist parents and ensure their cooperation in child visitation matters. The authorities' obligation to enforce visitations is not unlimited however, as they must bear in mind the interests, rights and freedoms of all the involved persons and especially the best interest and the rights of the child under Article 8 of the Convention. Depending on the nature and severity of the case, the best interest of the child may prevail over the parent's interests. In this regard the Court has repeatedly stressed that Article 8 does in no way authorize the parent to request adoption of measures that are detrimental to the child's health and development (see e.g. the judgment *Fiala v. the Czech Republic* of 18 July 2006, par. 96). This aspect is significant mainly in cases when the child is expressly opposed to visitation with his or her parent and the child's refusal is caused by the parent's behavior i.e. if the parent has not always treated the child appropriately or with empathy (see e.g. *Pedovič v. the Czech Republic*, judgment of 18 July 2006, par. 112 or *Drenk v. the Czech Republic*, judgment of 4 September 2014). Taking regard of the above as well as a State's positive obligation to conduct effective investigation of cases of ill-treatment on the hand of private persons (see e.g. the judgment *Šečić v. Croatia* of 31 May 2007), the above actions of Slovak authorities are in stark contradiction with the Court's case law, based on which domestic violence and sexual abuse amount to serious violation of human rights and States are obliged to respond accordingly (see e.g. the judgment *Opuz v. Turkey* of 9 June 2009).

### 2.2.3 Protection of freedom of speech of persons disclosing sexual abuse

It is worthwhile noting the case *Juppala v. Finland* (judgment of 2<sup>nd</sup> December 2008), in which the Court held that the freedom of speech of the applicant had been violated. The applicant had been found guilty of defamation of his son-in-law T. He had suspected his son-in-law of sexually abusing his grandson and took the child to the doctor. The Court noted that a *bona fide* disclosure about child sexual abuse suspicion should not be qualified as a criminal offence. In this regard, when contradictory interests are at stake, the Court ruled that the importance of child sexual abuse prevention prevails.

### 2.2.4 Low incidence of false accusations in child sexual abuse cases

As regard disclosure of child sexual abuse suspicions, law enforcement authorities need to keep in mind that professional circles dealing with this phenomenon agree that the incidence of false accusations is

<sup>222</sup> See also Karkošková S.: The issue of child sexual abuse suspicions/accusations in the context of decision making on custody and parental visitations with children, *Judicial Revue*, 8-9/2014, p. 971 et seqq.

below 10 percent. Hoyano and Keenan point out that false accusation cases are extremely rare, due to the specific characteristics of this criminal offense. An entire sequel of reasons in support of the victims' silence (including feelings of shame, the victim's fear, the victim's loyalty towards the perpetrator) not only make false accusations improbable, but quite to the contrary, they increase the probability of false denials i.e. when victims deny sexual abuse offences that actually happened.<sup>223</sup> A number of professionals note that divorce may provide the right context to disclose old cases of child sexual abuse as well as provide a situation to provoke child sexual abuse. It is therefore highly inappropriate when the nonoffending parent who wants to protect the child and eliminate the risk of further victimization of the child is perceived by the system as unscrupulous, manipulative, paranoid, hysterical or overprotective.<sup>224</sup>

### 2.2.5 Limitations of evidence submitted by sworn experts

Social workers, investigators, prosecutors as well as judges need to familiarize themselves with the possibilities as well as limitations of sworn experts' assessments in the field of child sexual abuse. Experts are often asked to answer the wrong questions in practice. Inadequate are mainly the questions whether the child suffers from any trauma symptoms and whether the suspected parent suffers from a sexual deviation. Yet these are very frequent questions. The inadequacy of the first question consists in the fact that up to 40 percent of sexual abuse victims are asymptomatic and 30 percent of victims show only a few symptoms. The second question is inappropriate in that the incidence of pedophilia in individuals committing child sexual abuse is approximately 50 percent. Failure to establish a sexual deviation diagnosis provides no evidence whatsoever that the individual has not been involved in illegal sexual activities.<sup>225</sup>

### JUDr. Marica Pirošíková, Agent of the Slovak Republic before the European Court for Human Rights

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<sup>223</sup> Hoyano, L., Keenan, C.: *Child Abuse: Law and Policy Across Boundaries*. New York: Oxford University Press, USA, 2010, s. 494.

<sup>224</sup> See Karkošková S.: The issue of child sexual abuse suspicions/accusations in the context of decision making on custody and parental visitations with children, *Judicial Revue*, 8-9/2014, p. 962.

<sup>225</sup> See also Karkošková S.: The issue of child sexual abuse suspicions/accusations in the context of decision making on custody and parental visitations with children, *Judicial Revue*, 8-9/2014, p. 962 et seqq.

## Ludmila Čírtková: Forensic psychological knowledge concerning domestic violence

### 1 Differentiation of the types of domestic violence

#### Intimate terrorism as a classic domestic violence variant

The first asylum home for battered women was established in the USA in 1974 (Wallace 2008). Others opened gradually. Asylum homes concentrated cases that opened up the problem of domestic violence in theory and practice. They presented horrendous stories of violence suffered by women on the hand of their husbands. Women suffered difficult-to-understand, repeated, long-lasting, intentional and dangerous assaults by their life partners.

#### A case illustrating chronic and serious domestic violence

Problems started after one year of a peaceful relationship. She was first hit in the face for having bought the wrong meat. After that just about anything was a good reason to beat her up: the fact that she washed the T-shirt he intended to wear, that she put on too much makeup, that she was making too much noise when washing the dishes, that she was unable to silence their crying child. Although she tried hard not to provide her partner with any grounds for violence, she was unable to prevent violent incidents. On the next day her husband asked her why she had a black eye and acted as if nothing at all had happened. He repeatedly explained to her that all she needed to do was to think the way he did and their marriage would be ok. After the wife returned to work, her partner prevented hitting her in the face so there would be no visible injuries. After he had assaulted her with a knife, he banned her from going to the doctor to have her cut wound treated. The violence culminated: he kicked her as she was lying on the ground and he strangled her as well. After one such incident she came to herself only when her husband was giving her a shower. For the first and last time he said he was sorry saying: "I'm sorry I overreacted." Shortly thereafter he hit her in the head and broke a tooth and forced her to glue it together. When she wanted to leave, he threatened her that she would end up in a wheelchair and that he would take their children away and that she would get run over by a car. Moreover, he banned her from contacting her parents. She was allowed to go only to work. The travel time to her job was precisely set and she was not allowed to come too late or too early. Her partner controlled the entire family. The incidents occurred also in front of their children. The wife ended up in hospital with a serious back injury. Because of her overall condition (suspiciously low weight, bad mental condition) she was examined by a psychiatrist and domestic violence was detected.

Similar stories were told by women who fled to asylum homes in 1970s a 1980s. Their stories shaped the first scientific notions of domestic violence. At the time it was defined as a chronic and intensifying physical, mental and possibly also sexual violence of a man towards his female partner. The severity (in terms of intensity and frequency) of assaults and related consequence served as arguments to criminalize domestic violence. In the Czech Republic domestic violence became a crime in 2004 when abuse of a person living in common home was included in the former criminal law (today it is Art. 199 of the Criminal Code).

For a long time expert knowledge about domestic violence was based on this form of domestic violence. Research projects focused on groups of female victims in asylum homes. This led to the stereotype of battered woman who is traumatized and helpless (Walker 1979). Over time, authorities were faced with victims who didn't fit this stereotype. It related to the implementation of laws aimed at *protecting* victims from domestic violence. The new legislation aimed at a timely intervention and domestic violence prevention. The element was perpetrator removal and victim support (in the Czech Republic it is

defined in the Act no. 135/2006 Coll.). In this new legal environment victims behave differently. They addressed the authorities, i.e. the police, intervention centers, and courts *sooner and thus with a “different type” of domestic violence*. It is far from true that domestic violence is always the classic form of severe chronic and escalating violence. The original stereotype is gone, and the compact picture of domestic violence victims has dissipated. Authorities now encounter an array of various types of both victims and domestic violence. Sometimes victims search for help already after the first small incidents. In some other cases it is not quite clear whether it is conflicting cohabitation or domestic violence.

Theory responded fast to the new facts. Research was undertaken aimed at empirically verifying the differentiation of domestic violence in its basic types, variants and patterns (Piispa 2002, Johnson & Leone 2005, Helfferich 2006). Today, the original classic domestic violence is only one of the variants. For understandable reasons it is the variant with the highest harm to society. Due to its characteristics, this type of domestic violence always meets the requirements to be classified as a crime of abuse of a person living in common home. In theory it is labeled as *partnership intimate terrorism* (Piispa 2002, Johnson 2004).

In his book “Types of domestic violence” written in 2008 Michael P. Johnson describes intimate terrorism as a highly traumatizing pattern that contains control and manipulation of the victim. The aggressor combines physical violence with emotional torment and forced sex without intimacy. This mix is an intentional tactic to create an asymmetric relationship. Motives of the aggressor cannot be found in low frustration tolerance, impulsiveness or the absence of self-esteem. The aggressor does not act under the “loss of control” even in the phase of the incident, but instead the aggressor’s actions are aimed at gaining or keeping control. Typical of this type of domestic violence is the fact that the incidents are unrelated with the conflicts between the partners. Conflicts in the sense of “confrontation of two more or less equal partners” are not frequent in the partnership. The reason is that the battered woman does not dare to oppose her partner’s decisions or orders. The single incidents are not preceded by quarrels or disputes between the partners. Intimate terrorism starters are usually various small stimuli (see the above example). The consequences of intimate terrorism on the victim are severe and complex and show both in physical and psycho-social dimensions. They are called battered woman syndrome. It is so-called victimization syndrome and not an official diagnostic unit in the sense of the International Classification of Diseases (ICD-10). The advantage of the above victimization syndrome consists in that it prevents psychopathologization of the victim and it does not label the victim a psychiatric case. Another advantage is the fact that it refers to the cause of the problem and admits a certain variability or range of specific symptoms. In various victims we may see various clinical diagnoses (e.g. post-traumatic stress disorder, depressive reaction or anxiety neurotic disorder), but also “just” a descriptive enumeration of victimization consequences that don’t fall under any specific psychopathological disorder (Gomola 2009).

### Other domestic violence patterns

Differentiation of domestic violence occurred in the 1990s. Johnson and Ferraro wrote in their breakthrough article: “The most promising future development is to distinguish various types of domestic violence. It is difficult to find practical questions, the answering of which would make the identification of the single domestic violence variants useless. The development of effective strategies is handicapped in that we are unable to distinguish various patterns of partner violence” (Johnson & Ferraro 2000, p. 948). Professional literature nowadays makes various attempts at classifying the types of domestic violence. Patterns described by several authors are listed below. These patterns are agreed on and their incidence is relatively frequent.

### **Mental torment in a partnership**

The English term **mental torment** (MT) is used for this serious form of domestic violence characterized by severe mental torment. Physical assaults of the victim are rare.

#### **Excerpts from the account of a mentally tormented woman:**

My husband controlled all I was doing. He scolded me for just about any pettiness, e.g. that I placed something one centimeter off from its previous position and I was labeled cheeky when I opposed him. He reproached me for e.g. not closing tightly the caps on creams, soda, ketchup and that I take our son out among other people and why we don't stay in our garden? When I wanted to discuss something I didn't like, he started enumerating his arguments saying that my debating endangered our common future. He was not to be convinced. I ended up apologizing, admitting that it was true that I didn't close the caps tightly, promising I would improve and after hours of debating I was completely mentally drained. I had to recite several times: I promise I will be nice, amenable, submissive, devoted, loyal, respectful, etc.

When my husband found my diaries, his interrogations started. I was not allowed to go to sleep. He told me he copied them to be used as evidence against me and that my thoughts and feeling were all in them. Based on that he started to terrorize me cruelly: When I was asleep at night, he would turn on the lights, rip off the blanket of me and he would hold my nose or pour water on me. I had to sleep naked and was not allowed to turn my back to him. I had no privacy left.

He wanted to kick me out and told me I should leave but without our children. When he learnt that indeed I wanted to leave, he started to put more and more pressure on me that I should behave the way he wanted me to, and unless I behaved that way, our relationship would never work. He asked me if I was aware of the things he was able to do, that a tragedy could happen and it would all be my fault...

In his opinion everybody outside the family was a stranger and I spend more time talking to strangers than to him, which was bad. So he started to do things on purpose: one day I drove to work. When I was finished working, the car was gone. He asked me to tell him in the slightest detail whom I had talked to during the day. When I refused he called the children: "Your mother doesn't want to tell me the truth about who she talked to, and so we'll call the police and she will have to tell them". The children started to cry and shout, they were scared that I would be taken by the police. He promised me that we would visit my parents since it was my father's birthday. I got ready and got in the car with the children; he came and said we would go nowhere because I didn't deserve it.

I started therapy. My husband didn't like it because he had no control over what I was saying. He claimed I was telling them lies. The outcome of the therapy was that we both should start marriage counseling. But we never went to see a couple therapist since he was opposed.

When I refused to put on a dog collar, he started to pull my hair so hard that I thought he would scalp me and he started smashing my head against the corner of the bed frame. He said that I would not say anything to anybody and twisted my hands and lay on top of me...

The described pattern is getting close to intimate terrorism (IT) due to its long duration and escalation tendency. The only difference is that the aggressor does not use physical violence and/or uses it seldom. The psychological substance is once again the application of power based on the tyrant's ideas and belief that an asymmetric relationship between the partners is ideal for a happy life of a couple. Cases of

mental torment (MT) are criminalized forms of domestic violence under Art. 199 of the Criminal Code. Empiric domestic violence research shows that mental torment in a partnership is rather the domain of women (see e.g. Buriánek & Kuchař 2006). This is probably true about light forms including episodic intervals of mental violence without escalation, alternating with a long phase of peace. Men are mostly accused of those cases that amount to mental torment.

### **Dysphoric domestic violence**

It is a specific variant derived from the personality type of the aggressor. For a classification in this subgroup, not only the description of violence is indicative, as it was the case in IT and MT. In this case the aggressor's personality is of more importance. Whereas in IT and MT it is believed that the aggressor's key motif is the application of power and control, in dysphoric domestic violence the main problem consists in the tyrant's dependent personality (Dressing & Gass 2009). The tyrant is continuously afraid of the partner's leaving and tries to prevent it by excessive control and by breaching the limits in the relationship. As a result, the dynamics between distance and intimacy that is the norm in normal couples is completely disrupted. The controlled and abused female partner (victims of this type of domestic violence are indeed women in most cases) reacts to the loss of her self-determination ability with attempts to rectify the relationship. In these conflicting situations, the frustrated dependent partner gets emotionally aroused and resorts to violent physical aggression. Professional literature refers to this variant as Dysphoric-Borderline-Violence (Johnson & Ferraro 2000).

### **Abstracts to illustrate dysphoric domestic violence:**

Right after the wedding he started limiting me by not allowing me to go places without him. We drove together to work. He called me all the time to check on me whether I was at work. Sometimes he unexpectedly came to see me. Outside of work he accompanied me everywhere. He didn't want me to visit my parents on my own. He didn't want me to meet my girlfriends. He said only if he came with me. He called me several times during the day, every two hours or so, he called me at home to check on me if I was there. Sometimes he would drop in unexpectedly. I was not allowed to go anywhere, because he banned me. When I went e.g. to the doctor with the children, he would check on us unexpectedly in the doctor's waiting room. My husband justified his behavior by saying he was afraid that something bad could happen to us. When there was a man around me, he immediately asked me if he was my lover. Sometimes he asked several times, and I had to swear on the death of my children. When I gave birth to our second child he wanted to visit his parents. I was tired and didn't want to go and that's when he assaulted me for the first time. He pushed me hard against the fridge which resulted in huge hematomas. The assault was so brutal that I started to fear him. My solution was that I started to agree with everything. Because of his character he had to leave his job. This made his behavior even worse. He used the stop watch to measure how long it took me to take our son to kindergarten. It took 12 minutes. When I came early he thought someone had given me a ride, when I came late, he thought that I had talked to someone. I was stressed when I had to wait for the lights to turn green. The worst thing of all was that he wanted sex on daily basis, not because he needed it, but he wanted me to get tired out so I wouldn't feel like having sex with someone else. Sex had to last at least 20 minutes, he checked the watch. My husband banned me from using makeup, shaving my legs and armpits, I was allowed to go to the hairdresser but only when he said it was ok. I was allowed to wash my hair only on Fridays. I was not allowed to take out the garbage when he was on the toilet because he would not be able to observe me through the window. We had to take a bath together. When he felt that I was too long in the shower, he called me names claiming I was trying to wash off the smell of my lover. I had to leave the door open also when I went to the toilet. Last week we were in

the supermarket and I moved a bit further with the cart. He yelled at me that since I was his wife I had to stand next to him. Since I was his wife I had to do what he told me to do, and I was not entitled to have an opinion on my own. He demanded that everyone should see that we were doing fine. He picked me up from work on a daily basis and I had to run to him and kiss him. And when this was not enough for him, he asked me to joyfully run towards him and kiss him...

Dysphoric domestic violence as a phenomenon is similar to MT (see the described case). When the dependent partner gets frustrated due to various risk factors (loss of job, decompensation of disturbed personality, abused partner's attempts to get out of the relationship) he may also slip into the IT form. There are practical reasons to keep dysphoric domestic violence as a separate type of domestic violence. It enables professionals to catch in a timely manner the profile of a dangerous partner who is likely to assault with a liquidating intent the leaving female partner and possibly their children. Removal of the aggressor or criminal prosecution without incarceration is not a reliable form of protecting the victims. Therapeutic support for the aggressor is recommended.

### Situational couple violence

The English term common couple violence (CCV) is the most frequently used in the literature. The manifestation of violence is related to the escalation of conflicts between the partners. This means that violence is not driven by an effort to gain *general control (power)* over the other partner, but rather by an effort to gain short-term control in relation to the problem at hand. Michael P. Johnson who described and introduced this type of violence, notes that this is the most frequent variant of violence between partners that is part of the normal picture of intimate cohabitation (Johnson & Ferraro 2000). At times, partners in every relationship attempt to gain power and dominance in relation to a specific problem at hand. CCV makes up for 80% of intimate partner violence and the remaining 20% are IT, MT and dysphoric domestic violence cases. M. P. Johnson also states that CCV is quite evenly distributed among women and men in the position of occasional aggressors (56% aggressors are men, 46% are aggressive women). CCV is characterized by a low number of incidents, with long peaceful phases and *there is no* violence escalation. It is obvious that this category may comprise variants described by other authors (Piispa 2002) as

- short history of domestic violence (domestic violence cycle occurred only a few times, the incidents cease and the partners usually continue a relationship)
- an episode in the past.

However, Johnson and his co-workers include in this group also cases, in which the partners switch their roles of victim and aggressor overtime. This means that the initial cycles of incidents due to their mildness and short duration (and for sure other factors) do not lead to fear in the victim, and thus do not lead to the installation of a permanent and deep unbalance in the relationship. If we summarize the findings, this pattern is completely off the original ideas and definitions of domestic violence because it lacks its key characteristics such as fear and learnt helplessness, an obviously asymmetric relationship between the partners and the typical violence cycle.

### Other variants of domestic violence

I'd like to mention two problems that are currently in the center of interest of researchers:

- **separation violence** and



- **coercive control violence.**

The term **separation violence** denominates in general aggression between the partners during separation or divorce. Basically it is a conflicting and “wild” termination of an intimate relationship. The main difference consists in the fact whether the relationship was marked by some form of domestic violence already in the course of its duration or whether the relationship was normal, ordinary i.e. there wasn't any variant of domestic violence. For such a constellation (i.e. no abuse and no aggression incidents) theoreticians use the term *separation-induced violence*. Separation-induced violence has its own dynamics and is a confrontation of two conflicting parties and usually ceases to exist after the divorce. Effective solution tools include e.g. mediation between the divorcing spouses (Tanha 2009). Due to practical reasons it is important to distinguish **separation violence** that is a **continuation** of previously occurring domestic violence. Such separation violence has completely different dynamics and dangers. It is in the cases of general (situational) couple violence that violent incidents **escalate** at the time of the separation. In cases of intimate terrorism and coercive control violence, on top there is the risk that separation violence may escalate into liquidating assaults directed at the leaving victim. From the perspective of the police, more accurate assessment of separation violence is needed e.g. to assess whether there is a need to provide the victim with temporary (short-term) protection and for reporting purposes.

**Coercive control violence** is the latest news in the theory of domestic violence (e.g. Stark 2007, Kelly & Johnson 2008). It is basically a variant of mental torment, for which is typical *permanent depressing pressure and non-standard control of the victim*. The classic cycle, i.e. the alternation of the phases of incident – reconciliation – peace/gradually growing pressure is missing. Instead, on-going manifestations may be seen in the relationship, such as threats, emotional abuse, isolation, denial of needs, downgrading, defamation and blaming, assertion of one's own privileges, economic abuse, pressure and threats. These manifestations lead to the installation of an *obvious relationship asymmetry*, i.e., the aggressor imposed on the weaker partner the position of a completely subordinated and servant puppet that must ask for permission for everything (including intimacy). Non-violent techniques not involving the use of physical violence are usually effective. In this type of domestic violence we usually encounter one or two physical incidents in the early stage of the relationship. They take the future victim by surprise emotionally to such a degree that later, threats and other non-physical coercive measures are sufficient. According to E. Stark (2007) victims are deprived of freedom and self-determination. The main psychological effects of this form of domestic violence are fear and anxiety of the tyrant, loss of self-confidence and self-esteem, depression and even post-trauma syndrome in serious cases. The victim can be compared to a cooked frog, whose timid and submissive behavior towards the partner seems to make little sense, especially in a context where the victim is successful in other areas, e.g. in their professional life.

**Table: Overview of domestic violence types**

1. Severe (criminalized) domestic violence patterns under Art. 199 of the Criminal Code

NAME	typical Symptoms	OTHER characteristics
Intimate terrorism	domestic violence cycle (i.e. long-lasting and repetitive incidents)	Committed by men in 97% of cases, by women in 3% of cases.
Classic original variant of domestic	relationship asymmetry physical violence is predominant	

violence	<ul style="list-style-type: none"> <li>• escalation</li> <li>• application of control and power</li> </ul>	<p>The victim develops battered woman syndrome.</p> <p>Starters of incidents are petty things.</p>
Mental torment	<ul style="list-style-type: none"> <li>• domestic violence cycle (i.e. repetitive incidents)</li> <li>• relationship asymmetry</li> <li>• mental torment is predominant</li> <li>• application of control and power</li> </ul>	<p>Severe forms of mental torment significantly limit the victim's quality of life. The victim is deprived of the ability to determine family affairs and self-determination.</p> <p>The victim may develop battered woman syndrome.</p> <p>Physical violence is rare, usually no serious injuries of the victim.</p>
Dysphoric domestic violence	<ul style="list-style-type: none"> <li>• domestic violence cycle (i.e. repetitive incidents)</li> <li>• relationship asymmetry</li> <li>• mental torment is predominant</li> <li>• application of control and power</li> <li>• jealousy</li> </ul>	<p>The tyrant shows dependent personality symptoms. Obvious efforts to keep the partner to oneself, to excessively control their whereabouts and contacts, effort at social isolation.</p> <p>The tyrant's frustration leads to violent incidents.</p> <p>The victim may develop battered woman syndrome.</p>

## 2. Other domestic violence patterns

Coercive control violence (CC)	<ul style="list-style-type: none"> <li>• permanent non-standard (excessive) coercion and control of the partner</li> <li>• relationship asymmetry</li> <li>• exceptional physical violence as a reaction to "opposition" of the oppressed partner</li> <li>• application of control and power</li> </ul>	<p>A variant of mental domestic violence, in which the cycle (i.e. alternation of peace and incidents) is replaced by permanent and excessive coercion, decimation and control over the weaker partner.</p> <p>Criminal prosecution of this variant depends on specific circumstances of the case.</p> <p>Battered woman syndrome is</p>
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		typical, i.e. the victim's inability to get out.
Common couple violence (CCV)	<ul style="list-style-type: none"> <li>• domestic violence cycle with presence of relatively long phases of peace</li> <li>• light forms of physical violence are predominant</li> <li>• starters of incidents are conflicting situations</li> <li>• relationship asymmetry oscillates over time and in its intensity or is not present at all in the relationship ("they take turns")</li> </ul>	<p>There is no permanent application of control and power by the aggressor. CV cycle can be "prolonged", i.e. violence occurs in episodes.</p> <p>Relationship asymmetry may occur in the hot phases of cohabitation, as well as a partial picture of battered woman syndrome.</p> <p>Intervention in the form of e.g. aggressor removal appears to be effective.</p>

From today's perspective, domestic violence is not a black and white phenomenon. There is no sense in talking about domestic violence without saying at the same time what type of domestic violence it is. Relatively frequent and typical patterns of domestic violence have been presented. Professional literature discusses also other less frequent forms of domestic violence. It must be emphasized that domestic violence cases are live stories that are developing in time in various ways. It is therefore possible to see one form become another form. Domestic violence differentiation is not a purely theoretical issue. Classification of domestic violence in more precisely delimited types has its practical reasons. First of all, it can provide a more effective solution to live developing stories, i.e. it enables to find appropriate intervention strategies. Mental torment is in the professionals' center of attention at present. Mainly the discovery of permanent coercive control violence without prominent physical violence towards the victim draws professional attention. There are discussions concerning legal assessment of this variant and clear descriptors (i.e. identification symptoms) of mental violence.

### Illustration

After divorce, the former partners stayed in the same family house. Because of the divorce, the ex-husband was making the life of his former wife miserable with constant harassment and terrorism. The civil court had to handle a case of domestic violence in the form of mental torment (i.e. mental violence under Art. 751 of Act No. 89/2012 Coll.), in which the female petitioner requested that the court issue a decision, based on which the defendant would be excluded from common home because of cohabitation unbearable for the petitioner due to mental violence against her person at the hand of the defendant. The petitioner stated to the court that based on the defendant's behavior described in the petition (derision, mocking her efforts at keeping the home in order, disregard for common things, consumption of the food belonging to the petitioner and their children, intentionally preventing her from parking in the garage in the winter months, humiliation of her person in front of the children....), which is long-lasting and repetitive, she had to seek expert medical attention. The psychiatrist stated to the court that she was in his care for anxiety depression disorder.

There is no doubt that systematic harassment and terrorism may cause a number of mental problems to the victim including anxiety depression disorder. For a legal assessment of mental violence, however, the consequences and the effects on the victim may not always be the most convincing arguments. What is important is the assessment of the intensity or the degree of mental violence. In this case it was possible to prove that the petitioner lost completely the possibility to control her life (and make choices about her activities) because all she did was react and put out the consequences of the malicious willful acts on the hand of the defendant. The defendant prevented her from living a normal daily rhythm (drive the children to their soccer practice, serve them dinner, etc.) and thus significantly decreased the quality of her life as well as that of the children. The defendant made cohabitation intentionally unbearable.

## 2 Current trends: interactive approaches to domestic violence

Interactive approach is a quite logical outcome of domestic violence research. Lenore E. Walker, a pioneer in the study of domestic violence and the founder of the Domestic Violence Institute, targeted especially severe and most serious variants of partnership abuse. This was reflected also in her first publication in 1979 dedicated to battered women. The topic drew significant attention due to many legitimate reasons. The avalanche of research during the following years brought a more detailed and differentiated insight in the issue of cohabitation of men and women involved in intimate relationships. Next to abuse, researchers describe also more complex variants of partnership violence. It is typical for some of them that both partners contribute to a conflicting relationship. For others it is typical that the victim completely *inadvertently* contributes to the strengthening or repetition of violent episodes in the cohabitation with a *problematic* partner.

The main lesson learnt from over 40 years of research may be summarized in this statement: It is important to distinguish *abuse* (i.e. intimate terrorism or coercive control violence) from other forms of violence in a partnership. The original position that “*domestic violence always amounts to abuse*” and crime proved unsustainable. Differentiation and correct diagnosis of violence is possible based on *partnership development analysis on a timeline*. Such an analysis includes the *behavior of both partners*.

Janet Johnston and Linda Campbell (1993) conducted two studies, in which they studied couples in the phase of conflicting divorces and ongoing custody disputes. They worked with a total of 140 parents. Based on the history of their collapsing marriages, the authors distinguished 4 main types: battering by males, male-controlled interactive violence, female-initiated violence and separation or divorce violence. Next to abuse of the female partner, researchers confirmed once again existence of mixed violence in a couple.

How did they describe **female-initiated violence** and **male-controlled interactive violence**? In the case of female-initiated violence, researchers have observed that the woman’s internal tension was the starter of conflicts. The woman is unhappy about how her partner is (un-)able to provide for her or the family. The woman reproaches him for his passiveness or inability, scolds him frequently, she may throw objects at him, etc. With her manifestations of aggression she wants to provoke the partner to activity according to her ideas. The variant “male-controlled interactive violence” starts with confrontations and arguments that lead to mutual assaults between the partners. However, the physically stronger man is successful and he enforces his will with violence. This scenario is repeated throughout the cohabitation. In such a conflicting relationship there is the presence of *repetitive violence*, but there is no *abuse*.

The substance of mutual violence in a couple is that it is related to conflicting situations and conflicting interaction. Both partners may resort to violence to assert their *objectives or interests*, which are at the basis of the conflict with the partner. To the contrary, abuse is a deliberate, intentional and systematic application of control and power that is based mainly on the aggressor's *character*. Therefore, abuse is described as *characterological* violence showing classic dynamics of emotional abuse (Friend et al. 2011). The main difference between situational and "characterological" domestic violence consists in the starters and motivation that lead to the application of violence.

Starting from the turn of the centuries there are stronger voices *about the necessity to study both partners and also the dynamics of the relationship development if we want to correctly understand and assess the current situation* (picture) that the judiciary, social services or intervention centers are confronted with. An interactive, dynamic approach is connected also with a change in the terminology. The term "domestic violence" is no longer used and instead the term "**intimate partner violence**" (IPV) is used. The change in the terminology itself signals that the newly introduced term covers various forms of violence between intimate partners, and not just unilateral abuse (Friend & Bradley & Thatcher & Gottman 2011, Kelly & Johnson 2008, Kuijpers & van der Kaap & Lodewijks 2011).

Probably the biggest news in IPV research are contemporary studies that focus on the risk factors in the victim that increase the probability of domestic violence incidence in a partnership. This opened room for previously rejected and questioned dyadic and/or interactive approach to domestic violence.

Risk factors are perceived as circumstances that usually play an important role in the search for domestic violence causes. It is interesting that the same risk factors may apply both for the victim and the perpetrator. The following enumeration lists circumstances that may lead to the role of the victim (i.e. to victimization) as well as to the role of the perpetrator (i.e. to aggression). Such individual factors include e.g.:

- low self-esteem or self-respect
- depression
- hostility and anger
- childhood abuse
- social isolation
- emotional dependence and feelings of insecurity
- belief in strictly divided gender roles
- committing mental violence
- strict discipline in the childhood
- borderline personality features.

Domestic violence takes place in a relationship. It is therefore evident that the behavior of both

partners (i.e. of the aggressor and of the victim) influences the specific dynamics of the relationship including the manifestations of violence. The subject of current theoretical ideas and research is the question what influence has the victim on the *continuation* of violence in the relationship. In other words, it is the basic question whether the victim may *inadvertently* contribute to the repetition or continuation of violent incidents on the hand of the partner, by reacting in an “incompetent” manner to the initial manifestations of violence. It must be emphasized that such research does not put in question the typological approach. Only the question of revictimization is in the center of attention. What is the impact of the victim’s characteristics and behavior on further development of the relationship? It is believed that studies focused on these aspects could influence the intervention strategies. Victims could profit from better therapeutic programs as they could learn to better control their partnership life.

The topic of what is the victim’s role in the repeating of violence in the relationship was opened up by a team around the researcher E. B. Foa. The team’s article (Foa & Cascardi & Zoellner & Feeny 2000) is one of the top 10 most quoted works in this field of research. Foa and her team believe that the partner’s violence leads to “mental problems” in the victim. The risk of revictimization increases in an insecure and stressed out partner, since the victim’s ability to handle the partnership life decreases.

Current research (Kuijpers & van der Knaap & Winkel 2011, Kuijpers & van der Knaap & Lodewijks 2011) indicates that the victim’s influence on the (dis-)continuation of violent incidents depends on the type of conflicting cohabitation. The Dutch researchers claim that a typical conflicting cohabitation includes an emotionally frustrated man and a woman with a negating bond. To put it in simple words: the man feels dissatisfied in terms of his needs and ideas about intimate life and he responds with aggression, which leads to repetitive negating behavior of the woman. She avoids his vicinity and loses interest in him. A man’s aggression towards a negating partner is basically a dysfunctional attempt at strengthening the partnership.

It continues to be true that abuse or severe domestic violence patterns are characterized by *unilateral violence*. In these cases the victim practically doesn’t have a chance to contribute to the shaping of the relationship or to co-decide whether it will be (dis-)continued. The victim has no possibility to negotiate with the partner since the aggressor is not interested. Instead, terrorism comes in place as described by M. Johnson in 1995.

Many researchers (Johnson & Ferraro 2000, Stark 2007, Füllgrabe 2011) emphasized the fact that over time in abuse cases there may be fewer physical assaults because the controlling partner only needs two or three violent incidents to gain power over the other partner. “Only” mental torment prevails afterwards. The victim obeys, suffers, feels helpless and doesn’t dare to attempt to rectify the relationship. This relationship development dynamic is typical of a cohabitation pattern that E. Stark (2007) called coercive control. For external observers the victim’s behavior appears counter-logical and counter-intuitive. It is up to victimological expertise to explain to the court why the victim allows being ridiculed and harassed by the aggressor if the victim is not exposed to physical assaults. Vulnerability of domestic violence victims can be caused by e.g. young age, absence of social support, previous victimization, mental or other handicaps etc. (Dutton 2002).

Unilateral terrorism is typically present also in *separation violence* in conflicting divorce cases. The jilted ex-partner initiates (prepares and implements) smaller or bigger events to damage the quality of life

of the victim in a targeted manner. He controls the victim's life e.g. by punching the victim's car's tires, discarding her cosmetics or prescription medication, filing complaints to authorities, etc. As a result, the victim loses control over one's life since she is unable to influence when she will be faced with staged problems. A significant share of the victim's day is filled with coping with the "nasty surprises" staged by the ex-partner. The harassed partner has no idea what and when to expect of the other partner. This results in permanent internal tension with all the psychosomatic consequences (depression, anxiety, etc.). The victim's possibility to influence or stop the violence is limited in these cases.

How to implement research knowledge about IPV in practice? This remains an open question for the time being.

IPV typologies remain little clear for the time being in terms of legal or socio-legal practice. Oftentimes approaches of various authors differ. Easy-to-use diagnostic tools and manuals enabling diagnosing the IPV type are missing. Moreover, researchers themselves point out to some complications in the practical application of the knowledge gained in research:

- not always is it a discreet IPV type in live cases,
- in various types (e.g. separation violence) various intensity of aggression manifestations are found,
- there is always a risk of wrongly assessing a specific case, etc.

**Face to face these risks, some experts are of the opinion that in practice the premise must always be made that the partner is being abused, until proven otherwise.** Their arguments are that underestimating IPV severity in a live case may endanger the victim's life and health. There are even authors who criticize interactive approach and its typologies claiming that they belittle the abuse of women. For example, Clare Dalton (1999) in her criticism of IPV typology raises the question: How frequent and severe should physical and mental violence be to amount to abuse? Some believe that IPV typologies help the lawyers of violent men to defend their clients in the courtroom by saying that it was not abuse, but merely conflicting cohabitation or even repetitive female-initiated violence in their case.

Regardless of the above theoretical and ideological confrontations, it is valuable for practice to accept the knowledge that domestic violence (or IPV) is a layered phenomenon and the cases are not all the same. Assessment of a specific partnership cohabitation case requires an analysis of the development of the relationship and of the behavior of both partners over time. Such a picture taken over time is called the **IPV calendar**. It can help detect that the couple experienced various types of IPV (e.g. conflicting cohabitation, abuse) throughout their cohabitation (Capaldi & Kim 2007). Intervention center staff just like other professionals should assess the following aspects in assessing a specific case:

- situational versus characterological violence
- episodic versus continuous (chronic) violence
- low or high intensity of violence

- attempts at conflict resolution by the victim
- aggressor's behavior following incidents
- incident starters or triggers (conflict versus application of control and power).

The aim of the IPV calendar is to map the partnership development on a timeline. This means that it starts with the phase when the partners first met and courtship. The following phases depend on the dynamics of the relationship development. The onset of the first conflicts, the incidents and the installation of control over the victim are usually significant points on the timeline. In any case, in severe domestic violence forms the IPV calendar should indicate when and how a partial or complete relationship asymmetry occurred.

### 3 Assessment of partnership abuse

From the legal perspective, abuse comprises so-called abusive torment inflicted intentionally by the tyrant to the victim. In general, the perpetrator may abuse the victim physically, but also by means of mental or sexual violence or neglect. In general, the abuse causes respective experiences in the victim. The abused person goes through so-called perception phase, in which the victim feels pain and emotional chaos at first (shame, anger, remorse, humiliation). Gradually there is also fear and e.g. sleeping disorders, fits of crying, alternation of emotional numbness and emotional overstimulation, the victim's trust in people decreases, etc. Finally, the abused person starts to feel as a victim.

Perception processes are prevalently emotional and intuitive, however, in most cases they correspond to objective reality. To put it in simple words, an individual perceives his/her situation as torment, i.e. he/she feels misery and deprivation and shows distinctive bodily and mainly mental symptoms. We can imagine also lighter or borderline forms of abuse, when due to various reasons, the victim's perception processes are complex e.g. due to a relationship of trust to the tyrant. Then the victim hesitates as to the interpretation of the suffered abuse, the victim is unable to give a clear meaning to the abuse, playing down the abuse by saying e.g. that it is a special manifestation of love. We can also come across the opposite variant in domestic violence. One of the partners feels that the conflicts and quarrels in their intimate life are so intense to label them abuse in his/her perception. He/she decides in bona fide to file a criminal complaint, although in reality it is not abuse.

In unclear cases it is appropriate to clarify the details of the course of the intimate partnership and to have the existing disorders analyzed by an expert. In these cases sworn experts are usually called in by the court. Experts in psychology don't express their opinion concerning legal issues; never the less they provide the law enforcement authorities with valuable information enabling to solve them. Let me illustrate this based on the following case:

An expert psychologist was called in to assess the cohabitation of a married couple. The expert was asked to answer the question whether it is conflicting cohabitation or domestic violence. If the latter case was true, it was to be established what type of domestic violence it is based on the current state of knowledge (theory). The court asked the expert to interrogate the victim during the main hearing. The sworn expert was provided with the complete criminal file to prepare this interrogation. This **atypical assignment** was the court's reaction to the development of the case. The first expert that had been called in to cast light on the psychological facts concluded that it was conflicting and disastrous marital cohabitation, but not domestic violence. Because the court had doubts concerning the expert's conclusion,



the court commissioned another expert opinion. It needs to be emphasized that it was proven in the case that there was long-lasting and repeated, obvious, mid-severe physical violence between the spouses, supported with evidence in the form of medical reports. At that point, only some symptoms confirming domestic violence had been proven (incidence of violence, repeated incidents over a long period of time). These symptoms can at the same time appear also in so-called *conflicting relationships of the type "common couple violence"*. Key definition symptoms of severe domestic violence in the sense of *abuse* had not yet been the subject of assessment in a psychological expert opinion. **Differential diagnostic symptoms** in this regard based on the domestic violence theory include mainly the following:

- presence of distinctive relationship asymmetry
- clear-cut and long-lasting role division of the aggressor and the victim
- triggers of violent incidents must be placed on the axis "conflicts versus control, power".

The called in sworn expert focused exactly on the clarification of these circumstances in his interrogation of the female victim during the main hearing. After assessment of the victim's testimony and forensic psychological analysis of the criminal file, the expert was able to formulate a conclusion that the originally conflicting marital cohabitation (mutual encounters of two more or less equal parties) developed under the influence of further circumstances in an asymmetric relationship with a clear-cut and unchangeable role division. Violent incidents were not the result of a conflicting situation between the partners, but were triggered by petty starters (the tea was too hot, the clothes took too long to dry, the remote control was misplaced, etc.), which proves that the motive was power and control, which is typical of so-called *characterological domestic violence* or abuse. In his assessment the sworn expert characterized in detail the phases of marital cohabitation and reached the conclusion that the last phase of their cohabitation amounts to abusive domestic violence (theory refers to it as intimate terrorism).

#### Forensic psychology guidelines used to assess abuse

First of all it must be stated that the assessment of the dynamics of the development and quality of the relationship between the alleged *perpetrator and his victim* is for the time being an **atypical assignment**. Classic psycho-diagnostic methods do not offer sufficient support to resolve it. In this regard the sworn expert's opinion is in a way *a scientific forensic psychological study* (Greuel 2004). To answer the assigned question it is necessary to work with the current state of relevant knowledge, e.g. domestic violence theory that delimits diagnostic symptoms and also the classification of various types – starting from abuse and ending with e.g. separation violence. Comparison of patterns defined in theory with the assessed case enables the expert to reach a conclusion whether the partners' cohabitation shows the proper symptoms and the case may amount to severe domestic violence and/or abuse. The expert must keep in mind that **it is not his/her prerogative to state opinions concerning legal issues** and he/she may not resort to legal assessment of the found facts. In their assessment experts may merely state what forms of repeated violence (physical, mental, sexual, etc.) occurred in a given relationship, whether they developed based on relationship asymmetry and what is the corresponding pattern or type of domestic violence.

Generally speaking, assessment of abuse in partnerships may be referred to the developing scientific field of **psychotraumatology** (Fischer & Riedesser 2009, Resick 2003, Butollo & Hagel 2003). This field of study describes subjective and objective trauma symptoms among other things. Differentiation between

trauma type I and trauma type II is made also. *Abuse* for its repetitiveness and long-lasting duration is a typical illustration of trauma type II (for more details see e.g. Čírtková 2014).

Particia A. Resick is one of the pioneers of psychotraumatology. She drew attention 30 years ago with her study of rape consequences. In her 2003 psychotraumatology publication she stated that first of all, stress and trauma need to be distinguished. Lack of money, divorce or losing one's job are examples of highly stressful life situations. Also partnership quarrels, various willful acts and disputes fall in the category of stress. The term trauma is used exclusively for situations that *exceed* stress dimensions. What characteristics must a situation have to be labeled traumatizing? The degree to which the *continuity* of an individual's life is endangered is considered a key indicator. Trauma is life-threatening or it threatens an individual's mental or physical integrity leading to strong feelings of fear (dread), helplessness and terror (Butollo & Hagel 2003). For example, incest or sexual abuse threatens an individual's mental identity, and therefore they are metaphorically called "murder of the soul". An interesting symptom is the so-called *trauma tongs*. This term denominates the hopelessness of the situation through the victim's eyes, i.e. the victim doesn't have or doesn't see any option to escape the threatening traumatizing situation. Because abuse is a traumatizing situation, a specific case must meet the above criteria. Abuse includes such forms of violence that are threatening to the victim's life continuity (or healthy development).

When this knowledge is applied to domestic violence, it means that the tyrant controls information received by the victim and the victim's physical and emotional state. It is expected in a *battered woman* that she was exposed to situations when she experienced justified fear for herself (and the children). It is also expected that she experienced the trauma tongs. During an expert examination a battered woman should spontaneously report corresponding experiences. For example, in the course of a structured interview on partnership cohabitation with an alleged tyrant the victim should describe incidents that got stuck in her memory, forming experience dominants. Exactly these experience dominants may then be analyzed and assessed under the criteria set by domestic violence theory and/or psychotraumatology. The following example will illustrate this issue:

The victim filed a criminal complaint against her husband for *abuse of a person* living in common home. During the first expert assessment she underwent a test to examine her personality with the conclusion that the woman shows a typical profile of battered woman and suffers from long-lasting and severe mental consequences. The second examination followed after a relatively short time. During the examination the woman stated that

- she is not afraid of her ex-husband and she has never been afraid of him, after all, he was not even able to complete his suicidal attempt, he just wanted her to feel sorry
- now she's happy at work and she's got a wonderful boss
- she enjoys tranquility with her children, they go on trips, she goes swimming, she enjoys life
- she has a "friend" and also her son would like a new daddy
- she sleeps well and doesn't have any health problems.

Neither the other methods confirmed the outcome of the original expert opinion. E.g. the test of relationship asymmetry showed that the victim was able to determine her life and the life of the family (e.g. she was allowed to take the children on trips on her own, she decided about her job, both partners

shared household chores). Furthermore, in describing her cohabitation with her husband she stated that the manifestations of violence were preceded by mutual conflicts and quarrels. After the first conflict due to her alleged cheating she left their common bedroom. From that time on the cohabitation of the spouses continued to deteriorate. She considered the following instances the most serious manifestations of violence and the worst incidents:

- he kept yelling at her and the children all the time
- he threw a cup of tea at her
- he followed her, controlled her, called her at work with extreme frequency
- he slapped her on Valentine's Day
- he shuffled his slippers
- he opened the window at her.

The above manifestations were subjectively perceived by the victim as *abuse of her person*. She was undoubtedly unhappy in the cohabitation with her husband. Yet it is obvious that the described violence does not meet the criteria for a traumatizing experience. The development dynamics and subsequent collapse of the partnership do not correspond with the picture of partner abuse as described by current theory (Fried et al. 2011, Johnson & Leone 2005, Kelly & Johnson 2008). In this case, even important definition signs of severe domestic violence were missing.

### Abuse consequences

Assessment of abuse consequences in domestic violence cases is definitely not a routine issue. Why this is the case is explained by the knowledge gained by current **victimology**. It may be summarized in the following points:

- abuse consequences are individual
- abuse consequences to a significant degree depend on the victim's personality, not just on the forms of abuse (see research on the D type personality)
- trauma is a process; also post-victimization influences matter (secondary victimization is harmful, social support is curative).

Typical abuse consequences include mainly posttraumatic stress disorder (PTSP) and adaptation disorder. In domestic violence victims the above consequences may not be considered a rule however. Current research shows that a higher probability of long-lasting consequences in the form of PTSP is found in those abuse victims who show certain personality peculiarities. Insofar, more serious consequences have been confirmed in victims with borderline personality features and victims with so-called D personality. The letter D stands for "distressed". This concept was authored by Johan Denollet (2000). In his opinion, the main features of such a person's disposition are prevalent negative emotions and social inhibitions manifested e.g. in the inability to express emotions.

Next to classic diagnoses pursuant to ICD-10 or DSM-V, the consequences of victimization (abuse) are also so-called **victimization syndromes**. Among the best known are e.g. “rape trauma syndrome” or “battered woman syndrome”. Victimization syndromes describe and explain mainly the victim’s **counterintuitive** behavior and experiences. They describe the *strange victimization consequences* that are usually contradictory with the generally believed myths about the “right” victims. Also the original understanding of the **battered woman syndrome** (BWS) by L. Walker (1979, 1984) corresponded with this approach. Walker described BWS using the following four characteristics:

1. The woman is convinced it’s all her fault.
2. The woman is unable to transfer responsibility for the violence on someone else.
3. The woman is concerned for her life and that of her children.
4. The woman believes that the tyrant is omniscient and omnipresent.

The statement that the victimization syndrome is present helps to answer the following questions: why did the victim allow it, why did the victim not leave, why did the victim get a weapon, etc. Professionals and/or sworn experts may explain better to the law enforcement authorities by means of victimization syndromes apparently illogical, paradoxical or otherwise “unreasonable” victim’s behavior or experiences that occurred in the course of a *specific* victimization or followed during the post-victimization phase. E.g. apparently not understandable sympathy for the tyrant or identification with the aggressor may be a reaction to so-called trauma tongs, i.e. experiences of helplessness towards the abuser. This is illustrated by the following example:

The accused was convicted of serious abuse of his female intimate partner and sentenced to 4 years in prison. It was a truly serious case of domestic violence, which is evidenced also by the fact that the accused was detained already during the pre-trial phase. Some 18 months after the final verdict the court discussed whether to reinstate the proceeding due to a new fact, which was a one-page typed letter signed by the ex-partner. The letter claimed that the victim had made it up out of jealousy. Her injuries that required repeated medical attention and even hospitalization were allegedly self-inflicted. In the court room the young woman seemed very unhappy, avoiding eye contact with the convict escorted in shackles. She confirmed to have signed the letter that had been brought to her by the convict’s new partner who was also present at the hearing and swore loudly at the ex-partner. The court had called in a sworn expert to the hearing who had examined the victim in the original criminal proceeding. The court asked the expert to explain the victim’s behavior. The expert testimony was based on the explanation of the *victimization syndrome of battered woman*. With its help it was possible to explain that the battered woman’s fear of the former partner was greater than her fear of punishment for giving false testimony.

### Conclusion

Traditional role of sworn experts – psychologists was aimed at examining the personality (originally) mainly of the perpetrator and it was logically based mainly on the knowledge from clinical psychology and psychodiagnostic methods (mental tests and interviews). The output consisted in the assessment of the perpetrator’s personality. We’ve been experiencing recent changes. With new domestic violence and stalking crimes quite naturally new questions arise that need to be clarified in the criminal proceeding. There is also more interest on the hand of the society in crime victims, which has led to victimology

development. There is also a need for experts to clarify victim-related issues that are important for the purposes of criminal proceedings. Consequences of these trends are manifested in the shift (or expansion) of the role of psychology experts from classic assessments of the perpetrator's personality towards forensic psychological topics. Based on international theory and practice, the agenda of forensic psychological experts includes e.g. assessment of credibility of the victim's testimony (Volbert & Dahle 2010, Herbst 2012, Greuel 2004), victimological expertise, clarification of the dynamics of the relationship between the perpetrator and the victim mainly in cases of sexual and domestic violence against women (Long 2007, Turvey & Petherick 2009).

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## Marica Pirošíková: Crime victims' rights from the perspective of ECHR case law

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”) does not include a specific provision regarding crime victims' rights (hereinafter referred to as the “victim”). Nevertheless, the European Court for Human Rights (hereinafter referred to as the “Court”) drew guarantees in its case law from the Convention's single articles, which have a significant impact on the position of the victim in the proceedings held before domestic authorities. Should the above guarantees be violated by domestic authorities, the victims may lodge a petition with the Court.<sup>226</sup>

### 1 The Right to Life

#### 1.1 Duty to protect the right to life (substantive limb)

As regards the right to life, the Court noted that the first sentence of Art. 2, section 1 imposes an obligation on the State not only to refrain from intentional and unlawful deprivation of life, but also to adopt appropriate measures to protect life of individuals who are subjects to its authority (see the judgment *L.C.B. v. the United Kingdom* of 9 June 1998, par. 36). This commitment includes a State's primary obligation to ensure the right to life by implementing effective criminal law provisions deterring from commitment of crimes against individuals and by having in place a law enforcement system to ensure prevention, suppression and punishment for the violation of the above provisions. At the same time, this commitment may under certain circumstances arise into a positive obligation of state authorities to adopt preventative operational measures to protect the life of an individual where it is known, or ought to have been known to them in view of the circumstances, that he or she is at real and immediate risk from the criminal acts of a third party (see the judgment *Osman v. the United Kingdom* of 28 October 1998, par. 115). In the cases *Kontrová v. Slovakia* (see the judgment of 31 May 2007) and *Opuz v. Turkey* (judgment of 9 June 2009), a positive obligation shall arise based upon the finding that the state authorities knew or should have known at the time about the existence of an actual and immediate threat posed onto the life of a specific individual due to the crime activities of a third party and they failed to adopt measures within their authority that are deemed reasonable and appropriate to prevent the threat.

The applicants in the case *Branko Tomašić and Others v. Croatia* (judgment of 15 January 2009) were the relatives of the victims. On 15 August 2006 M.M. shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself just one month after his release from prison where he had served a sentence for repeatedly threatening M.T. that he would kill her, himself and their child. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence. The applicants complained, under Article 2 (right to life) and Article 13 (right to an effective remedy), that the State had failed to take

<sup>226</sup> As regards the Slovak Republic, in case of delays during the investigation, a complaint with the Constitutional Court objecting a violation of the positive obligations under Articles 2, 3 and 8 of the Convention may be filed in the course of the proceedings (see e.g. the case I. ÚS 72/04, in which the Constitutional Court stated a violation of Article 3 of the Convention, ordered the relevant police body to act in the matter and awarded the applicant with SKK 100,000 as just satisfaction). Before a constitutional complaint, remedy may be sought by filing a petition and a repeated petition under the Prosecution Law (see the case *Zubaľ v. Slovakia*). In some instances due to specific circumstances of the case, the Court rejected that filing of a constitutional complaint should be conditioned by a prior exhaustion of the above remedy (see *Koky v. Slovakia* and *Puky v. Slovakia*). If a criminal proceeding is discontinued, in case of doubts concerning effective investigation, it may be requested with reference to the above Convention Articles that the Constitutional Court abolish such decision, whereas the law enforcement authorities shall be bound to proceed in line with the legal opinion of the Constitutional Court (see e.g. the case III. ÚS 86/05). If no remedy is achieved through the proceeding before the Constitutional Court, a petition with the Court may be lodged and priority review of the application in consideration of the severity of the case may be requested.



adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths. The Court held that there had been a violation of Article 2 of the European Convention on Human Rights on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the mother and her child. The Court noted in particular that the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them. The Court furthermore noted several shortcomings in the actions of domestic authorities: although the psychiatric report drawn up for the purposes of the criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated; it resulted from the submitted documents that the treatment of M.M. in prison consisted of several sessions with the prison's staff members, none of whom was a psychiatrist; the relevant regulations nor the court's judgment specified what treatment should M.M. undergo; nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free. The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T., in violation of Article 2. The Court held that there was no need to examine separately the complaint under Article 2 regarding the failure of the State to carry out a thorough investigation into the possible responsibility of its agents for the deaths of M.T. and V.T. For the determined violation the Court awarded the applicants 40,000 EUR in respect of non-pecuniary damage and 1,300 EUR in respect of legal costs and expenses.

In the judgment *Kontrová v. Slovakia* (judgment of 31 May 2007) the Court noted that in the applicant's case the police had failed to meet its duties under the applicable criminal code provisions and service regulations, such as: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. The Court deemed proven that the shooting of the applicant's children by her husband had been a direct consequence of the police officers' failure to act. The above was de facto stated already by the Supreme Court upon abolishing the decision of the Regional Court of 21 January 2004 and the judgment of the District court of 20 October 2003. The District Court dismissed the summons. It found that the criminal offence of dereliction of duty presupposed a complete or enduring failure to discharge the duty. Merely impeding the discharge of the duty was not enough. It found that in the present case the officers' actions did not amount to such a failure to discharge their duty and that the connection between their actions and the tragedy was not sufficiently direct. The Regional Court dismissed an appeal against the judgment. The Supreme Court took action on the merits based on a complaint in the interest of the law lodged by the Prosecutor General. The Supreme Court found that the lower courts had assessed the evidence illogically, that they had failed to take account of all the relevant facts and that they had drawn incorrect conclusions. The Supreme Court found that it was clear that the accused officers had acted in dereliction of their duties. It concluded that there was a direct causal link between their unlawful actions and the fatal consequence. The Supreme Court remitted the case to the District Court for reconsideration and pointed out that, pursuant to Article 270 Art. 4 of the CCP, the latter was bound by its above legal views. The District Court found officers B., P.Š. and M.Š. guilty as charged and sentenced them to, respectively, six, four and four months' imprisonment. The Court held that the applicant had no effective remedy available on the national level, through which it would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death, which was the direct consequence of the Government's failure to meet its positive

obligations under Article 2 of the Convention. In the proceedings before the Court the Government argued that an action for protection of personal integrity was a remedy that the applicant should have used in respect of her complaints under Articles 2 and 8 of the Convention in order to comply with the requirement to exhaust domestic remedies pursuant to Article 35 Art. 1 of the Convention. In support of this argument, the Government relied on judicial decisions and maintained that these decisions showed that the action in question was available to the applicant both in theory and practice. The Government argued that in an action in the Nitra District Court (file no. 10C 142/2002) a mother claimed, among other things, financial compensation for non-pecuniary damage in connection with the death of her daughter. She relied on the previous conviction for manslaughter of her daughter. In a judgment of 15 May 2006 the District Court accepted that the plaintiff had suffered damage of a non-pecuniary nature and awarded her 200,000 SKK by way of compensation. In an action in the Žiar nad Hronom District Court (file no. 7 C 818/96) a mother claimed, among other things, financial compensation for non-pecuniary damage caused to her and her son in connection with the latter's violent death. She relied on the defendant's previous conviction for the extremely violent and racist murder of her son. The District Court concluded that the plaintiff and her son had suffered non-pecuniary damage and in a judgment of 9 September 2004 it awarded the plaintiff 100,000 SKK by way of compensation of the non-pecuniary damage she suffered and 200,000 SKK by way of compensation of the non-pecuniary damage her son suffered. On 19 January 2005 the Banská Bystrica Regional Court upheld the first-instance judgment. The Court dismissed the Government's objection on the failure to exhaust domestic remedies. It found that there was no sufficiently consistent case-law in cases similar to the applicant's to show that the possibility of obtaining redress in respect of non-pecuniary damage by making use of the remedy in question was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law. The Court observed at the admissibility stage that there had been some development in academic understanding and judicial practice in respect of the scope of actions for protection of personal integrity. The events which gave rise to the present case occurred in 2002. The decisions on which the Government recently relied date from 2006. Any relevance they might possibly have in respect of the present case is therefore reduced by the fact that that they were taken after the relevant time.

For the determined violation the Court awarded the applicant 25,000 EUR in respect of non-pecuniary damage and 4,300 EUR in respect of legal costs and expenses.

Consequently the Slovak Republic was found guilty in the case *Kontrová* due to the fact that the Court agreed with the applicant's allegation that no effective national remedy was available to her in relation to the objected violation of the right to life, through which she would have been able to apply for compensation of non-pecuniary damage.

In the case *Furdik v. Slovakia* (decision of 2 December 2008) the applicant *inter alia* objected violation of Article 2 of the Convention in that the state involved failed to adopt necessary measures to protect the life of his daughter who died as a result of injuries which she sustained while climbing the Široká veža peak in the High Tatras. He claimed that Slovak law did not provide sufficient guarantees to ensure efficient organizing of medical rescue service in similar cases. Mainly, no specific time limit was set, during which the rescue service would be obliged to get to the injured person. In the applicant's opinion it should have been within 10 - 15 minutes from when an emergency call was placed, with the exception of vis major cases. The applicant claimed that he would have been able to successfully demand compensation before national authorities only if national law incorporated a similar guarantee. The Government argued that the applicant had not exhausted domestic remedies as required by Article 35 Art. 1 of the Convention. In particular, he could have sought redress by means of an action under Act 514/2003 as well as by means

of an action for protection of personal integrity under Articles 11 et seq. of the Civil Code. As regards both the decisions of civil courts on such claims and the above conclusions reached by the prosecuting authorities, the applicant could have ultimately sought redress before the Constitutional Court pursuant to Article 127 of the Constitution. The Government maintained that, in any event, domestic law contained comprehensive and sufficient guarantees for ensuring effective and timely assistance to persons in emergency. It was not realistic to fix in the relevant regulations a specific time-limit for the air rescue team to reach a person whose life was in danger as suggested by the applicant.

The Court does not consider that the regulatory framework in place in Slovakia as such is inconsistent with the requirements of Article 2 of the Convention. The Court did not consider that the positive obligations under Article 2 stretch as far as to require the incorporation in the relevant regulations of an obligation of result, that is a time-limit within which an aerial ambulance must reach a person needing urgent medical assistance, as suggested by the applicant. Various limiting factors inherent to the operation of airborne medical assistance, such as its dependence on weather conditions, accessibility of terrain and technical constraints would render such a general obligation difficult to fulfil and impose a disproportionate burden on the authorities of Contracting States.

As for an action for protection of personal integrity, in the Court proceedings the Government noted next to the judgments in the case *Kontrová* another case from domestic practice that confirms the effectiveness of this remedy, namely the proceedings held at the Prešov District Court, file no. 6C 67/2004. In that case the plaintiff demanded compensation for non-pecuniary damage following the death of her mother due to shortcomings in medical assistance during the latter's confinement. On 17 May 2006 the District Court upheld the petition in part referring to expert reports stating that the plaintiff's mother did not receive adequate medical care as required by the law. The medical institution had been obliged to pay the plaintiff 400,000 SKK in compensation for non-pecuniary damage. That judgment became final on 6 November 2006.

The Court dismissed the Government's objection on the failure to exhaust domestic remedies noting that the decisions on which the Government relied date from 2006. Any relevance they might possibly have in respect of the present case is therefore reduced by the fact that they were taken after the relevant time. The Court in relation hereto reminded that on 7 November 2005, an expert commission within the Health Care Supervisory Office found an infringement of the relevant health care legislation by the Air Rescue Service. The Ministry of Health discontinued the proceedings in that respect, on 28 June 2006, holding that the Air Rescue Service had not contravened any of the duties imposed on it by law. In the context of the criminal proceedings which ended on 13 November 2006, the Regional Prosecutor's Office in Prešov expressed the view that there had been shortcomings in the organization of the rescue operation but that these did not qualify as criminal offences. Unjustified delay in the arrival of the rescue team was also noted in the report submitted by the Czech Mountaineering Association. The Court noted another case from domestic practice from 2006 that confirms the effectiveness of an action for the protection of personal integrity in the case of a death (the above judgment of the Prešov District Court that became final on 6 November 2006). The Court held in view of the above that the applicant could arguably claim redress under Article 11 et seq. of the Civil Code and, if unsuccessful, lodge a complaint with the Constitutional Court relying on the guarantees of Article 2 of the Convention or its constitutional equivalent.

## **1.2 Duty to conduct an effective official investigation when individuals have been killed as a result of the use of force (procedural limb)**

The obligation to protect the right to life under Article 2 of the Convention also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. Whatever mode is employed, however, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

In the case *Mižigárová v. Slovakia* (judgment of 14 December 2010), the applicant objected under Article 2 of the Convention a violation of the right to life due to the fact that her husband died of the consequences of a lethal injury that he suffered in the course of police custody and that Slovak authorities failed to conduct a thorough and factual investigation into the circumstances of his death. The applicant complained under Article 3 of the Convention that her husband was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into that ill-treatment. The applicant complained that she had not had an effective remedy for her complaints under Articles 2 and 3 within the meaning of Article 13 of the Convention. The applicant complained that her rights, and the rights of her deceased husband, under Articles 2, 3 and 13 of the Convention were violated in conjunction with Article 14 on grounds of ethnic origin.

The facts of the case may be summarized as follows: At approximately 8.00 to 8:30 p.m. on 12 August 1999 police officers apprehended the applicant's husband and another person on suspicion of having stolen the bicycles they were riding. Police officers used force to apprehend them and drove them to the District Police Department in Poprad. At the time of his arrest, the applicant's husband (Mr. Šarišký) was in good health. After four policemen questioned him, Mr. Šarišký was taken to another room for further interrogation by Lieutenant F., an off-duty officer with whom he had had previous encounters. At some point during the interrogation, the applicant's husband was shot in the abdomen. He died after four days in

hospital as a result of the sustained wounds. On 29 May 2000 a public prosecutor indicted Lt. F. with the offence of causing injury to health under Section 224(1) and (2) of the Criminal Code as a result of his negligence in the course of duty. In the indictment the public prosecutor stated, inter alia, that according to the reconstitution of the events of 4 May 2000 Lt. F.'s testimony that the pistol was on his belt covered by the shirt was not true, because if that had been the case, the applicant's husband could not have pulled it away from him. On 18 October 2000 a judge of the District Court in Poprad issued a penal order under Section 314e of the Code of Criminal Procedure. In it he convicted Lt. F. of injury to health caused by negligence in the course of duty within the meaning of Section 224(1) and (2) of the Criminal Code. The penal order stated that Lt. F. had failed to secure his service weapon contrary to the relevant regulations and that as a result, the applicant's husband had managed to draw the weapon from the case and to inflict with it a lethal injury on himself. Lt. F. was sentenced to one year's imprisonment, suspended for a two-and-a-half-year probationary period. Neither the public prosecutor nor Lt. F. challenged the penal order which thus became final. Lt. F. committed suicide on 23 January 2001.

With its judgment of 14 December 2010, the Court stated on the merits of the case, that Article 2 of the Convention has been violated. In this respect the Court stated that even if the applicant's husband committed suicide in the manner described by national authorities, they violated their duty to take appropriate measures to protect his health and physical integrity during police custody. The Court also noted that the circumstances of the case did not provide any grounds for the police office on duty to have a weapon on him during the interrogation of the applicant's husband who had been arrested on suspicion of bicycle theft. Secondly, the Court noted that at the time of Mr Šarišský's death there were regulations in force which required police officers to secure their service weapons in order to avoid any "undesired consequences". Consequently, the Court found that there has accordingly been a violation of Article 2 of the Convention under its substantive limb.

As to the procedural part of Article 2 of the Convention, i.e. investigation into the circumstances surrounding the death of the applicant's husband, the Court concluded that it was not sufficiently independent. The criminal investigation was supervised by police officers from the Department of Supervision and Inspection at the Ministry of the Interior. The Court observes that these police officers were under the command of the Ministry of the Interior. Even if the Court were to assume that these officers were sufficiently independent for the purposes of Article 2 of the Convention, it is concerned that they did not commence their investigation until 13 August 1999, when an officer interviewed the wounded Mr Šarišský in hospital. The task-force that was formed immediately after the shooting was comprised of police officers from Poprad, which was the district in which Lt. F. was based. It was these officers who conducted the initial forensic examination of the scene. Moreover, after the Department of Supervision and Inspection took over, officers from Poprad continued to be involved in the investigation. In particular, it is clear from the record of the reconstruction conducted on 4 May 2000 that the technicians carrying out the experiments were from the Criminal Police Department in Poprad, which was Lt. F.'s department. Further investigations were also carried out by the Regional Investigation Office in Prešov. Whilst the Court acknowledges that the local police cannot remain passive until independent investigators arrive, in the absence of any special circumstances, immediate action by local police should not go beyond securing the area in question. In the present case, the task-force examined the crime scene, photo-documented it and recovered fingerprints and ballistic, biological and material evidence. They did not, however, have the necessary technical equipment to test Lt. F.'s hands for gunshot residue, and instead permitted him to return home, although they submitted that he remained under the constant supervision of a police guard. No further details have been provided concerning the identity of this guard or the extent of the supervision.

However, as police officers from the Department of Supervision and Inspection at the Ministry of the Interior did not arrive until the following day, it must be assumed that the guard was also from Lt. F.'s department in Poprad. The Court is also concerned about the continued involvement of technicians from Lt. F.'s department in Poprad in the investigation, most notably during the reconstruction carried out on 4 May 2000. Their involvement diminished the investigation's appearance of independence and this could not be remedied by the subsequent involvement of the Department of Supervision and Inspection. The Court therefore finds that the investigation was not sufficiently independent.

Moreover, the Court finds that the failure of the investigators to give serious consideration to Mr Šarišký's claim that he shot himself after Lt. F. handed him the gun amounted to a serious deficiency in the Šarišký's death. The allegation that Lt. F. voluntarily gave Mr Šarišký his gun amounts to a much more serious allegation against Lt. F. than that of causing injury to health by negligence, and yet the investigators do not appear to have considered it, preferring instead to rely on Lt. F.'s claim that Mr Šarišký forcibly took the weapon from him. The Court further observes that in a case such as the present, where there were no independent eyewitnesses to the incident, the taking of forensic samples was of critical importance in establishing who was responsible for Mr Šarišký's death. If the investigators had brought the necessary equipment to the police station, samples of gunpowder residue could have been taken from Lt. F.'s hands in the immediate aftermath of the shooting. If such samples had been taken, it might have been possible either to exclude or confirm that he pulled the trigger. Instead, samples were not taken until the following day. Although the Government submitted that Lt. F. remained under the supervision of a police guard until the samples were taken, the Court has concerns about the independence of the guard, who was most likely a police officer from Lt. F.'s department. Consequently, the result of the gunpowder residue test cannot be relied on. Although a ballistics test later confirmed that Mr Šarišký "most probably" shot himself, if conducted properly the gunpowder residue test could have been conclusive. Thus, there was a failure by the investigators to take reasonable steps to secure evidence concerning the incident which in turn undermined the ability of the investigation to determine beyond any doubt who was responsible for Mr Šarišký's death. Finally, the Court observes that very little attention appears to have been paid to the applicant's claim that her husband had injuries to his face, shoulder and ear, even after the autopsy confirmed the presence of these injuries. The Government have subsequently indicated that these injuries were ignored because they were not relevant to determining the cause of death. They were, however, relevant to determining whether Mr. Šarišký was ill-treated by police officers either during his arrest or in police custody, which in turn is relevant both to an investigation into a potential violation of Article 2 of the Convention and to a separate allegation under Article 3. The Court therefore finds that the failure to investigate the applicant's claim that her husband was ill-treated by police officers prior to the shooting amounted to a serious shortcoming in the criminal investigation and prevented the authorities from obtaining a clear and accurate picture of the events leading to Mr. Šarišký's death. In light of the above, the Court concludes that no meaningful investigation was conducted at the domestic level capable of establishing the true facts surrounding the death of Mr. Šarišký. It follows that there has also been a violation of the procedural limb of Article 2 of the Convention.

The Court awarded the applicant 45,000 EUR in respect of non-pecuniary damages and 8,000 EUR in respect of legal costs and expenses. The Court dismissed the remainder of the applicant's claim.

In the case *Puky v. Slovakia* (decision of 14 February 2012) the applicant complained under Article 2, both taken alone and in conjunction with Article 13 of the Convention, that the Slovak authorities had failed to carry out a thorough and effective investigation into the death of his brother that allegedly occurred in the course of large-scale police operations in reaction to protests by people of Romany ethnic

origin in Eastern Slovakia in February 2004. With reference to his and his brother's ethnic origin and the facts of the case, the applicant further alleged a breach of Article 14 in conjunction with Articles 2 and 13 of the Convention. The applicant argued that the authorities had failed to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events leading to the death of his brother. In that respect the Court notes that the authorities took a number of steps to establish the relevant circumstances of the case. In particular, they promptly examined and documented the scene where the body was found, arranged for an autopsy and a forensic examination of the body to be carried out and questioned eight witnesses, including the applicant and his brother's partner. The proceedings were discontinued after two forensic experts had found no signs of physical violence on the body and had determined suffocation by drowning as the direct cause of the death. In the Court's view, the domestic authorities took appropriate action with a view to establishing the relevant facts of the case in the circumstances. The participation of lawyers from the League of Human Rights at the reconstruction of the events at the place where the body had been found and the CPT's involvement indicate that there was a sufficient element of public scrutiny of the investigation. Finally, the Court concluded that the investigation lasted sixteen months. Considering the action taken and the decisions given during that period, it can be considered to be compatible with the requirement of promptness and reasonable expedition within the meaning of the case-law referred to above. The investigation into the death of the applicant's brother did not, therefore, fall short of the requirements of Article 2 of the Convention. The Court rejected the complaint under Article 2, both taken alone and in conjunction with Article 13 of the Convention as manifestly ill-founded. The Court notes that the case was given special attention by the highest prosecuting authorities. There is no indication of discriminatory treatment contrary to Article 14 of the Convention in the circumstances of the present case. It follows that the applicant's complaint under Article 14 of the Convention is also manifestly ill-founded and must be rejected.

## 2 Prohibition of torture and the right to respect for private and family life

Similar to the Right to life, the Court has formulated positive obligations also in the case of Article 3 (Prohibition of torture) and Article 8 (Right to respect for private and family life) of the Convention.

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of the minimum level of severity is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. (See e.g. judgments *Raninen v. Finland* of 16 December 1997, par. 55, *Kudla v. Poland* of 26 October 2000, par. 91 and *Peers v. Greece* of 19 April 2001, par. 67)

Claims of ill-treatment must be supported by evidence before the Court. The standard which the Court adopts in assessing evidence of violations of Article 3 is "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. (See e.g. judgments *Selmouni v. France* of 28 July 1999, par. 88 and *Aydin v. Turkey* of 25 September 1997, par. 73)

The concept of private life includes a person's physical and mental integrity. Under Article 8, States have an obligation to protect an individual's physical and moral integrity from other individuals. (See e.g. the decision on admissibility of the application of *M.T. and S.T. v. Slovakia* of 29 May 2012.)

## 2. 1 States' obligation to protect individuals from ill-treatment and violation of the right to respect for private and family life (substantive limb)

The Court has drawn an obligation under Article 3 of the Convention, based on which States are required 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.

Similarly, States' positive obligations under Article 8 of the Convention inherent in effective "respect" for private and family life may involve the adoption of measures in the sphere of the relations of individuals between themselves. Albeit it is the government's discretion to choose the means to ensure compliance under Article 8 to provide protection against torture by private persons, an effective countering of serious criminal offences where basic values and private life elements are at stake, requires adequate criminal law provisions.

In this regard the Court noted that in certain situations (e.g. bodily injury, rape, domestic violence), effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect (see the judgment in *Sandra Janković v. Croatia* of 5 March 2009, par. 36). In the case *M.T. and S.T. v. Slovakia* (decision on admissibility of 29 May 2012) the Court emphasized that this attitude in principle is not limited to cases of physical violence, but to the contrary, especially in domestic violence cases it may apply also to psychological violence.

In the Court's view, States have an obligation to adopt such legislative and other measures ensuring efficient violation prevention or having a deterrent effect on potential perpetrators.

In the case *B. v. Moldova* (judgment of 16 July 2013) the applicant was regularly beaten by her husband. The violence was proven by 7 medical certificates. The courts had adopted 6 administrative decisions. The applicant's husband had been imposed fines ranging from EUR 9 to EUR 18 four times. Criminal proceedings for attempted rape had been instigated against him, but the proceedings had been discontinued as the applicant withdrew the criminal complaint. After reviewing the case, the Court held that there had been a violation of Article 3 and of Article 8 of the Convention. The Court stated that Moldovan law provides a legal framework enabling authorities to adopt measures aimed at protecting domestic violence victims and that Moldovan authorities had been aware of the violent behavior of the applicant's husband, since they had sanctioned him several times. The Court noted that although the authorities did not remain completely passive, the measures they had adopted did not prevent further assaults. In this regard the Court noted the very low fines that failed to have a deterrent effect on the perpetrator. As regards the withdrawal of the applicant's criminal complaint, the Court stated that in domestic violence cases authorities in their decisions on proceedings are obliged to establish a balance between the victim's rights under Articles 2, 3 and 8 of the Convention, and that the more serious the criminal offence or the higher the risk of its continuation, the more persistent should the authorities be in prosecuting such offence in the public interest even though the victim had withdrawn her criminal complaint. In the assessed case the authorities failed to analyze whether the severity of assaults on the applicant required to continue the investigation, even though the applicant had withdrawn her criminal complaint. Despite the reported attempted rape supported by a medical certificate that confirmed the allegation, the authorities did not initiate any investigation of their own motion and limited themselves to an administrative proceeding. The Court further considered that Moldovan courts refused to order the applicant's husband's temporary eviction from the family apartment. Despite a restraining order had been issued against her husband, by allowing him to continue living in the family apartment with the applicant,



the Moldovan courts made this measure ineffective. As regards Article 8 of the Convention, the Court stated that in deciding on the petition on the husband's eviction from the family apartment, the Moldovan courts failed to consider whether the applicant's husband executed his right to the use of the apartment in a manner infringing the applicant's rights under Article 8. The Court decided that domestic authorities failed to meet the State's positive obligation under Article 8 by not having established a balance between the affected rights, forcing the applicant to continue to bear the risk of violence or leave the family apartment. The Court awarded the applicant EUR 15,000 in respect of compensation of non-pecuniary damage and EUR 3,000 in respect of legal costs and expenses.

In the case *Bevacqua and S. v. Bulgaria* (judgment of 12 June 2008) the first applicant who claimed that she had been regularly beaten by her husband, left him and filed for divorce, taking their 3-year old son (second applicant) with her. Anyhow, her husband continued beating her. She spent 4 days in an asylum home for battered women with her son, but she was told that she might be prosecuted for child abduction, which might result in the court's decision to award joint custody. Filing a criminal complaint provoked further violence. Her application to have a preliminary injunction issued entrusting the son in her custody was not assessed with priority expedition and the son was entrusted in her custody only after the divorce more than a year later. The following year she was beaten by her ex-husband and her applications for criminal prosecution were turned down due to the reason that it was a "private matter" that required private criminal prosecution. In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life. The Court emphasized that the authorities' view that no assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights. The Court awarded the applicant EUR 4,000 in respect of compensation of non-pecuniary damage and EUR 3,000 in respect of legal costs and expenses.

In the case *A. v. Croatia* (judgment of 14 October 2010) the applicant's currently ex-husband (suffering from mental disorders such as anxiety, paranoia, epilepsy and post-traumatic stress disorder) physically assaulted the applicant repeatedly and threatened her with death for many years, and abused her in the presence of their young daughter. After the applicant went into hiding, she asked the court to issue a restraining order against her husband. The court turned down her request claiming that she failed to prove real and imminent risk posed to her life. The Court stated a violation of Article 8 of the Convention as the national authorities failed to implement measures ordered by the national courts, aimed on the one hand at addressing the offender's psychiatric condition, which appear to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by her former husband. They thus left the applicant for a prolonged period in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life. The Court awarded the applicant EUR 9,000 in respect of non-pecuniary damage and EUR 4,470 in respect of costs and expenses.

In the case *Kaluczka v. Hungary* (judgment of 24 April 2012) the applicant shared an apartment with her violent partner against her will over the course of several proceedings on ownership of the disputed apartment. She claimed mainly that the Hungarian authorities failed to protect her from constant physical and mental abuse in her apartment. The Court concluded that Hungarian authorities failed to meet their positive obligation under Article 8 of the Convention. The Court specified that despite the applicant had filed a number of criminal complaints against her partner for bodily injury, requesting on several occasions

a restraining order to be issued against him, and initiated civil proceedings seeking his eviction from the apartment, Hungarian authorities failed to implement sufficient measures to effectively protect her. The Court awarded the applicant EUR 5,150 in respect of non-pecuniary damage.

The case *Eremia and Others v. the Republic of Moldova* (judgment of 28 May 2013) concerned the applicants' complaint about the Moldovan authorities' failure to protect them from the violent and abusive behaviour of their husband and father, a police officer. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) in respect of Ms Lilia Eremia, and a violation of Article 8 (right to respect for private and family life) in respect of her two daughters. The Court held that, despite their knowledge of the abuse, the authorities had failed to take effective measures against Ms Eremia's husband and to protect his wife from further domestic violence. It also considered that, despite the detrimental psychological effects of her daughters witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. Finally, the Court found a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3 in respect of Ms Lilia Eremia since the actions of domestic authorities were not mere failure in investigating the violence she had sustained, but the authorities' attitude had amounted to condoning violence and had been discriminatory towards Ms Eremia as a woman. In this regard the Court noted that the conclusions of the United Nations Special Rapporteur on violence against women, its causes and consequences only further reinforced the impression that Moldovan authorities failed to fully appreciate the seriousness and scope of the problem of domestic violence in Moldova and its discriminatory effect on women. The court held that the Republic of Moldova was to pay the applicants jointly EUR 15,000 in respect of non-pecuniary damage and EUR 2,150 for costs and expenses.

In the case *Hajduová v. Slovakia* (judgment of 30 November 2010) the applicant alleged that the domestic authorities had violated her rights under Article 8 of the Convention by the District Court failing to comply with their statutory obligation to order that her former husband A. be detained in an institution for psychiatric treatment, following his criminal conviction.

The circumstances of the case may be summarized as follows: On 21 August 2001 the applicant's (now former) husband, A., attacked her both verbally and physically while they were in a public place. The applicant suffered a minor injury and feared for her life and safety. This led her and her children to move out of the family home and into the premises of a non-governmental organisation in Košice. On 27 and 28 August 2001 A. repeatedly threatened the applicant, *inter alia*, to kill her and several other persons. Criminal proceedings were brought against him and he was remanded in custody. In the course of the criminal proceedings, experts established that the accused suffered from a serious personality disorder. His treatment as a psychiatric hospital was recommended. On 7 January 2002 the District Court Košice I convicted A. The court decided not to impose a prison sentence on him and held that he should undergo psychiatric treatment. At the same time, the court released him from detention on remand. A. was then transported to a hospital in Košice. That hospital did not carry out the treatment which A. required, nor did the District Court order it to carry out such treatment. A. was released from the hospital on 14 January 2002. After his release from hospital, A. verbally threatened the applicant and her lawyer. On 14 and 16 January 2002, respectively, the applicant's lawyer and the applicant herself filed criminal complaints against him. They also informed the District Court about his behaviour and of the new criminal complaints they had filed. On 21 January 2002 A. visited the applicant's lawyer again and threatened both her and her employee. On the same day he was arrested by the police and accused of a criminal offence. On 22 February 2002 the District Court arranged for psychiatric treatment of A. in accordance with its decision of 7 January 2002. He was consequently transported to a hospital in Plešivec. The applicant filed a complaint

with the Constitutional Court under Article 127 of the Constitution. The Constitutional Court rejected the applicant's complaint claiming that the applicant should have pursued an action for the protection of her personal integrity before the ordinary courts.

The Court in its judgment of 30 November 2010 held violation of Article 8 of the Convention. As for application admissibility, the Court considers that the Government have failed to show, with reference to demonstrably established consistent case-law in cases similar to the applicant's, that their interpretation of the scope of the action for protection of personal integrity was, at the material time, sufficiently certain not only in theory but also in practice and offered at least some prospects of success. In making this conclusion, the Court has also taken into consideration the applicant's personal circumstances, the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection. The Court did not accept the Government's objection as to the exhaustion of domestic remedies in the form of an action for the protection of the applicant's personal integrity. As for the merits, having regard to the relevant facts of the case as well as the Government's acknowledgement that the application is not manifestly ill-founded, the Court finds that the lack of sufficient measures taken by the authorities in reaction to A.'s behaviour, notably the District Court's failure to comply with its statutory obligation to order his detention for psychiatric treatment following his conviction on 7 January 2002, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life.

As for just satisfaction, the Court awarded the applicant EUR 4,000 in respect of compensation of non-pecuniary damage and EUR 1,000 in respect of legal costs and expenses.

## **2.2 Requirement to conduct an effective official investigation of ill-treatment and violation of the right to respect for private and family life (procedural limb)**

If a person has an arguable claim that he or she was subjected to treatment that is illegal and contradictory to Article 3 of the Convention, then this provision in conjunction with a general obligation imposed on Contracting States by Article 1 of the Convention "everyone in their jurisdiction shall be granted the rights and freedoms set out in (...) of this Convention" means by implication a requirement to conduct effective official investigation. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This obligation may not be limited to cases of ill-treatment on the hand of State agents.

Based on the Court's case law, a State's positive obligation under Article 8 to guarantee an individual's physical integrity may be extended on issues concerning effective investigation.

The case *M. C. v. Bulgaria* (judgment of 4 December 2003) concerned a disputed violation of the State's positive obligation to protect individuals' physical integrity and private life and secure effective remedy. The applicant alleged before the Court to have been raped twice (on 31 July 1995 and 1 August 1995), however Bulgarian law does not provide an effective protection from rape and sex assault because rape perpetrators are prosecuted only in the presence of evidence of significant physical resistance and that Bulgarian authorities failed to duly investigate the events of 31 July 1995 and 1 August 1995.

The Court observes that Article 152 Art. 1 of the Bulgarian Criminal Code<sup>227</sup> does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. What is decisive, however, is the

<sup>227</sup> This provision defines rape as sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled by the use of force or threats; (3) who was brought to a state of helplessness by the perpetrator.

meaning given to words such as “force” or “threats” or other terms used in legal definitions. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The Court recognizes that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little “direct” evidence. The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a “date rape”, in the absence of “direct” proof of rape such as traces of violence and resistance or calls for help. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centered on the issue of non-consent. That was not done in the applicant's case. The Court finds that their approach in the particular case was restrictive, practically elevating “resistance” to the status of defining element of the offence. The authorities may also be criticized for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors. Furthermore, they handled the investigation with significant delays.

Without making any statements concerning the issue of guilt of P. and A., the Court finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention. The Court awarded the applicant 8,000 EUR in respect of compensation of non-pecuniary damage and 4,110 EUR in respect of legal costs and expenses.

In the case *Valiulienė v. Lithuania* (judgment of 26 March 2013) a female victim of domestic violence objected before the Court that domestic authorities had failed to investigate her allegations of ill-treatment and prosecute her partner. The Court found violation of Article 3 of the Convention due to the fact that the practice and manner, in which the criminal law mechanism was applied in the applicant's case, failed to

provide her with effective protection from domestic violence. Namely, there were delays in the investigation and the prosecutor decided to discontinue the investigation. As for just satisfaction, the Court awarded the applicant EUR 5,000 in respect of compensation of non-pecuniary damage.

In the case *E.M. v. Rumania* (judgment of 30 October 2012) the applicant objected that the investigation of her criminal complaint filed in the matter of domestic violence committed in the presence of her daughter (who was 18 months old at the time) was ineffective. Rumanian courts turned down the applicant's petition on the grounds that her claims about her husband's violent behavior against her were not supported with sufficient evidence. The Court found violation of Article 3 of the Convention in its procedural limb because the manner, in which the investigation was conducted, did not provide the applicant with effective protection as required by Article 3 of the Convention. The Court mainly noted that the applicant, upon filing the first criminal complaint, had requested assistance and protection for herself and her daughter from her husband's aggressive behavior. Despite the legal framework provided for cooperation between various authorities and implementation of out-of-court measures in relation to domestic violence, and despite the fact that the applicant supported her claims with medical certificates, it did not appear that Rumanian authorities had implemented any measures aimed at investigating her allegations. As for just satisfaction, the Court awarded the applicant EUR 7,500 in respect of compensation of non-pecuniary damage and EUR 178 in respect of costs and expenses.

### 3. Effective Remedy

Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 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 respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, par. 95, and *Aydın v. Turkey*, judgment of 25 September 1997, par. 103). The Court itself will in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. It has previously found that, in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies (see *Keenan v. the United Kingdom*, par. 130).

#### 3.1 Situation in the Slovak Republic

Pursuant to Art. 11 of the Civil Code, a natural person has the right to protection of personal integrity, mainly protection of his or her life and health, civic honor and human dignity, as well as respect for private life, the person's name and expressions of personal nature.

Pursuant to Art. 13 par. 1 of the Civil Code, a natural person has mainly the right to request the court to order to refrain from violation of his or her right to protection of personal integrity, remove the consequences of violation, and to be awarded just satisfaction. Pursuant to par. 2 of this provision, a natural person has also the right to non-pecuniary damage compensation in money should just satisfaction

under par. 1 appear insufficient mainly due to the reasons that the dignity or respect in society of a natural person has been significantly adversely affected. Pursuant to Art. 13 par. 3 of the Civil Code, the amount of the compensation under par. 2 shall be established by court with consideration to the severity of the damage and circumstances of the violation of the right.

If a person was deprived of his or her life as a result of a criminal offence or another violation, his or her next-of-kin indicated in Art. 15 of the Civil Code may claim compensation of non-pecuniary damage due to a violation of the right to life and the physical integrity or their next-of-kin. Such a violation of the right to life amounts at the same time to a violation of the right to protection of private life and/or family life of the next-of-kin, and hence they may request compensation for non-pecuniary damage sustained in relation to the violation of their personal integrity rights. The amount of non-pecuniary damage compensation is left to the court's discretion, taking due consideration of the statutory criteria regarding the severity of the damage and the circumstances of the violation of the personal integrity rights. The concrete amount of the compensation must take due regard of the circumstances of the case and must be established on equitable basis.

It should be noted that the payment of the court fee has been lifted for crime victims instigating proceedings for the compensation of damage or non-pecuniary damage sustained as a result of a criminal offence under Art. 4, section 2 (i) of the Act No. 71/1992 Coll. on Court Fees and Penal Register Excerpt Fees with effect from 1 January 2006.

In the judgment *Kontrová v. Slovakia* (judgment of 31 May 2007) the Court held in agreement with the applicant that the applicant had no effective remedy available on the national level, through which it would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death and that an action for protection of personal integrity did not ensure to the applicant such remedy. The Court observed already at the admissibility stage under Article 35 of the Convention that there was no sufficiently consistent case-law in cases similar to the applicant's to show that the possibility of obtaining redress in respect of non-pecuniary damage by making use of the remedy in question was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law.

In the case *Furdík v. Slovakia* (decision of 2 December 2008) the Court noted another case from domestic practice from 2006 that confirms the effectiveness of an action for the protection of personal integrity in the case of a death. The Court held in view of the above that the applicant who claimed violation under Article 2 (right to life) could arguably claim redress under Article 11 et seq. of the Civil Code and, if unsuccessful, lodge a complaint with the Constitutional Court relying on the guarantees of Article 2 of the Convention or its constitutional equivalent.

In the case *Baláž and Others v. Slovakia* (decision of 28 November 2006) the applicants complained about a violation of Article 8 of the Convention due to ill-treatment by the police. They also complained about the shortcomings in the ensuing investigation and telephone threats. The Government claimed that two of the applicants (Mr Baláž Jr. and Ms Konečnicková) failed to exhaust domestic remedies because they had not claimed compensation of damages under Act no. 58/1969 Coll. and relevant provisions of Act no. 171/1993 Coll. on Police Corps. In the Government's view they also had the possibility to seek protection of their personal integrity and claim compensation of non-pecuniary damage under Art. 11 et seq. of the Code of Civil Procedure. The Court found that the claims of Mr. Baláž Jr. and Ms. Konečnicková about ill-treatment by the police were investigated by the police, by the Inspection Service of the Ministry of the Interior and all levels of the Prosecution, which assessed them as manifestly ill-founded. If Mr. Baláž Jr. and

Ms. Konečnicková did not agree with this conclusion, they had several remedies available to apply their rights under the Convention. Among others, they could have appealed against the decision to discontinue the case, as a result of which no accusation was raised against the police officers involved in the case, and they could have appealed against the conviction of Mr. Baláž Jr. Moreover, he and Ms. Konečnicková could have raised a claim to damage compensation before ordinary courts under the Act no. 171/1993 Coll. on the Police Corps or could have sought protection of their personal integrity under Art. 11 et seqq. of the Code of Civil Procedure.

Act no. 514/2003 Coll. became effective on 1 July 2004, pursuant to which aggrieved parties due to wrong official procedures or illegal decisions may claim compensation of non-pecuniary damage in money. Thanks to this provision, this remedy may be considered effective in respect of the Court's case law. Under this law, responsibility may be claimed for damage caused by decisions issued from the effectiveness date of this Act, i.e. starting from 1 July 2004. The same applies to damage caused by wrong official procedures. Aggrieved parties who sustained damage due to a wrong official procedure or an illegal decision after this date shall claim non-pecuniary damage compensation under this Act instead of under the provisions of Art. 11 et seqq. of the Civil Code.

As regards effective remedy, the Court noted that in certain situations effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect (see the judgment in *Sandra Janković v. Croatia* of 5 March 2009, par. 36). In the case *M.T. and S.T. v. Slovakia* (decision on admissibility of 29 May 2012) the Court emphasized that this attitude in principle is not limited to cases of physical violence, but to the contrary, especially in domestic violence cases it may apply also to psychological violence. Due to the above reasons, the Court refused the Slovak Government's argument that the applicants failed to file a personal integrity protection claim as an effective remedy, by means of which in the Government's view the applicants could have demanded that violation of their personal integrity would stop.<sup>228</sup>

Similarly, in the case *Hajduová v. Slovakia* (judgment of 30 November 2010, par. 36-38) the Court under Article 35 par. 1 of the Convention reviewed and refused the effectiveness of an action for the protection of the applicant's personal integrity under Art. 11 et seqq. of the Civil Code in a situation where State authorities failed to comply with their statutory obligation to order Ms. Hajduová's husband detention for psychiatric treatment following his conviction for abuse and making threats against her, which amounted to a breach of the State's positive obligations under Article 8 of the Convention.

In the case *M. C. v. Bulgaria* (judgment of 4 December 2003) the Court emphasized that effective protection against rape and sexual abuse requires measures of a criminal-law nature and refused the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators.

Albeit in the Court's view in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies; this does not

<sup>228</sup> In its deposition the Government noted the judgment 1 Co 25/94 of 19 April 1994 of the Supreme Court of the Slovak Republic that ruled that the fact that a certain behavior of a physical person was subject to criminal proceedings or civil proceedings does not prevent a subsequent reaction of other persons to this behavior to become subject to personal integrity protection proceedings under § 11 et seqq. of the Code of Civil Procedure. The Government further noted the judgment of 20 June 2007 11 C 99/2006, in which the District Court in Čadca upheld the personal integrity protection claim filed by a divorced woman against her ex husband by issuing a restraining order banning violation of the applicant's personal integrity (making threats to her life and health and verbal assaults against her) and ordering her ex husband to stay at a minimum distance of 30 meters.

mean that States may withdraw from their responsibility for serious violations of the Convention with a mere reference to the possibility to seek damages in civil proceedings. States have to react to such violations adequately by means of an effective criminal-law mechanism. At the same time, such a mechanism must include a possibility to make a claim in respect of sustained non-pecuniary damages (see the judgment *Kontrová v. Slovakia*). Although it is not a condition that it should happen directly within the criminal proceedings, the situation in Slovakia has developed as follows.

Pursuant to Art. 287 of Act no. 301/2005 Coll., as amended, if a court has found guilty a person charged with a criminal offence, as a result of which damage had been sustained by a third party, the court's judgment shall as a rule impose damage compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory obstacle exists, the court shall always bind the perpetrator to compensate damage if the amount is included in the description of the merits of the judgment, by which the perpetrator has been found guilty or in case of compensation of moral damage sustained as a result of an intentional violent criminal offence under a special law in as far as the damage has not yet been paid. The statement on the perpetrator's obligation to compensate damages must specify the recipient and the adjudicated claim. In justified cases the court may state that the damages shall be paid in installments and the court shall specify the installment payment schedule, having regard to the victim's opinion. The original provision of Art. 287, section 1 read as follows: *"If a court has found guilty a person charged with a criminal offence, as a result of which pecuniary damage had been sustained by a third party, the court's judgment shall usually impose damage compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory obstacle exists, the court shall always bind the perpetrator to compensate the damages if the amount is included in the description of the merits of the judgment, by which the perpetrator has been found guilty, in as far as the damage has not yet been paid in the stated amount."* Although pursuant to Art. 46 of Act no. 301/2005 Coll. the injured party was defined as a person who had suffered an injury to health, pecuniary, moral or other damage as a result of a criminal offence, compensation of other than pecuniary damage in criminal proceedings was excluded by the above wording of the provision of Art. 287, section 1. This provision was amended by Act No. 650/2005 Coll., which removed the above legal obstacle. In this regard we note the commentary to the Rules of Criminal Procedure concerning the provision of Art. 287, section 1, which, *inter alia*, states the following: *"In consideration of the definition of the term damage (Art. 46, section 1), the obligation to decide on the damage in the convicting judgment, if the claim has been duly raised, shall apply to pecuniary, moral as well as other damage, and also to the violation or jeopardy of the victim's other statutory rights or freedoms, whereas the term "damage" in relation to the harmful effects of intentional violent criminal offences pursuant to special law shall be interpreted in the case of death, rape or sexual violence according to the interpretation of the term "non-pecuniary damage" used in civil proceedings."*

This legislative amendment has aligned the Slovak legal framework with the European standard that enables a crime victim to claim compensation of non-pecuniary damage (moral damage) in the criminal proceedings. In this regard we note that meanwhile the establishment of pecuniary damage incurred as a result of a criminal offence may significantly exceed the scope of the criminal proceedings, in most cases, the evidence collected in relation to the circumstances of the criminal offence and the manner, in which it was committed, shall suffice to establish non-pecuniary damage compensation. After all, the Court, which often awards compensation of non-pecuniary damage, limits itself in the justification to the following wording: *"Ruling on an equitable basis, the Court decides to award the applicant..."* since the merits of the case have been sufficiently assessed in the justification of the Court's opinion concerning the violation of the rights guaranteed by the Convention.



It needs to be noted in relation to a victim's claim for non-pecuniary damage compensation in ancillary proceeding that the criminal court shall apply procedures under the provisions of the Rules of Criminal Procedure, but concerning the conditions of the claim itself, the court shall apply provisions of the civil substantive law, and namely provisions on personal integrity rights of natural persons that are enshrined in the Civil Code as protection of personal integrity provisions in Articles 11 through 16. Albeit financial compensation of the aggrieved party for moral damage, suffering (and/or for the death of the next-of-kin as a result of a violent criminal offence) may never sufficiently compensate the loss of the next-of-kin, it may however to a certain degree compensate the crime victim's emotional distress due to the criminal offense. If financial compensation is combined with a just punishment of the perpetrator, it may happen that the crime victim leaves the courtroom with a good feeling and believe in justice in the broadest sense of the word. With regard to the above, it may be said that criminal courts in the Slovak Republic have sufficient statutory means available within the ancillary proceedings to decide in the convicting judgments also on non-pecuniary damage compensation.<sup>229</sup> It is probably just a matter of time when criminal courts will start to make use these means to a greater extent. Ancillary proceedings enable victims to seek just satisfaction already during the criminal proceeding without having to enforce their claims in separate civil proceedings.<sup>230</sup>

### Some rights of crime victims under Article 6 of the Convention

(Right to a fair trial)

Only the accused person may be the subject of the rights pertaining to the "criminal part" under Article 6 of the Convention. The injured party (crime victim) does not have any rights in the criminal proceedings under Article 6, insofar as the applicability is based on a "criminal accusation" of a third party, not even the right to instigate the prosecution of a third party. If a private legal action is admissible by the legal system concerned, in which damages in connection with the criminal offence may be claimed concurrently or if such a claim may be raised in the ancillary proceedings, Article 6 section 1 shall apply to the injured party in the "civil part".

Meanwhile the Court assesses complaints of applicants who had raised a claim for damage compensation in ancillary proceedings mainly in respect of undue delays in the criminal proceeding, the case law of the Constitutional Court in this regard is not always aligned with the Court's approach.

In the case *Loveček and others vs. Slovak Republic* (judgment of 21 December 2010) the applicants were clients of a private non-banking investment company SUN, a.s. and sued the Slovak Republic for a violation under Article 6 section 1 of the Convention in respect of undue delays in the criminal proceeding, in which they claimed compensation of damages as aggrieved persons. The applicants' individual claims to damages were later excluded by the Supreme Court from the criminal proceeding and they were referred to civil proceedings. In terms of the incompatible length of the criminal proceedings with the "reasonable time" requirement, the applicants objected under Article 13 of the Convention that they did not have any

<sup>229</sup> See e.g. the judgment of the Regional Court in Žilina 1To/10/2011 of 22 February 2011, by which the Court with regard to § 287 par. 1 of the Rules of Criminal Procedure bound the perpetrator to compensate the two crime victims for non-pecuniary damage in the amount of EUR 10,000 each; or the judgment of the Regional Court in Prešov 8To/13/2013 of 25 March 2015, by which the Court with regard to § 287 par. 1 of the Rules of Criminal Procedure bound the perpetrator to compensate the two crime victims for pecuniary and for non-pecuniary damage in the amount of EUR 20,000 each.

<sup>230</sup> For more information see Bargel M.: The importance of just satisfaction for crime victims in criminal proceedings, s. 8 et seqq. ([http://www.ja-sr.sk/files/Bargel%20Martin\\_Zadostučinenie%20a%20jeho%20význam%20pre%20poškodeného%20v%20trestnom%20konaní.pdf](http://www.ja-sr.sk/files/Bargel%20Martin_Zadostučinenie%20a%20jeho%20význam%20pre%20poškodeného%20v%20trestnom%20konaní.pdf))

effective remedy available on the national level. The applicants lodged a complaint with the Constitutional Court on a violation of their right to a hearing “without unjustified delay” and “within a reasonable time”. In August 2002 the Constitutional Court declared the complaint inadmissible. It observed that the primary aim of criminal proceedings was to detect criminal offences and to punish perpetrators and not to determine aggrieved parties' claims for damages. Aggrieved parties' claims for damages were of a private-law nature and were predominantly to be asserted before the civil courts.

In its judgment of 21 December 2010 the Court declared admissible the applicants' complaint concerning the unreasonable length of proceedings. The remaining part of the application was declared inadmissible. The Court disagreed with the government's argument that Article 6 section 1 of the Convention was inapplicable to the present case due to the fact that the applicants had been excluded with their individual claims for damages from the criminal proceedings. In this regard the Court noted that until a decision was adopted by the Supreme Court to exclude the injured parties from the criminal proceedings, the applicants had a right to have their individual claims for damages resolved within a reasonable time. Furthermore, the Court considered that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement. There has accordingly been a breach of Article 6 Art. 1 of the Convention. Having examined all the material submitted to it, the Court considers that although the length of the criminal proceedings has been in part due to the complexity of the case, the Court cannot disregard the fact that it took over two years and three months to set up a special investigation unit. Delays in the pre-trial stage were also acknowledged by the Bratislava V District Office of Public Prosecution. The Court awarded the applicants a total of 56,150 EUR in respect of compensation of non-pecuniary damage and 63.50 EUR in respect of administrative expenses.

In the case *Javor and Javorová v. Slovakia* (judgment of 15 September 2015) the applicants alleged that their third-party claim for damages, which they had attached to criminal proceedings concerning an offence of which they were the victim, had not been determined within a reasonable time as provided for by Article 6 par. 1 of the Convention. The criminal proceedings had been discontinued based on the investigator's conclusion that there was no criminal case to answer. No charges had been brought against a specific person. Meanwhile, the applicants had lodged a constitutional complaint under Article 127 of the Constitution challenging the length of the proceedings on their third-party claim for damages attached to the above criminal proceedings, alleging a violation of the reasonable-time requirement under Article 6 par. 1 of the Convention and its constitutional equivalent. This complaint was declared inadmissible in March 2010; the Constitutional Court held that an aggrieved party claiming damages in criminal proceedings only benefited from the right to a hearing within a reasonable time under Article 6 after a charge had been brought against a specific person and, in the present case, the charges against A. had been quashed. The applicants lodged a petition with the Court who decided that their right under Article 6 par. 1 of the Convention had been violated.

The Government relied on the position taken by the Constitutional Court and raised an inadmissibility objection to the effect that, in any event, neither of the applicants could have benefited from the Article 6 guarantees because, under the domestic law, such guarantees only extended to compensation claims in criminal proceedings after a charge had been brought against a specific person, in combination with the fact that, in the present case, the charge against A. had been quashed and no new charge had been brought. In its judgment in relation to admissibility, the Court is of the view that, where a Contracting Party decides to provide for the possibility of making third-party claims in the framework of criminal proceedings, and depending on its specific features, the guarantees of Article 6 must be provided and complied with. The Slovakian legal order undoubtedly provided for the possibility of attaching third-

party claims to criminal proceedings. The Court notes that if such a claim is properly made and duly pursued, it constitutes an obstacle to the lodging of the same claim before the civil courts and has further legal consequences. The Court notes that for any such a claim to be considered as having been properly made, it has to specify its defendant, legal basis and amount. Under the domestic law and practice of the ordinary courts, a third-party claim for damages may be included into criminal proceedings with the above consequences as early as with the criminal complaint and without depending on whether charges have been raised against a concrete person. In view of the above, the Court has found no reasons for departing from its previous findings that the guarantees of the civil limb of Article 6 of the Convention apply to third-party claims for damages attached to criminal proceedings in Slovakia, and that, in so far as they are joined to a criminal complaint against a specific defendant or made subsequently to it, they enjoy the said guarantees from the moment they are made. The Court declared the application admissible. The Court concluded that the duration and the unfolding of the proceedings under review were at blatant variance with the “reasonable time” requirement bordering on denial of justice. There has accordingly been a violation of Article 6 of the Convention. The Court awarded the applicants EUR 5,200 jointly in respect of non-pecuniary damage and EUR 1,000 in respect of EUR in respect of costs and expenses.

***JUDr. Marica Pirošíková, Agent of the Slovak Republic before the European Court for Human Rights***

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