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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

REPORT ON THE STANDING AND RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

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Report on the Standing and Rights of Victims in Criminal Proceedings¹

Introduction

1. The standing of victims in criminal proceedings has been a priority of the Council of Europe ('CoE') for a long time. In recent years the Council, in conjunction with other supranational institutions including the European Union ('EU') and the United Nations ('UN'), has boosted standard-setting activities in this area, leading to important developments in the legislation and practice of CoE Member States.

However, the status of victims in criminal proceedings still requires the attention of legislators throughout Europe and across the world. The rights of victims should be reinforced and more widely recognised, notably by establishing or strengthening measures for their protection, assistance and respect. In particular, questions of human rights and legal issues relating to the criminal law are crucial aspects of any study of the standing and rights of victims of crime, as are measures for the assistance, support and monitoring of victims, which need to be established and implemented across all European countries.

When drafting new legal standards, it is vital to take existing relevant CoE Recommendations and Treaties into account, as well as legal instruments from other international organisations, in order to establish common rules in this field. Although existing standards may appear sufficient, the CoE should examine the possibility of drafting common rules, which take full account of the negative effect of crime on victims, and which could also serve as the foundation for future standards, aimed at enhancing the standing and rights of victims in criminal proceedings.

2. Recent activities within the CoE indicate that Member States do indeed have the will to strengthen the rights, and elevate the status, of victims. The theme: "Victims, place, rights and assistance" was chosen as the main topic of the Ministers of Justice's 27th Conference in Yerevan in 2006. Three years later, at their 29th conference (18-19 June 2009, Tromsø), Ministers set the issue of victims at the top of the agenda once more: although discussions mainly focused on victims of domestic violence, as well as violence against women in general, they also addressed the broader issue of victims' standing and rights in criminal proceedings, leading to the adoption of Resolution No. 1 on prevention and response.

3. In point 22 of Resolution No. 1, the CoE's Ministers of Justice invited the Committee of Ministers (CM) to engage the European Committee on Crime Problems (CDPC), in cooperation with the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH), to examine the following decisions: these should be taken into account when drafting common rules related to the status and rights of victims in criminal proceedings:

- a. Ensure respect for the individual circumstances, rights and dignity of victims, and protection against any intimidation, harassment or abuse, throughout the judicial process;
- b. Recognise and improve the status of victims throughout the investigation phase and subsequent criminal proceedings;
- c. Ensure effective access to justice by providing information, legal advice and, where appropriate, legal aid;
- d. Ensure specific assistance and protection to the most vulnerable victims;
- e. In cases where it is decided an alleged offender should not be prosecuted, consider ways for victims to have such decisions re-examined;
- f. Provide for compensation schemes, including for the reimbursement of expenses incurred, in relation to criminal proceedings.

4. As a result, the CDPC examined this specific topic at its 58th plenary meeting (12-16 November 2009, Strasbourg) and invited the Committee of Ministers to note that the CDPC instructed the Secretariat to engage an expert to carry out a preliminary study report/study on the subject of

¹ This document does not specifically refer to the issue of victims of domestic violence and violence against women, since this particular topic is under consideration of the Council of Europe committee known as CAHVIO.

victims as a follow up to Resolution No. 1.² On their 1073rd meeting the Deputies decided to accept the invitation of Ministers of Justice and the CDPC.

I. Relevant Instruments of the Council of Europe and Other International Bodies

5. As observed above, the importance of the standing and rights of victims has been fully recognised by the Council of Europe and other international bodies, in particular the European Union and the United Nations. However, whilst a number of international legal instruments have been drafted and implemented, the issue still demands a more comprehensive approach. The Council of Europe is in a good position to provide this and should thus consider the following:

A. Instruments of the Council of Europe

6. The CoE has already addressed this issue on several occasions. In 1977 the Committee of Ministers adopted Resolution (77) 27 on the compensation of victims of crime, which recommended the compensation of victims and their dependants, serving as the basis for the adoption of the European Convention on Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983). This Convention, which was the first comprehensive, legally-binding European instrument in this area, establishes minimum standards of practice. Although it was a significant step forward, it only applies to specific circumstances and it does not define expressly the concept of "victim".

In addition, where compensation is not fully available from other sources, for example for jurisdictional reasons,³ the Convention provides that a State should compensate the victims of crimes, where they have suffered serious bodily injury, or damage to the health of a deceased person's dependants, but only in cases of violent crimes of intent. Victims are entitled to receive compensation at the very least for loss of earnings, medical and funeral expenses, whilst dependants are entitled to claim damages for loss of a provider.

7. Two years after the adoption of the Convention, the Committee of Ministers further adopted Recommendation Rec. R (85)11, on the victim's place in the wider framework of the criminal law. It should be noted that this instrument, which remains in force, contains a list of procedural rights and measures for the victims of crimes in general. Indeed, the Recommendation tackles a variety of rights which should be recognised and applied throughout all stages of criminal proceedings, from pre-trial to post-trial stages. It stresses further that criminal justice should take into account the specific needs of victims to a greater extent, taking account of the physical, psychological, financial and social impairment caused. For this purpose, specific measures are recommended to ensure that victims' needs are addressed, including the training of relevant parties, such as the Police.

8. Recommendation R(87)21 (1987) on 'assistance to victims and the prevention of victimisation' contains a number of issues related to support services, both generally and relating to specific categories of victims, public awareness, monitoring, research and mediation, as well as to the prevention of disclosure of information on the victim to third parties without the victim's consent. It is also important to note that the recommendation stresses that the criminal justice system as it stands is insufficiently equipped to meet victims' needs fully: therefore, it also provides for other forms of assistance including structured programmes and awareness-raising measures with an emphasis on especially vulnerable victims.

9. A number of other legal instruments have been adopted, which segment their approach based on the nature of the crime, for example terrorism, sexual exploitation or violence against women. The CoE Convention on the Prevention of Terrorism (16 May 2005) contains a general provision on compensation and support of victims, including members of their close family. In addition, according to paragraph 31 of the Explanatory Memorandum, the Convention also contains a provision emphasising that the envisaged respect for human rights relates not only to those accused or convicted of terrorist

² See point 3. in the list of decisions of the 58th plenary session of the CDPC.

³ In the civil legal field, the standards of the rights of victims were examined in the Report on 'non-criminal remedies for crime victims,' prepared by the Group of Specialists on remedies for the victims of crime (CJ-S-VICT), which was further examined by the CDCJ and the Committee of Ministers (1037th meeting on 8 October 2008).

offences, but also to the rights of victims - or potential victims - of those offences (see Article 17 of the ECHR).⁴ It is submitted that this kind of provision should not be limited to instruments concerning terrorism.

10. The CoE Convention on 'Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,' (16 May 2005) contains important provisions related to confiscation. The Convention imposes an obligation on the Parties to give the return of confiscated property to the requesting Party priority, to the extent permitted by domestic law. Furthermore, if so requested, it requires Parties to ensure that victims are compensated: it is submitted that a broader application of this principle should be considered in future instruments.

11. The 'CoE Convention on Action against Trafficking in Human Beings,' (16 May 2005) marked the opening of a new chapter in victims' rights regulation. The Convention employs a comprehensive approach to the protection of victims of trafficking and witnesses to it, though it should be noted that the scope of the measures contained within it is limited only to trafficking victims. Nevertheless, the approach includes: respect for human rights and gender equality by ensuring effective investigation and prosecution; introducing the principle of non-discrimination;⁵ and distinguishing the various rights in the context of both substantive and procedural law.

12. As regards the substantive criminal law, the consent of the victim of such trafficking is no longer relevant, and receiving the benefit of services provided by such a victim is expressly sanctioned. Where the offence, deliberately or by gross negligence, endangered the victim's life, the circumstances are considered to be aggravating. The definition of "victim" contained in the Convention is necessarily broad: "a victim is any natural person who is subject to trafficking in human beings".

13. The Convention provides a legal framework, taking the specific needs of the various classes of victim - for example, children - into account. The Convention also provides for civil society's role in the protection and assistance of victims, and prevention of the crime: in particular, governments are encouraged to take steps to: identify victims, but to protect both this identity and their private life; to assist victims in their physical, psychological and social recovery; to provide special assistance to child victims; and to ensure ready access to information, legal aid and compensation. Repatriation and redress are also regulated, and a chapter on international cooperation obliges the Parties to work together to provide assistance protection for victims. Monitoring mechanisms are fundamental to this approach, and the activities of the GRETA should be taken into account.

14. Similarly, the measures contained in the 'CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,' comprehensively address the rights and standing of a limited class of victims, namely children. The Convention, which came into force 1 July 2010, contains: the non-discrimination principle; a definition of the the concept of "victim";⁶ guidance on jurisdictional issues;⁷ and provisions for more generic measures of rights reinforcement, which take the special needs of witnesses into account, throughout the criminal investigation and subsequent proceedings.⁸

4 This study focuses on victims' issues in general. Nevertheless it has to be pointed out that the CoE is also active in the field of victims of terrorism. For instance, the Guidelines on Human Rights and the Fight Against Terrorism were adopted by the Committee of Ministers in July 2002, and the Guidelines on the Protection of Victims of Terrorist Acts in 2 March 2005.

5 Article 3 of the Convention states: 'the implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

6 Article 3 lit. c) of the Convention states: "for the purposes of this Convention 'victim' shall mean any child subject to sexual exploitation or sexual abuse."

7 Article 25 para 6 of the Convention states: "for the prosecution of the offences...of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the prosecution can only be initiated following a report from the victim or a denunciation from the State of the place where the offence was committed".

8 (1). Each Party shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings, in particular by (a) informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases; (b) ensuring, at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or

The Convention outlines guidance for interviewing victims, and provides for the passing of time, to allow the victim to report the crime after he or she has reached the age of majority: crucially, the initiation of proceedings does not depend on the victim's complaint.

15. The Committee of Ministers' Recommendation Rec (2006) 8 on assistance to crime victims is a further, recent legal instrument in this area, which contains a definition of "victim" consistent with that provided for in the EU Framework Decision (see chapter on the EU).⁹ The Recommendation recalls fundamental principles, stressing the importance of recognising and respecting victims' rights, in particular their rights to security, dignity, private and family life, and non-discrimination. States are further encouraged to establish measures to avoid secondary victimisation that do not depend on the identification, arrest, prosecution or conviction of the perpetrator. Such measures include assisting victims' rehabilitation in the community, at home and in the workplace, as far as possible in a language that they can easily understand, including the provision of medical, social and psychological care, financial support, and counselling. These services should be provided free of charge at least in the immediate aftermath of the crime. Vulnerable victims are specifically provided for.

The Recommendation pays particular attention to the role of public and victim support services, for which minimum standards are defined, as well as criminal justice and other agencies in the community. It also deals with the creation of specialised centres for victims of certain types of crimes. Access to information and the content of information are also regulated. Right to effective access to other remedies - insurance, State compensation, confidentiality, training issues related to agencies involved, coordination and cooperation, mediation, research issues - are also covered. The Recommendation adds value as it covers natural persons who are victims of all types of crimes, including non-violent crimes and crimes committed through negligence, rather than being restricted to specific crimes, as noted with regard to the Conventions discussed above. It should be stressed however that the compensation provisions contained within the Recommendation envisage payments only to victims of serious, intentional, violent crimes, as well as their immediate family and dependants.

B. Instruments of the United Nations

16. On 29 November 1985, the General Assembly of the United Nations adopted the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (A/RES/40/34, 96th Plenary meeting), defining the concept of "victim"¹⁰ to include the rights of victims in criminal proceedings, in

definitively; (c) enabling them, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered; (d) providing them with appropriate support services so that their rights and interests are duly presented and taken into account; (e) protecting their privacy, their identity and their image and by taking measures in accordance with internal law to prevent the public dissemination of any information that could lead to their identification; (f) providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation; (g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact; (2) Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings; (3) Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings; (4) Each Party shall provide for the possibility for the judicial authorities to appoint a special representative for the victim when, by internal law, he or she may have the status of a party to the criminal proceedings and where the holders of parental responsibility are precluded from representing the child in such proceedings as a result of a conflict of interest between them and the victim; (5) Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention; (6) Each Party shall ensure that the information given to victims in conformity with the provisions of this article is provided in a manner adapted to their age and maturity and in a language that they can understand.

⁹ 'Victim' means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.

¹⁰ (1). "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within

the context of access to justice and fair treatment, restitution and compensation. It further urges all UN Member States to establish national and international procedures to facilitate this, including implementing training programmes for all those who work with victims of crime, including police officers.

17. The Rome Statute of the International Criminal Court contains provisions on the compensation of victims, but also procedural rights such as the right to make representations before the Pre-trial Chamber, or the right to submit observations concerning questions of jurisdiction and admissibility. The Court should take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims. In addition, an exception to the principle of the public hearing was introduced to protect victims, allowing proceedings to be conducted *in camera*, with evidence presented electronically or through other specialised means.

18. The UN 'Convention on Transnational Organised Crime' (2000) offers a more comprehensive set of regulations. For instance, it establishes the possibility to physically protect an individual who is both a "victim" and "witness," whilst providing further assistance and protection to all victims.¹¹ The Convention also proposes a legal basis for mutual legal assistance, if a victim is located in the territory of the requested State, providing that specific conditions are met. Some of the important measures in the area of mutual legal assistance can also be found in the United Nations Convention against Corruption, as well as in the 2003 Protocol to prevent, suppress and punish trafficking in persons, especially women and children. This supplements the United Nations Convention against transnational organised crime. One of the purposes of the Protocol is to protect and assist victims of such trafficking with full respect of their human rights. It extends the catalogue of means of assistance to and protection of victims of trafficking in person.¹²

19. In the field of non-binding instruments the United Nations played a very active role. An important number of guidelines related to victims have been adopted in recent years, focusing for example on victims who are women, children, and victims of terrorism, to name but a few.

Member States, including those laws proscribing criminal abuse of power; (2). A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

11 Article 25 - Assistance to and protection of victims (1). Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation. (2). Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention. (3). Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

12 Article 6 Assistance to and protection of victims of trafficking in persons (1). In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. (2). Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. 3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and financial assistance; and (d) Employment, educational and training opportunities. 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. Article 7 Status of victims of trafficking in persons in receiving States. 1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. 2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

C. Instruments of the European Union

20. Various important legal instruments were adopted in the EU, in particular the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings,¹³ and the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. Both instruments provide minimum and basic standards within the EU. These had an impact, not only on the national legislation of EU Member States, but also on the development of standards in other fora, including the CoE.

21. The Council Framework Decision establishes a legal basis for the harmonisation of rules and practices concerning the standing and main rights of victims in Member States of the EU. "Victims" are legally defined¹⁴ and the following issues are particularly addressed:

- a. Rights of victims in criminal proceedings and corresponding obligations of states: a right to respect and recognition at all stages of criminal proceedings; the right to be heard;¹⁵ the right to receive information and information about the progress of the case (the minimum list of information is contained in a particular provision); reimbursement of expenses' the right to have legal advice available; the right to protection; the right for compensation during criminal proceedings; the obligation of state to promote mediation; and the right to notify the commission of a criminal act in another Member State in their home country;
- b. Victim support;
- c. Prevention and training of personnel; and
- d. Monitoring mechanisms.

22. The Council Directive 2004/80/EC of 29 April 2004 relating to compensation of crime victims provides for a scheme of compensation measures for victims of violent crimes on the basis of international cooperation in cross-border cases throughout the European Union. Such measures ensure that victims can turn easily to the competent authority in their Member State for a crime committed in another, including by overcoming practical and linguistic difficulties.

23. In addition to these standards, the Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings (29 April 2004), or who have been the subjects of an action to facilitate illegal immigration, who cooperate with the competent authorities should also be mentioned.¹⁶

II. Recent and Ongoing Victim-Related Activities

A. The Council of Europe

24. The most recent development of CoE standards in this field is the Convention of the Council of Europe on 'the counterfeiting of medical products and similar crimes involving threats to public health' (the Medicrime Convention)¹⁷, which is a comprehensive international instrument in the field of medicrime focusing notably on the prevention of such crime and the protection of its victims. It

13 Point 9 of the Preamble to the Framework Decision states: 'the provisions of this Framework Decision do not, however, impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings.' It means that the Member States are not under obligation to provide the rights regulated by the Framework Decision if a victim does not have a status of a party to criminal proceedings or a status of a witness.

14 'victim' shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State

15 According to Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) the victims are not considered parties to criminal proceedings in common law countries, but the right to be heard is recognised in the UK and Ireland.

16 The scope of application of the Directive is related to victims from non-EU Member States, who are or have been victims of trafficking, even if they came to the EU Member State without legal permit.

17 The draft Convention has been approved by the CDPC, however, it has not been formally adopted by the Committee of Ministers so far.

underlines the principle of non – discrimination,¹⁸ and the legal definition of “victim” is provided.¹⁹ In addition, if an offence caused the death of, or damage to the physical or mental health of the victim, such circumstances should be considered to be aggravating.

25. The Medicrime Convention also establishes Member States’ obligation to ensure that victims of an offence, which is committed on the territory of a Party other than the one where they reside, can make a complaint before the competent authorities of their State of residence. Furthermore, the Medicrime Convention includes measures to protect victims, in particular by:

1. Ensuring that victims have access to information relevant to their case and necessary for the protection of their health;
2. Assisting victims with their physical, psychological and social recovery;
3. Providing in domestic law for victims’ rights to compensation from perpetrators.

26. The Convention also contains a catalogue of victims’ rights at all stages in criminal investigations and proceedings, namely:

1. The right to be informed about the services available to them and, unless they do not wish to receive it, follow-up information regarding their complaint, the charges, the general progress of the investigation or proceedings and their role therein, as well as the outcome of their case;
2. the right to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented and considered – in a manner consistent with the procedural rules of domestic law;
3. the right to be provided with appropriate support services;
4. the right to be provided with effective measures for their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. the right to have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings;
6. The right to have access to legal aid, provided free of charge where appropriate, when they are a party to criminal proceedings.

27. In accordance with conditions provided for in domestic law, the Medicrime Convention addresses States’ obligation to ensure access of victims to assistance and/or support by relevant groups, foundations, associations or governmental or non-governmental organisations during criminal proceedings.

28. The Council of Europe is currently considering the need for a new binding instrument on trafficking in organs, tissues and cells. If a Convention is drafted, provisions concerning the rights of victims should be included. However, if it is agreed that a Convention should be drafted in this field, it is presumed that it would not go beyond the selective and restrictive approach described above. In any case, possible future work in this field should be considered in future activities outlined in the recommendations and conclusions.

29. It is important to note that ongoing discussions regarding the draft Convention on preventing and combating violence against women, in particular domestic violence, show that there is a real need

18 Article 2 of the Medicrime Convention states: „The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

19 ‘victim’ shall mean any natural person having suffered adverse physical or psychological effects as a result of having used a counterfeit medical product or a medical product manufactured, supplied or placed on the market without authorisation or without being in compliance with the conformity requirements as described in Article 8.

to establish and reinforce the rights of victims of such violence. The CAHVIO's conclusions should be fully explored, with a view to formulating common rules in this field.

30. In addition, the group of specialists on child-friendly justice (CJ-S-CH) is currently working on the Draft Council of Europe Guidelines on child friendly justice. Specific needs of children who are victims are included. Although these Guidelines will not be legally binding, they will provide important standards which may have an impact on future activities in this field.

B. The European Union

31. Such victim-related issues are also a priority of the EU. On 23 October 2009, the Council of Ministers adopted Council Conclusions on the European Financial Coalition and national financial coalitions against child pornography. One of the aims of the European Financial Coalition is to help identify, locate and safeguard victims, but the Council Conclusions also presented a strategy to ensure the implementation and support of victims' rights, stressing that victims' issues should be given a higher priority via a common EU strategy, based on the following principles:

- Victims should be given assistance and protection throughout criminal proceedings, in order to exercise their fundamental human rights
- The rights of both the victim and the accused should be observed;
- Respect and non-discrimination of victims;
- Crime victims should be given the opportunity to request and receive relief from the harm caused to them, via compensation measures;
- The professional treatment of victims by judicial and law enforcement agencies;
- Access to any case information to protect their interests and exercise their rights, as far as possible in a language that they understand;
- Protection from victimisation;
- Specific measures for the especially vulnerable;
- Assistance and protection of victims' family members, where appropriate;
- Provision of new legislation, or amendments to existing laws, where appropriate, to reinforce these rights;

32. The Council Conclusions referred to the "Stockholm programme," adopted by the European Council on 10-11 December 2009, which also highlighted the need to reinforce victims' rights. The Council Conclusions also urge the European Commission to co-ordinate its activities in the field with the work carried out by Member States and within the CoE, on the basis of the Memorandum of Understanding between the EU and the CoE.

33. With this in mind, the EU, under the Spanish Presidency, initiated discussions on a draft European Protection Order, which aims at protecting women who are victims of gender-based violence across national borders. Internal discussions between the EU Member States and various EU bodies are on-going.

34. In addition, the Framework Decision of 2001 discussed above is currently being examined by the European Commission, following a report revealing a lack of Member States' support in implementing the principles contained within it. The EU is therefore evaluating the possibility of either drafting new legislation which would merge both the Framework Decision and the Directive regarding compensation, or developing specific practical measures to ensure that the Framework Decision is implemented effectively. Their decision should be available in 2011.

35. However legislation must be supported by practical measures. The European Commission Decision of 30 November 2009, amending Decision 2007/116/EC on the introduction of additional reserved numbers beginning with "116," requires that the competent National Regulatory Authority in EU Member States include the number from 15 April 2010: 116006 is, for example, a helpline to assist

victims, providing information on rights, including compensation and insurance, and offering emotional support, whilst providing a referrals service to the relevant organisation.²⁰

36. In conclusion, there is a clear international trend geared towards the reinforcement of victims' rights. However, extant international legal instruments still lack a comprehensive approach, continuing to segment victims into specific categories of crime, rather than providing a generic model for the implementation of safeguards for victims' rights. The outcome of current discussions in the international community remains to be seen, but it is more than likely that the provision of further resources will be required to effect any real change, and the impact upon criminal proceedings will require very close management to ensure that efficiency and defendants' rights to, for example a fair trial, are not impaired.

III. The Legal Standing and Rights of Victims

A. The Principle of Non-Discrimination

37. The principle of non-discrimination is a visible and important concept, relevant to the regulation of victims' rights and the establishment of appropriate measures in this field. It became a standard principle in recent CoE Conventions dealing with victims and is a vital consideration in the drafting of common rules.

B. The Definition of 'Victim' and/or 'Vulnerable Victim'

38. Many older legal instruments do not contain a definition of the concept 'victim.' More recently however, it has been increasingly present in criminal legal instruments. However, whilst no standard definition of the term has been thus far determined, contemporary activity in this field has nevertheless been encouraging, and a standard definition of 'victim' does not seem out of reach.

39. Further questions revolve around the concept of 'vulnerable victim.' As a matter of principle, the rights of victims should be generally regulated for any victims of crime. However, there are certain needs related only to particular categories of victims which may require the establishment of measures to protect their specific rights and needs. It is clear that a definition of 'vulnerable victims,' if proven to be feasible, should take into account at least two vulnerability grounds: one based on the nature of the crime (sexual, violence, terrorism etc), the other based on the victim's personal characteristics (age, sex, origin, disability, nationality, status - e.g. asylum seeker etc.). With this in mind, child victims in particular should be considered as a group requiring special attention,²¹ taking into account the CoE draft Guidelines on child – friendly justice.

C. The Substantive Criminal Law

40. The substantive criminal law provides one means to tackle this issue. As described above, CoE and UN Conventions provide minimum common standards related to specific offences. Such instruments classify behaviours as those requiring regulation and prohibition and selectively address defined categories of crime (for example terrorism, trafficking in human beings, sexual exploitation, drug related offences etc.), which determine the scope of regulations relating to the rights of the respective victims of these identified groups. There is only one binding CoE instrument, which provides for a general regulation of rights of victims. The right to compensation is provided for all the victims of violent crimes of intent.²²

²⁰ In some states the practical measures include having an Ombudsman for Victims of Crime. This may inspire national systems while considering improvements in the area of victims.

²¹ Various international instruments take into account the specific status of child victims. For instance the Lanzarote Convention already provides some procedural rules, which may serve as basis for future activities.

²² This is not the case for victims of non-violent intentional crimes and victims of non-intentional crimes. It should be noted that consequences of certain non-intent based crimes may be equally or even more serious than the consequences of certain intent-based crimes.

D. Procedural Criminal Law

General issues:

41. It should be noted that issues of procedural criminal law are fundamental to the issue of victims' rights. The following factors should be taken into account:

1. the definition of precisely *when* a person is considered a victim;²³
2. the status and rights of dependants;²⁴
3. the distinction between witness-victims and general victims, including related issues of those eligible for compensation.²⁵
4. the circumstances where a person may be considered a victim in one State, but in another equivalent circumstances would not be classified as a matter of criminal law.

42. The following rights of victims are already incorporated into extant instruments, though on a hitherto inconsistent basis.²⁶

General Rights:

- i. The non-discrimination principle;
- ii. The right to protection from intimidation, victimisation and retribution;
- iii. The right to respect and proper treatment from the Police, other law enforcement agencies and judicial authorities.

Procedural Rights:

- iv. The right of access to information throughout the proceedings, from the initial investigation through to post-trial procedure, as far as possible in a language known to the victim;²⁷
- v. The right to be heard and to provide evidence (these rights could be restricted to certain stages of proceedings and/or should be related to the victim's personal circumstances);
- vi. The right to be notified about important decisions or case developments (for example that a person has been accused of an offence, that charges have been brought before the court, a judgment has been issued etc.), as well as issues which may affect a victim's safety, where appropriate (for example the release or escape of an alleged offender from custody or prison – see 'international cooperation,' below);²⁸

23 Legislation may define the decisive moment from which a person is considered a victim (within the legal meaning of the concept – including rights, which are recognized by legislation for a victim).

24 Specific rights, as well as support and assistance measures for dependants, should be further examined.

25 In most cases, a direct victim of a crime and/or his or her dependants, will be considered to be victims in criminal proceedings, with the full range of procedural rights (taking into account that a right to compensation may apply in either criminal or civil proceedings, depending on the legal system). There are situations where, for instance compensation was paid by an insurance company or by some other third party during the proceedings. In such cases, it is considered that the rights of the original victim are fully recognised and enforced, though such a company or third party will also be considered to be a victim. This issue is mainly related to victims in criminal proceedings, and is usually left to domestic legislation.

26 Please also refer to the case-law of the European Court of Human Rights, contained in Appendix 1.

27 Measures and means to implement this right may be left to the national legislation. It would be, however, feasible to agree on minimum information to be provided (Article 4 of the EU FD defines a following content of the information, which may be relevant for future activities):

(a) the type of services or organisations to which they can turn for support; (b) the type of support which they can obtain; (c) where and how they can report an offence; (d) procedures following such a report and their role in connection with such procedures; (e) how and under what conditions they can obtain protection; (f) to what extent and on what terms they have access to: (i) legal advice or (ii) legal aid, or (iii) any other sort of advice, if, in the cases envisaged in point (i) and (ii), they are entitled to receive it; (g) requirements for them to be entitled to compensation; (h) if they are resident in another State, any special arrangements available to them in order to protect their interests.

28 A victim may decide not to assert this right as a whole or in part (in any case a restriction of application should be based on explicit request of a victim that he or she does not wish to receive such information). Restrictions may apply, in exceptional cases, where providing the information could affect the proper prosecution of the case. As regards the language issues inherent in any such trans-border notification procedure, the extent to which the notification can and should be provided in a language understood by the victim requires further consideration. Likewise, the

- vii. The right to legal aid, where appropriate;²⁹
- viii. The right to participate in criminal proceedings;³⁰
- ix. Where a victim is a child, the application of child-friendly procedural rules³¹;
- x. The right to mediation, where appropriate³²;

Rights to Assistance and Support

- xi. The right to protection (safety, privacy etc) of victims and their families;³³
- xii. The right to medical, psychological and financial assistance, where appropriate;
- xiii. The right to specific assistance, as appropriate, for vulnerable victims, or in regard to certain, specific crimes;

Rights To Expenses, Property and Compensation

- xiv. The right to have legal costs refunded, where appropriate;³⁴
- xv. The right to request and receive compensation;³⁵
- xvi. The right to the return of seized property wherever possible (unless it is necessary in the conduct of proceedings).

Rights Related to International Cooperation

xvii. the right to be notified of international cooperation, especially where the safety of the victim is at stake (for example, extradition, the surrender of an offender to another country, or notification of the release or escape of a person surrendered, extradited or transferred);

xviii the right to be notified in the Home State of the criminal offence committed by the perpetrator in another state, together with a corresponding obligation incumbent on the domestic authorities to make such notifications to other Member States.

It seems appropriate to give further consideration as to whether victims should be provided with any additional rights in cases where the transfer of criminal proceedings is deemed necessary, or in cases transferred on the basis of European Convention Article 21 on Mutual Legal Assistance.³⁶

cost and lead-time required to produce such a translation, as well as an evaluation of the necessity for it, should be taken into account. The issue may best be left subject to a case-by-case approach – an agreement on minimum notification rights should be the first step.

29 The right to legal aid is an important aspect of victims' rights, especially in criminal proceedings. However, the circumstances of the case and the victim need to be considered individually: further restrictions may be justified.

30 The importance of this right is obvious. However, there are differences, in particular between common and civil law jurisdictions, concerning the standing of victims in criminal proceedings.

31 Examples of such rules exist in various international documents such as Article 31 of the Lanzarote Convention, however it would be inappropriate to agree any specific wording before the work of the Council of Europe on child-friendly justice is finalised. These rules pay particular attention to the specific needs of child victims, and are invariably related to the right to protection from intimidation and victimisation, for example Article 35 – Interviews with the child (1) Each Party shall take the necessary legislative or other measures to ensure that: (a) interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities; (b) interviews with the child take place, where necessary, in premises designed or adapted for this purpose; (c) interviews with the child are carried out by professionals trained for this purpose; (d) the same persons, if possible and where appropriate, conduct all interviews with the child; (e) the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings; (f) the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person. (2) Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law. (3) When the age of the victim is uncertain and there are reasons to believe that the victim is a child, the measures established in paragraphs 1 and 2 shall be applied pending verification of his or her age.

32 The concept of mediation may have positive consequences for the handling of some cases. However, some suggest that mediation, while providing an important alternative to formal proceedings, may not be appropriate in all cases.

33 It should be noted that different orders exist in Member States' legislation to provide for such protection.

34 Further analysis is required, in order to determine which cases should benefit from this right.

35 This right is currently limited: it goes without saying that any extension of it would require the provision of additional resources.

43. The list of rights provided in this Chapter is not exhaustive: it merely provides a basis for the development of minimum standard provisions. Some of the rights listed here may be subject to certain restrictions or conditions, and any further activity in the field of victims' rights should take the need for an approach which balances the rights of victims and those of defendants, in particular the rights to a defence and a fair trial, into consideration. Common rules should also contain a general provision on the training of representatives of competent authorities dealing with victims, such as police officers, magistrates, prosecutors and judges.

IV. Conclusions and Recommendations

44. On the basis of this analysis, it is clear that there exist many inconsistencies in victim support and protection at the international level. As discussed above, although the CoE has been working on issues related to victims' rights for a long time, no comprehensive binding instrument regarding such rights currently exists, apart from that concerning the compensation of the victims of violent crimes. Likewise EU standards, which have their origins in the aforementioned 2001 Framework Decision, still require a practical or legislative response to the lamentable deficiencies in this Decision's implementation, a response which is not anticipated until next year (2011). In both jurisdictions, whilst the scope of trans-border legal instruments is becoming broader over time, as an increasing number of instruments are adopted and ratified by an ever-growing number of Member States, there remains some considerable way to go: many common crimes (for example theft, robbery, fraud and murder) are as yet barely addressed by international law.

45. No state is immune to crime. No citizen is immune from becoming a victim of a crime. As more and more people travel or migrate from one country to another, issues of jurisdiction, non-standard legal sanctions and other barriers invariably preclude efficient justice for victims. Much has been discussed and implemented regarding the rights of defendants in criminal proceedings, and it is now time to pay close attention to victims' rights. A generic model comprised of minimum standards, taking extant legislation into account, must be established and effectively implemented in all CoE Member States: this should include active promotion, to ensure that the victims of crime are aware of their existence.

46. From a practical point of view, some victims (for example children, or those otherwise defined as 'vulnerable') would require more than these minimum standards and, where necessary, specific provisions which address these needs should be considered.

47. This report thus concludes, making the following recommendations:

1. Short – Term Perspective

Conclusion and Recommendation No. 1:

It would be feasible to set up common rules for victims based on the list of rights described in Part IV, and to the extent deemed necessary to analyse the issues addressed in this report, namely: an approach aimed at formulating common standards of victims' procedural rights, inspiration for which may be derived from the most recent CoE Conventions. It is submitted that it would be appropriate to also include some of the wording contained in the EU Framework Decision. This approach may involve:

- a) **Information gathering:** if more information on Member States' domestic legislation, concerning the issues and rights outlined in Part IV, is required before common rules could be drafted, a questionnaire could be designed in order to provide for a more inclusive and focused approach.
- b) **International cooperation:** an appropriate body of the CoE, such as the PC-OC, could be consulted as to whether or not (or to what extent) information rights regarding the extradition, surrender, transfer and/or release or escape of an offender from prison abroad should be provided: at the very least whether there is any particular reason to oppose

36 The transfer of criminal proceedings (or a procedure under Article 21 of the MLA Convention) is more relevant to alleged offenders, evidence, and other factors: the standing of victims is not addressed in any meaningful way.

such idea should be investigated. The potential ability of a victim to influence transfer proceedings may also be considered.

- c) **Child-Friendly Justice:** the results of CoE work concerning vulnerable groups should be incorporated.

2. Medium – Term Perspective

Conclusion and Recommendation No. 2

As referred to above, there is no binding instrument providing minimum standards on this issue in any of the 47 Member States. Such standards as yet exist only in the EU, though even there proposals are underway, with the aim of reinforcing those standards' implementation. The progress and experience of the EU shows that the status of victims in criminal proceedings can and should also be improved in CoE Member States: an agreed list of common standards for victims should be drafted to reflect their specific needs in the modern criminal justice systems. The following should be considered:

a) **Existing Standards:** the experience and development of similar strategies in the European Union, and via other extant instruments must be taken on-board;

b) **A Comprehensive Model for All Victims of Crime:** the drafting of a new, comprehensive and binding (and/or, where appropriate, non – binding) instrument, addressing all victims of crime. Ratification and implementation issues should be evaluated and addressed. This model is likely to include:

- i. **General provisions**, including robust definitions of 'victim' and 'vulnerable victims;' the non-discrimination principle; the right to protection from intimidation, victimisation and retribution; and the right to respect and proper treatment by the Police, other law enforcement agencies and judicial authorities;
- ii. **Procedural rights**, including access to information; notification rights; the right to be heard; the right to legal aid; the right to medical and psychological assistance, including counselling; participation rights; specific rights for vulnerable victims; and the right to mediation;
- iii. **Rights to Assistance and Support** in enforcing their procedural rights (above);
- iv. **Rights to Expenses, Property and Compensation**, including the return of seized property, and reparations for harm caused; and
- v. **International Cooperation:** such procedural rights should apply too in trans-border cases.

A few examples of the recent ECtHR case-law follows in Appendix I: these cases specifically focus on the procedural rights of victims at the trial stage.

APPENDIX 1

Case law of the European Court on Human Rights

1. Right to a fair hearing

Access to Court / Joining the proceedings as a civil party

- *Perez v. France* [GC], 47287/99, 12 February 2004

This case concerned the clarification of the Court regarding the applicability of Article 6§1³⁷ of the European Convention on Human Rights (the Convention) to civil-party proceedings. On the basis of Article 6 of the Convention, the applicant sought to establish the unfairness of the investigation concerning her allegations of having been assaulted by her two children. During the investigations, the applicant lodged a civil-party complaint to claim reparations for the damage caused by the offence.

The French Government argued in the first instance that the general applicability of Article 6 defined in Article 6§1 could only apply to the right to claim for compensation arising from a civil wrong committed by the offender, which constitutes a civil right where the victim seeks to punish the offender and/or to obtain compensation. Secondly, the Government contended that the sole purpose of exercising the victim's civil right was to trigger, or be joined in, a prosecution. Therefore, Mrs Perez was not exercising a civil right and a civil-party complaint was insufficient to bring the associated proceedings 'a priori' within the ambit of Article 6§1.³⁸

The European Court of Human Rights (the Court) sought to end the uncertainty surrounding its past case-law³⁹ regarding the applicability of Article 6§1 of the Convention to civil proceedings, and adopted a new approach to ensure, notably, consistency in the rights and standing of victims in criminal proceedings. The Court recalled that a criminal complaint accompanied by an application to join the proceedings as a civil party came within the scope of Article 6 § 1 of the Convention, except in certain specific cases ("private revenge" and *actio popularis*: the right to have third parties prosecuted or sentenced for a criminal offence could not be asserted independently, rather it had to be integral to the victim's exercise of the right to bring proceedings under domestic law, a civil right, even if only to secure symbolic reparation or to protect a civil right)⁴⁰. The Court considered that the applicant's claim came within the scope of Article 6§1 of the Convention, since Mrs Perez had lodged a civil complaint during the criminal investigation, and thus claimed her right to damages caused by the offence.

However, the Court stated in its judgment that the French Cour de Cassation could not be criticised for not mentioning all domestic provisions, in particular irrelevant ones, when it took due account of and effectively addressed all of the applicant's claims. No violation of Article 6§1 was thus found.

37 In the determination of 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. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

38 *Perez v. France*, [GC], 47287/99, judgment of 12 February 2004, para. 36

39 see for example *Tomasi v. France*, judgment of 27 August 1992 where the Commission held that the right to compensation depended on whether there was a dispute over a civil right and on whether the outcome of the complaint was decisive for such a right. This approach tends to over-complicate the analysis of Article 6's applicability to civil proceedings.

40 *Perez v. France* [GC], 47287/99, judgment of 12 February 2004, para. 70.

- Gorou v. Greece (N°2) [GC], 12686/03, 20 March 2009

In 1998, the applicant - a civil servant in the Ministry of National Education - filed a criminal complaint against her immediate superior, S.M., for perjury and defamation without claiming compensation since the latter stated that the applicant “did not observe working hours and did not get on well with her colleagues.”⁴¹ During the first hearing in 2001, the applicant reiterated her civil-party application claiming 3 Euros for the damages caused to her reputation but the defendant was acquitted. In 2002, the applicant petitioned the public prosecutor of the “Court of Cassation,” under the relevant provision of the Code of Criminal Procedure, to lodge an appeal on point of law against the Criminal Court’s judgment, alleging that it did not contain sufficient reasoning.⁴²

The applicant complained of a violation of Article 6§1 of the Convention when her request to the public prosecutor was dismissed with insufficient explanation, since her six-page petition, containing detailed arguments that were – allegedly - ‘completely disregarded’,⁴³ was returned to her with a handwritten note stating that ‘there are no legal or well-founded grounds of appeal to the Court of the Cassation.’⁴⁴ She further alleged that the absence of any justification prevented her from assessing whether the decision was improper or arbitrary. The applicant further recalled the Court’s relevant case-law against Greece which established that the “public prosecutor was obliged to give reasons for his decisions, implying that the injured party could expect his or her principal claims to be dealt with attentively”⁴⁵.

The reasoning of the Court concerning the applicability of Article 6§1 of the Convention to the proceedings stems from the principle of *Perez v France*⁴⁶ which the Court recalled to conclude that the applicant did apply for civil status in criminal proceedings, primarily because the aim of the applicant was to protect her right to a ‘good reputation’ and, secondly, although symbolic, the proceedings had an economic aspect on the basis of the applicant’s claim. Furthermore, the Court considered that Article 6§1 applied to the request of the applicant to the public prosecutor, on the basis of the continuous presence of the ‘dispute’ when the applicant appealed. The Court held that the request was made in the same context and pursued the same aim as her previous application and therefore formed an integral part of the proceedings joined by the applicant as a private party.⁴⁷

It is important to note that Article 6§1 imposes an obligation on courts to provide reasons for their decisions. However, depending on the circumstances of the case⁴⁸, the level of detail required will vary. In the present case, although domestic law did not in principle entitle the private party to appeal on points of law once an acquittal has been made, the Court stressed that ‘the existence of an established judicial practice cannot be disregarded’ and that, ‘in view of the specific features of the applicant’s request to the public prosecutor of the Court of Cassation, Article 6§1 of the Convention is applicable. The same practice should be taken into account in assessing the extent of the reasoning to be given by the public prosecutor in his reply.’⁴⁹ However, the Court recalled that appellate courts are not obliged to justify appeal dismissals on points of law.⁵⁰ Therefore, the Court concluded that the duty of the public prosecutor at the Court of Cassation stemming from Article 6§1 of the Convention is restricted to giving a response, rather than a detailed justification to the private party, and stated that ‘to demande more detailed reasoning would place on the public prosecutor an additional burden that is

41 Gorou v. Greece (N°2) [GC], 12686/03, 20 March 2009, para. 10

42 Op. Cit. para. 11: “The defendant’s acquittal was justified by the fact that the offending remarks had been truthful and that it was not his intention to defame or insult the applicant”.

43 Op.Cit., para 20

44 Op. Cit.,para. 14

45 Op. Cit.,para 20

46 Application of *Perez v France*, para 66: “ Article 6§1 applies to proceedings involving civil party complaints from the moment the complainant is joined as a civil party unless he or she has waived the right to reparation in an equivocal manner” and para. 70 in *Perez* applied in *Gorou v Greece*, para 24: “to fall within the scope of the Convention such right must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation”.

47 *Gorou v Greece*, op.cit., Para 35

48 See for example, *Van de Hurk v. the Netherlands*, 19 April 1994, § 61

49 Op. Cit, para.38

50 See in particular *Salé v. France*, no. 39765/04, 21 March 2006, para. 17.

not imposed by the nature of the civil party's request for him to appeal on points of law against an acquittal.' No violation of Article 6§1 was found.

It is important to note the partially dissenting opinion of Judge Casadevall, which underlined that the Court addressed the same issue in *Alija v Greece (no1)*⁵¹, *Greece v. Gorou (no 4)*⁵² and *Markoulaki v. Greece(no1)*,⁵³ but found a violation of Article 6§1 of the Convention. Judge Casadevall considers the Court in *Gorou* took a step backwards: 'once it has decided to extend individuals' rights in a particular aspect of the right to a fair hearing, it should not – unless there has manifestly been mistake – reverse its decision. Acquired rights in the cause of human rights are at least as precious as acquired rights in other branches of the law and therefore the principle of non-regression must prevail.'

Joining the proceedings as a civil party and access to items of documentary evidence⁵⁴

-Ernst and Others v. Belgium, 33400/96, 15 July 2003 (only available in French)

The applicants, four Belgium journalists, relied on **Article 6§1 of the Convention to complain that they were denied the right to join a prosecution as private parties, on the grounds that the defendant was a judge entitled to immunity from jurisdiction. The applicants further complained that documentary evidence had not been disclosed or communicated to them and that the hearing had not been in public.**

The facts concern search and seizure procedures ordered by the investigating judge within the applicants' homes and newspapers' offices, in connection with the prosecution of members of the State's legal service for breach of confidence, following leaks in highly sensitive criminal cases.

The decision of the Court was based on the assessment of whether the immunity of the judge was compatible with the Convention. For this purpose, the Court examined whether other remedies were made available to the applicants to protect their rights under the Convention effectively. Therefore, the Court considered that the applicants were not deprived of an action to seek reparation and the restrictions imposed by the judge's immunity were not disproportionate, since they did bring a civil action for damages against the State in respect of the same matter, and they could have brought a civil action against the other persons to whom they referred in their complaint.

Regarding the domestic Court's failure to communicate documentary evidence concerning the searches, and the corresponding violation of the 'equality of arms' principle, the Court underlined in the first instance that such a procedure was performed on the basis of the principles governing adversarial process when deciding on the admissibility of the application to join the proceedings as private parties. The Belgian Court only referred to documentary evidence which had been made known to the applicants in order to reach its decision. The Court considered therefore, that the fact that the public prosecutor held items of evidence which were not revealed to the applicants was of little consequence and, accordingly, that there was no violation of Convention of Article 6.

On the issue of the absence of a public hearing, although the Court recalled that the public nature of a hearing or judgment is a fundamental principle of Convention Article 6§1, to ensure the transparency of the administration of justice and therefore fair trial, it further highlighted that restrictions on Article 6§1 of the Convention may seem necessary,⁵⁵ and national courts should take into account procedural idiosyncrasies and the specific nature of the issues to be examined, in the course of reaching a

51 *Alija v Greece (no1)*, no 73717/01, 7 April 2005

52 *Greece v. Gorou (no 4)*, no 9747/04, 11 January 2007

53 *Markoulaki v. Greece(no1)*, no. 44858/045, 26 July 2007.

54 See also *Menet c. France*, 39553/02, judgment of 14 June 2005 (only available in French).

55 Article 6§1 of the Convention: "Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"

See also *B. and P. v. United Kingdom*, 36337/97 and 35974/97, para. 37, judgment of 05 September 2001

decision. The Belgian Constitution requires that hearings and judgements be delivered in public, except investigation procedures which concern this specific case. The Court stressed that while the applicant neither requested a public hearing, nor made any reservations on the hearing being held in private, the Court found that there had been no violation of Article 6§1 of the Convention.

Positive obligations of the State regarding Article 2 and excessive delays of proceedings

- **Calvelli and Ciglio v. Italy**, 32967/96, 17 January 2002

The applicants alleged a violation of Articles 2 and 6§1 on the ground that procedural delays had prevented the prosecution of the doctor responsible for the delivery of their child, who had died shortly after birth.

The principles concerning the applicability of Article 2 and the positive obligation of the State in this respect were recalled by the Court, which underlined that the State should refrain from the intentional taking of life as well as taking appropriate steps to safeguard the lives of those within its jurisdiction.⁵⁶ It further stressed that such principles apply to the public-health sector, where measures should be taken to protect the patients' lives including establishing an effective independent system to determine the cause of death of patients both in the private and public sector and ensure that those responsible are made accountable.

The case-law of the Court established that 'even if the Convention does not, as such, guarantee to have criminal proceedings instituted against third parties, the effective judicial system required by Article 2 may - and in certain circumstances must - include recourse to criminal law.'⁵⁷ Where the violation of the right to life was not intentional, the provision of criminal law remedy will not necessarily be required, since in cases of medical negligence for example, the obligation of the State will be fulfilled if a civil remedy is afforded to the victim, alone or in conjunction with a remedy in the criminal courts, which was the case in Italy in the present case. The Court stressed that the existence of such remedies is not sufficient to satisfy the provision, which will be met if the protection afforded, operates effectively in practice within a time-span such that the court can complete their examination of the merits of each individual case.⁵⁸

However the Court concluded that there was in fact no violation of Article 2, since the applicants had waived their civil right to instigate proceedings, by agreeing with the defendant to receive compensation for the damages sustained, and stated 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 no longer able to claim to be a victim.'⁵⁹

In respect of the applicants' claim under Article 6§1 of the Convention, that the proceedings had taken an unreasonable amount of time, the Court considered that such an issue should be considered in light of the circumstances of the case, in particular its complexity and the conduct of the applicant.⁶⁰ On this basis, the Court found no violation of Article 6§1, since the case was complex and there were no periods of inactivity attributable to the authorities.

Participation in the investigation

- **Sottani v. Italy**, 26775/02, 24 February 2005

A hospital autopsy revealed that the death of the applicant's wife, who had been suffering from leukemia, was caused by acute bronchopneumonia. The applicant, relying on Articles 6§1 and 13 of

⁵⁶ LCB v the United Kingdom, judgment of 9 June 1998

⁵⁷ Calvelli and Ciglio v. Italy, 32967/96, 17 January 2002, para. 51 and see also Kiliç v. Turkey 22492/93, § 62

⁵⁸ Op.cit, para. 53

⁵⁹ Op. Cit para 55

⁶⁰ See notably Torri v Italy, judgment of 1 July 1997, para. 24.

the Convention, complained of the public prosecutor's failure to order a judicial autopsy, and further relied on the principle of equality of arms in the application under the domestic criminal code, which only allows the public prosecutor to apply directly to the investigating judge to perform such an autopsy.

Concerning the applicability of Article 6§1 of the Convention, the Court recalled the principle applied in *Perez* concerning the need to safeguard victims' rights and their proper place in criminal proceedings by pointing out that, simply because the requirements inherent in the concept of a fair trial in criminal cases are not necessarily the same as those in disputes about civil rights and obligations - as evidenced by the fact that for civil disputes there are not detailed provisions similar to those in Article 6 §§ 2 and 3 - does not mean that the Court can ignore the plight of victims and downgrade their rights.⁶¹ Furthermore, the Court stressed that Article 6 might apply, in spite of the absence of a claim for financial reparations, on the basis of the proceedings' outcome and its relevance to the civil right claim.

Although Italian legislation prevents a private party from joining the proceedings until the preliminary hearing, that party can nevertheless exercise his or her right to actively participate in proceedings right from the preliminary stage of the investigations, including by requesting that the prosecutor applies to the investigating judge for the immediate disclosure of evidence. The Court considered that such rights are fundamental to ensure the effective participation of private parties in proceedings, in particular in cases where evidence may deteriorate over time and may need to be collected at an early stage. In addition, the injured party is entitled to submit pleadings at all stages of the proceedings, and may request the inclusion of evidence. Article 6§1 therefore applied to the facts of this case.

However, the complaint was not deemed admissible, since the applicant did not request an immediate judicial autopsy, and therefore failed to make use of all remedies available to him under domestic law.

2. Right to respect of private and family life

Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009

This case concerned a **violation of the applicant's right to respect for her physical integrity (Article 8 the Convention⁶²) due to the inefficiency of the Croatian judicial authorities** in dealing with a complaint concerning an alleged physical and verbal assault by certain individuals, and their failure in their **positive obligation to protect her adequately from aggression**. The violation of Article 8 was also due to the flawed implementation of the legal measures intended to address such matters in domestic criminal law.

The applicant, a female Croatian national who was unemployed with no income, brought a civil action in 1999 to seek protection from two individuals, who allegedly changed the locks of her privately owned flat and removed all her belongings. In 2003, the day after the applicant had regained possession of her flat, she was attacked by three individuals upon her arrival, directly in front of the property. The police filed a report of the incident, which stated that the applicant was verbally and physically attacked when she attempted to enter her flat, and that she suffered death threats in the event should she ever return. The domestic courts rejected allegations of physical violence, on grounds of lack of evidence.

The Croatian Criminal Code distinguishes between 'serious' criminal offences, to be prosecuted by the State Attorney's Office (either of its own volition or by a private application), and more 'minor' criminal offences, usually prosecuted by means of a private prosecution. The domestic courts considered that the alleged violence and threats made with respect to the applicant should be qualified as 'minor,' and thus the prosecution had to be brought privately by the victim.

⁶¹ Sottani v. Italy, 26775/02, 24 February 2005 and Perez v. France, para 72

⁶² Article 8 : 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is interesting to note that, as regards the alleged violation of Convention Article 8, the Government considered the Article to be inapplicable in this case, on the grounds that the relationship between the acts of violence in question and the applicant's private and family life was too remote to fall within its scope.⁶³ Furthermore, it argued on the one hand that the applicant did not fall within the category of 'vulnerable victims requiring special protection,' and on the other that the attacks did not last for a sufficiently long period of time for the authorities to have become aware of them. Finally, the Government stressed that facts could not be ascertained, since the domestic courts only found that the applicant had been subjected to verbal violence.

The Court stated, however, that the physical and moral integrity of an individual is covered by the concept of 'private life,' which extends to the sphere of the relations of individuals with each other. The Court thus found that the **notion of private life includes attacks on one's physical integrity**,⁶⁴ which notably implied that **the State has a positive obligation to adopt specific protective measures**. With respect to the medical documentation, which proved the existence of the physical violence alleged by the applicant to have occurred in connection with her attempt to enter a flat for which she had court approval to occupy, the Court considered that such acts required 'the State to adopt adequate positive measures in the sphere of criminal-law protection.'⁶⁵

As regards the implementation of domestic legal measures, the Court rejected the applicant's claim that her Convention rights could be secured only if the attackers were prosecuted by the State, and that the Convention requires State-assisted prosecution. The Court underlined the fact that **the right to a State-assisted prosecution does not apply in all cases**. The applicant had the ability to prosecute her attackers via either a private prosecution, or as an injured party in a subsidiary capacity.

With respect to the issue of the **domestic authorities' compliance with such legal measures**, the Court noted that the violent nature of the aggression and seriousness of the threats should have been classified as something other than 'minor' under domestic law, on the basis of the detailed description of the attack found in her initial criminal complaint, the police report, and her medical records, as well as her subsequent request for an investigation. Thus the Court agreed with the applicant's decision not to prosecute on the basis of 'minor' injuries, rather to request an investigation on charges of violent behaviour. Furthermore, the Court stressed that although the applicant's request did not strictly follow the exact form required, she nevertheless gave a clear and relevant description of the attack despite not being legally represented due to her not having access to legal aid. In accordance to the relevant domestic provisions, the Court confirmed that the applicant's submissions were sufficient to allow an investigation, and the decision of domestic courts to dismiss the request of the applicant, on the grounds that it was 'incomprehensible and incomplete,' was therefore unjustified. In addition, the Court considered the government's assertion that the applicant had failed to bring a private prosecution to be ill-founded, as Mrs Jankovic had indeed tried to proceed but the relevant authorities had ignored her complaint and thus thwarted her attempt.

As such, the Court noted that proceedings were terminated as a result of statutory limitations, and were concluded without any final decision on the attackers' guilt. The decisions of the domestic courts in this case were thus revealed to be inefficient, and there had been a failure to act on the part of the Croatian judicial authorities. The circumstances of the case, the Court observed, demonstrated that the system did not offer adequate protection to the applicant from an attack on her physical integrity, and showed that the manner in which the relevant legal measures had been implemented was flawed, to the extent that it constituted a violation of the respondent State's positive obligation under Article 8 of the Convention.⁶⁶

63 Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009, para 29

64 see X and Y v. The Netherlands, 8978/80, judgment of 26 March 1985, para 23

65 Sandra Jankovic v. Croatia, 38478/05, judgment of 14 September 2009, para 47; see also Opuz v. Turkey, no 33401/02, judgment of 9 June 2009 concerning the positive obligation on national authorities to take all reasonable steps to protect the lives of individuals against violence between private persons.

66 *ibid*, para 57-58 (paraphrased).