

# Partnership for Good Governance



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## THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON VICTIMS’ RIGHTS IN CRIMINAL PROCEEDINGS

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## A. Introduction

1. This study is concerned with the way in which the case law of the European Court of Human Rights (“the European Court”) relating to the application of the European Convention on Human Rights in criminal proceedings (“the European Convention”) has identified a need for certain rights for victims to be recognised.
2. The study has been prepared at the request of the Council of Europe pursuant to the European Union – Council of Europe joint project “Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in Georgia in line with European standards”.
3. The specific terms of reference are to address the following issues:
  - What are the standards for granting a person a victim status?
  - Right of victim to know essence of the case, in what extent victim shall enjoy the right to know the case materials, grounds for limitations, stages;
  - Right of a victim to make copy of case files, exceptions, stages;
  - Right of a victim to receive the compensation and the role of prosecutor with this regard;
  - Right of a victim to file the motion against the decision of prosecutor;
  - Right of a victim to appeal court decisions;
  - What are the standards of considering a victim’s position while conclusion of plea bargain and the application of discretionary power by the prosecutor.

and also to provide concrete recommendations on the protection of victim’s rights in criminal proceeding according to the European Convention.

4. However, in considering these issues, it is important to bear in mind that the European Convention has no specific provision dealing with the rights of a victim of a criminal offence. Nonetheless, the issue of the rights of victims has generated some significant case law under the European Convention. This case law has particularly been concerned with the right to a fair trial, with the European Court emphasising

the need to safeguard victims' rights and their proper place in criminal proceedings. Simply because the requirements inherent in the concept of a “fair trial” are not necessarily the same in disputes about civil rights and obligations as they are in cases involving criminal trials, as evidenced by the fact that for civil disputes there are no detailed provisions similar to those in Article 6 §§ 2 and 3 (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 32) does not mean that the Court can ignore the plight of victims and downgrade their rights. In any event, the Code of Criminal Procedure, in a preliminary Article introduced by law no. 2000-516 of 15 June 2000, expressly sets out certain principles fundamental to criminal trials, including “a balance between the rights of the parties” and that the “rights [of victims shall be] safeguarded” (see paragraph 19 above). Lastly, the Court draws attention for information to the text of Recommendations Nos. R (83) 7, R (85) 11 and R (87) 21 of the Committee of Ministers (see paragraphs 26-28 above), which clearly specify the rights which victims may assert in the context of criminal law and procedure<sup>1</sup>.

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<sup>1</sup> *Perez v. France* [GC], 47287/99, 12 February 2004, para. 72.

5. However, although the issue of the rights of victims may arise out of criminal proceedings, these rights may also come within the rights that Article 6 guarantees in respect of civil proceedings. Moreover, the rights of victims can also be derived from other provisions in the European Convention, notably Articles 2, 3, 4, 5 and 8.
6. It should also be borne in mind that the Committee of Ministers of the Council of Europe has adopted various Recommendations to member states with respect to the rights of victims<sup>2</sup>. As the extract above illustrates, these can influence the way in

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<sup>2</sup> Thus, Recommendation No. R (83) 7 on participation of the public in crime policy, adopted by the Committee of Ministers on 23 June 1983, advocates the establishment of an efficient system of legal aid for victims so that they may have access to justice in all circumstances; Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, adopted by the Committee of Ministers on 28 June 1985, provides: “A. at police level 1. Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner; 2. The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation; 3. The victim should be able to obtain information on the outcome of the police investigation; 4. In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim; B. In respect of prosecution 5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender; 6. The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information; 7. The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings; C. Questioning of the victim 8. At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them; D. Court proceedings 9. The victim should be informed of – the date and place of a hearing concerning an offence which caused him suffering; – his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice; – how he can find out the outcome of the case; 10. It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished; 11. Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction; 12. All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account: – the victim's need for compensation; – any compensation or restitution made by the offender or any genuine effort to that end; 13. In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or of any other measure, great importance should be given among these conditions to compensation by the offender to the victim; E. At enforcement stage 14. If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible; F. Protection of privacy 15. Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or the particular status or personal situation and safety of the victim make such special protection necessary, either the trial before the judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate; G. Special protection of the victim 16. Whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender”; Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation, adopted by the Committee of Ministers on 17 September 1987, “recommends that the governments of member States take the following measures: ... 4. ensure that victims and their families, especially those who are most vulnerable, receive in particular: ... – assistance during the criminal process, with due respect to the defence”; Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000, provides: “ ... 34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a

which the case law of the European Court is developed but neither all the requirements in them nor all the issues covered by the terms of reference for this study have so far been recognised in this case law.

7. The study deals first with the status of being a victim and then considers issues relating to the adequacy of the criminal law and penalties, conducting an investigation, bringing a prosecution, participation in a prosecution, discontinuance and dismissal of a prosecution, the conclusion of a plea bargain, the protection of victims, delay, participation in sentencing and compensation<sup>3</sup>.
8. Particular recommendations for action that might be necessary to protect the rights of victims that have been recognised by the European Court are italicised in the text.

## B. Victim status

9. The case law has not generally been concerned with whether or not a particular person should be regarded as a victim of an alleged criminal offence since this has been recognised by the national legal system in the proceedings that have given rise to the application to the European Court.
10. However, as the commission of criminal offences will in many instances affect the “civil rights” – as understood for the purposes of Article 6(1) of the European Convention<sup>4</sup> - of someone, such persons will be able to invoke that provision if those rights are adversely affected by the conduct of criminal proceedings even if national law does not accord them any recognition as a victim.
11. Moreover, it should be noted that the European Court also accepts that the close relatives of persons who have died other than those from natural causes can invoke the rights guaranteed under Article 2<sup>5</sup>. It takes a similar view of the position of such relatives who are affected where someone is subjected to ill-treatment contrary to Article 3<sup>6</sup> or is deprived of liberty contrary to Article 5<sup>7</sup>.

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challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.”

<sup>3</sup> Although the focus of the study is on the rights of victims in criminal proceedings, it should be borne in mind that in certain circumstances their involvement and that of persons closely connected to them could lead to a violation of the requirement in Article 6(1) of the European Convention that the tribunal determining a case be independent and impartial. See, e.g., *Demicoli v. Malta*, no. 13057/87, 27 August 1991 (the victims of an allegedly defamatory article were on the panel trying the editor of the journal concerned), *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 (the judges trying the case were the ones that were the object of the remarks on which liability was based), *Kristiansen v. Norway*, no. 1176/10, 17 December 2015 (in which a juror knew the victim and commented on her character) and *Mitrov v. “the former Yugoslav Republic of Macedonia”*, no. 45959/09, 2 June 2016 (in which the victim’s mother was a judge in trial court).

<sup>4</sup> This is an autonomous concept and is not, therefore, restricted to a particular national understanding of civil liability.

<sup>5</sup> See, e.g., *McCann and Others v. United Kingdom* [GC],

<sup>6</sup> See, e.g., *De Donder and De Clippel v. Belgium*, no. 8595/06, 6 December 2011.

<sup>7</sup> See, e.g. *Varnava and Others v. Turkey* [GC], no. 16064/90, 18 September 2009.

12. *There is thus a need to ensure that all such persons are accorded the rights that the European Convention has been recognised on conferring on “victims”.*

### C. Adequacy of the criminal law and penalties

13. The scope of the criminal law must be adequate to protect rights or freedoms under the European Convention. This approach is founded upon the view that the safeguarding of certain fundamental values cannot be left just to the protection afforded by the civil law but requires the effective deterrence that is provided by criminal provisions<sup>8</sup>. On a number of occasions, however, the European Court has found that this has not been the case, with consequence that the victim of the impugned conduct was then able to claim successfully that the High Contracting Party concerned had violated them.

14. Thus, in a case where torture had been used in the course of interrogation by the police, it has found a violation of Article 3 because none of the offences relied upon in the proceedings against them<sup>9</sup> appeared capable of squarely addressing the full range of issues thrown up by the treatment to which the applicant had been subjected, in particular the effect in a very serious way on dignity and psychological well-being<sup>10</sup>. The European Court also considers that States have a positive obligation inherent in Articles 3 and 8 of the European Convention to enact criminal law provisions effectively punishing sexual abuse of children<sup>11</sup>, as well as to ensure that the definition of rape adequately reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy<sup>12</sup>.

15. Furthermore, it has found violations of Article 8 where the law failed to provide for the possibility of criminal proceedings being taken against a man who had sexually assaulted a mentally handicapped child<sup>13</sup> and where the offences of attempted child pornography and sexual molestation did not provide sufficient protection against the attempted covert filming of the applicant naked by her stepfather in their bathroom<sup>14</sup>.

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<sup>8</sup> See no. 8978/80, 26 March 1986, para. 27.

<sup>9</sup> Namely, bodily harm, abuse of office and coercion of a confession or a statement.

<sup>10</sup> See, e.g., *Hristovi v. Bulgaria*, no. 42697/05, 11 October 2011 and *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015.

<sup>11</sup> See *M and C v. Romania*, no. 29032/04, 27 September 2011, para. 111.

<sup>12</sup> See *M C v. Bulgaria*, no. 39272/98, 4 December 2003, paras. 165-166.

<sup>13</sup> *X and Y v. Netherlands*, no. 8978/80, 26 March 1985. Although there were two potentially relevant offences, these were not considered not provide the victim with practical and effective protection since the first (abuse of a dominant position to cause a minor of blameless conduct to commit indecent acts) could only be prosecuted on complaint by the actual victim and not by the victim's representative and the second (apparently designed to penalise indecent exposure and not indecent assault) was not clearly applicable to the present case.

<sup>14</sup> *Söderman v. Sweden* [GC], no. 5786/08, 12 November 2013. Although in this case the European Court did not consider that recourse to the criminal law would necessarily be the only way of fulfilling obligations under Article 8, there was also no civil remedy available offering an adequate level of protection.

16. In addition, it has found a violation of Article 4 where the scope of the criminal law was not sufficient to provide a minors and others with practical and effective protection against being held in servitude<sup>15</sup>.
17. A failure to impose a criminal sanction on conduct causing death would also, in many instances but especially in cases of what is generally understood to be “murder”, result in a violation of the right to life under Article 2<sup>16</sup>.
18. Although the inadequacy of the criminal law has so far only been established to entail violations of a limited range of rights and freedoms under the European Convention, it is likely that this approach will be followed regardless of the right or freedom concerned where the conduct interfering with it is particularly serious. This is because the European Court can be expected to take the view that there is a need for effective deterrence against grave acts where fundamental values and essential aspects of rights and freedoms are at stake<sup>17</sup>.
19. Even where the scope of the criminal law is adequate, it is also possible that allowing legal obstacles to the identification and prosecution of an offender to remain in place where the conduct concerned affects rights and freedoms under the European Convention will also be found incompatible with the positive obligations inherent in those rights and freedoms.
20. An instance of this occurring can be seen in a case where an overriding requirement of confidentiality meant that it was impossible to establish who had placed an advertisement of a sexual nature concerning a minor on an Internet dating site. The European Court found that this gave rise to a violation of Article 8<sup>18</sup>.
21. However, this does not preclude the possibility of limiting criminal responsibility and thus the possibility of a prosecution where the perpetrators of acts that infringe rights and freedoms under the European Convention are children or have diminished mental capacity<sup>19</sup>.

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<sup>15</sup> *Siliadin v. France*, no. 73316/01, 26 July 2005, *C N and V v. France*, no. 67724/09, 11 October 2012 and *C N v. United Kingdom*, no. 4239/08, 13 November 2012.

<sup>16</sup> However, as was observed in *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17 January 2002, “if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged” (para. 51).

<sup>17</sup> See *K U v. Finland*, no. 2872/02, 2 December 2008, at para. 43. The European Court also observed in this case that: “while this case might not attain the seriousness of *X and Y v. the Netherlands*, where a breach of Article 8 arose from the lack of an effective criminal sanction for the rape of a girl with disabilities, it cannot be treated as trivial. The act was criminal, involved a minor and made him a target for approaches by paedophiles” (para. 45).

<sup>18</sup> *K U v. Finland*.

<sup>19</sup> See *Đorđević v. Croatia*, no. 41526/10, 24 July 2012, in which it was observed: “141. The Court notes at the outset that acts of violence in contravention of Article 3 of the Convention would normally require recourse to the application of criminal-law measures against the perpetrators (see *Beganović v. Croatia*, no. [46423/06](#), § 71,

22. *There is a need, therefore, to ensure not only that the existing criminal law does not have the sort of gaps seen in these cases but also that its scope is kept under review to address other gaps that might emerge.*
23. In addition, both the penalties that are prescribed for particular offences and those that are actually imposed where allegations of conduct adversely impacting upon rights and freedoms under the European Convention need to reflect the gravity of the violation concerned and have a dissuasive effect on any repetition.
24. The only instances so far of this occurring have been in cases concerned with the infliction of ill-treatment contrary to Article 3<sup>20</sup>. However, this does not mean that the European Court will not also take a similar approach where the penalty prescribed or imposed in respect of conduct does not reflect the gravity of its impact on the enjoyment of other rights or freedoms.
25. *There is a need, therefore, to keep under review the adequacy of penalties for conduct that has the potential to affect rights and freedoms under the European Convention and to ensure that appropriate guidelines exist regarding the approach to sentencing in such cases.*

#### D. Conducting an investigation

26. There is no case law regarding the need to investigate offences in general following a complaint by a victim.
27. However, any failure to do so, as well as excessive delay in so doing, will undoubtedly affect the “civil rights” of the victim and have the potential to violate Article 6(1) of the European Convention if this effectively precludes him or her exercising his right of access to court<sup>21</sup>.
28. Moreover, there are a number of rights and freedom under the European Convention in respect of which conduct alleging violating them will give rise to an obligation to undertake a thorough and effective investigation, namely, those under Articles 2<sup>22</sup>, 3<sup>23</sup>, 4<sup>24</sup>, 5<sup>25</sup> and 8<sup>26</sup>, which can be invoked by victims before the European Court.

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25 June 2009, as regards Article 3, and Sandra Janković, cited above, § 47, as regards Article 8).<sup>142</sup> However, in the present case most of the alleged perpetrators were children below 14 years of age, against whom, under the national system, it is not possible to apply any criminal-law sanctions ...”.

<sup>20</sup> See, e.g., *Okkali v. Turkey*, no. 52067/99, 17 October 2006, paras. 71-78, *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, paras. 124-125, *Austrianu v. Romania*, no. 16117/02, 12 February 2013, paras. 73-75 and *Myumyun v. Bulgaria*, no. 67258/13, 3 November 2015, paras. 73-75.

<sup>21</sup> As is clear from the discussion in paras. 42, 67, 68 and 80 below.

<sup>22</sup> This applies to all deaths other than those from natural causes. See, e.g., *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014

<sup>23</sup> Where there is an arguable claim of ill-treatment, whether inflicted by public officials or private persons. See, e.g., *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, at paras. 114-123.

<sup>24</sup> In cases of forced labour and servitude; see *C N and V v. France*, no. 67724/09, 11 October 2012, *C N v. United Kingdom*, no. 4239/08, 13 November 2012 and *J and Others v. Austria*, no. 58216/12, 17 January 2017.

29. Much of the case law concerning the conduct of a thorough and effective investigation has been concerned with the status of those conducting it (i.e., they must be independent and impartial in law and practice)<sup>27</sup> and the manner in which it is handled (i.e., it must be capable of leading to the identification and punishment of those responsible, be initiated promptly and be conducted with reasonable expedition)<sup>28</sup>.
30. However, in cases involving alleged violations of Articles 2 and 3, the European Court has also established that the duty of investigation can require that it be subjected to public scrutiny necessitating the involvement of the victim in a given case.
31. This involvement that relatives of deceased persons should be accorded does not mean that there is an automatic requirement that police reports and investigative materials be disclosed or otherwise published since the European Court has accepted that these can involve sensitive issues with possible prejudicial effects to private individuals or other investigations<sup>29</sup>. It has, therefore, concluded that the access required for such relatives might be provided for in other stages of the available procedures, such as a judicial investigation or trial. Nonetheless, keeping the next of kin informed about the progress of an investigation should occur where there was no such prejudicial risk<sup>30</sup>.
32. Moreover, their involvement can entail a requirement for them to be able to take part in those stages of an investigation that are of a judicial or quasi-judicial character, including the possibility to ask questions of witnesses and to be legally represented<sup>31</sup>. For this to be effective there should be advance disclosure to them of the statements of those witnesses who are to be questioned<sup>32</sup>.
33. This obligation was thus breached where neither the victim of an alleged rape nor her representative were given the opportunity to put questions to the witnesses whom she accused of perjury before the prosecution decided to close the criminal investigation on the basis that the use of force or threats had not been established beyond

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<sup>25</sup> Failure to investigate an alleged arbitrary detention. See, e.g., *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, 13 December 2012, at paras. 242-243.

<sup>26</sup> In cases requiring a criminal sanction, such as in *X and Y v. Netherlands*, no. 8978/80, 26 March 1985.

<sup>27</sup> See, e.g. *Ramsahai v. Netherlands* [GC], no. 52391/99, 15 May 2007.

<sup>28</sup> See, e.g., *Hugh Jordan v. United Kingdom*, no. 24746/94, 4 May 2001 and *McKerr v. United Kingdom*, no. 28883/95, 4 May 2001. These requirements are not considered in the present study as they do not relate specifically to the situation of the victim. However, it should be noted that the failure to conduct a thorough and effective investigation will also be inconsistent with the right of victims of unlawful killings to know what happened; *Jelić v. Croatia*, no. 57856/11, 12 June 2014, para. 94.

<sup>29</sup> *McKerr v. United Kingdom*, no. 28883/95, 4 May 2001, para. 129. See also para. 53 below.

<sup>30</sup> *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014, at paras. 349-350

<sup>31</sup> *Paul and Audrey Edwards v. United Kingdom*, no. 46477/99, 14 March 2002, at paras. 82-84 and *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, at para. 239. In order to allow to next of kin to be legally represented there may also be an obligation to provide legal aid; *Rantsev v. Cyprus and Russia*, para. 240.

<sup>32</sup> *McKerr v. United Kingdom*, at para. 147.

reasonable doubt<sup>33</sup>. Similarly, the obligation was found to have been breached where an investigating judge failed to hold, or arrange for, a face-to-face confrontation between the police officers in question and the applicants who were alleging that they had been slapped by those officers<sup>34</sup>. It was also breached where no detailed reasons were given for the dismissal of complaints of ill-treatment<sup>35</sup>.

34. In addition, there will be a need for the next of kin to be informed of any decision not to prosecute<sup>36</sup> and to be given an explanation as to why it was concluded that the matter under investigation did not amount to a criminal offence<sup>37</sup>.
35. Although the procedural obligation to conduct a thorough and effective investigation has also been recognised by the European Court to exist where there are allegations of human forced or compulsory labour, servitude and human trafficking and arbitrary detention contrary to Articles 4 and 5 of the European Convention but the issue of participation in such an investigation has not so far arisen in them.
36. Restrictions on the ability of victims of crimes – and not necessarily those connected with Articles 2, 3, 4 and 5 of the European Convention - to participate in the investigation have also been recognised as having the potential raising an issue under Article 6(1).
37. Thus, in a case concerned with criminal proceedings in respect of the death of the applicant's wife following the administration of a her drug to her in hospital – the European Court considered that the existence of rights under domestic law such as the possibility of requesting that the prosecutor apply to the investigating judge for the immediate production of evidence and the right to appoint a statutory representative for the exercise of the rights and powers enjoyed by the injured party might prove to be essential for the victim of a crime's effective participation in the proceedings as a civil party, especially where certain evidence was likely to deteriorate over time and would no longer be obtainable at later stages in the proceedings. However, it did not accept that the right of access to court required that the injured party should actually be able to apply directly to the investigating judge for the immediate production of evidence, namely a judicial autopsy. Instead, the European Court concluded that the applicant's failure to request that the public prosecutor make such an application meant that he had failed to make use of the remedy available to him under domestic law, rendering the application inadmissible<sup>38</sup>.
38. It remains uncertain whether Article 6(1) – as opposed to Articles 2 and 3 - can be relied upon – to require a victim to be able to attend hearings of witnesses and the

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<sup>33</sup> *M C v. Bulgaria*, no. 39272/98, 4 December 2003, at para. 177.

<sup>34</sup> *Bouyid v. Belgium*, at para. 128.

<sup>35</sup> *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003, at para. 126.

<sup>36</sup> *Güleç v. Turkey*, no. 21593/93, 27 July 1998, para. 82.

<sup>37</sup> *Hugh Jordan v. United Kingdom*, no. 24746/94, 4 May 2001, at paras. 124 and 129.

<sup>38</sup> *Sottani v. Italy* (dec.), no. 26775/02, 24 February 2005.

accused in the course of the investigation<sup>39</sup>, something which was also noted by the European Court as not possible.

39. *There is a need, therefore, to ensure that appropriate arrangements are in place to ensure that there is thorough and effective investigation into a victim's complaint about an offence having been committed. In particular, these arrangements should ensure that there is appropriate involvement in any investigation by the victim, which may need to be facilitated by the provision of legal aid. In addition, the victim should be informed of the outcome of an investigation and of the reasons for any decision taken regarding this.*

## E. Bringing a prosecution

40. Notwithstanding the requirements about the scope of the criminal law and the level of penalties prescribed, the European Court has consistently held that Article 6(1) of the European Convention does not guarantee a right for the individual to require the institution of a criminal prosecution against an alleged perpetrator of an offence or to be able to institute one him or herself<sup>40</sup>.

41. Furthermore, while the protection of rights under the European Convention may, as has been seen<sup>41</sup>, require the possibility of criminal proceedings being brought in respect of certain conduct, the European Court does not consider that this entails that any prosecution that is brought being State-assisted, at least not where it is possible for the victim to pursue a prosecution him or herself<sup>42</sup>. However, where State-assisted prosecution exists for particular offences, there would not be any obligation to provide in addition for the possibility of private prosecution.

42. However, where there is a matter in respect of which a prosecution could be brought – whether by the State or by a private person – and this matter relates to a right under the European Convention, conduct by public authorities that leads to the possibility of bringing such proceedings fails because they have become time-barred will constitute a violation of the State's positive obligations under the right concerned. This is because that outcome could not be said to have provided the victim with adequate protection<sup>43</sup>, to have had a sufficient deterrent effect on the perpetrators concerned or

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<sup>39</sup> This was noted by the European Court as not having been possible in *Forum Maritime SA v. Romania*, no. 63610/00, 4 October 2007, at para. 129 but this was not the basis of its finding of a violation of Article 6(1) in that case.

<sup>40</sup> See, e.g., *Helmers v. Sweden*, no. 11826/85, 29 October 1991, at para. 29 and *Perez v. France* [GC], 47287/99, 12 February 2004, at para. 70 and *Atanasova v. Bulgaria*, no. 72001/01, 2 October 2008, at para. 35.

<sup>41</sup> See, paras. 13-21 above.

<sup>42</sup> *Sandra Janković v. Croatia*, no. 38478/05, 5 March 2009, at para. 49. Under Croatian law it was possible for the injured party in cases of certain violent acts committed by private individuals either to bring a private prosecution or, where the public prosecutor declines to prosecute, to take over the prosecution as a subsidiary prosecutor.

<sup>43</sup> *Sandra Janković v. Croatia*, at para. 58 (the positive obligations arose under Article 8 in respect of an attack on the applicant's physical integrity).

to have been capable of ensuring the effective prevention of unlawful acts such as those about which the victim had complained<sup>44</sup>.

43. *There is a need to ensure that any decision taken regarding a possible prosecution does not disregard the requirement to fulfil any positive obligations owed to the victim under the European Convention.*

## F. Participation in a prosecution

44. Where the conduct alleged to constitute a criminal offence has affected the victim's "civil rights" as understood in the case law of the European Court, the right of access to court under Article 6(1) of the European Convention would generally require that the person concerned be able to seek a remedy in civil proceedings.
45. While a legal system may also provide for the possibility of a victim joining criminal proceedings as a civil party, such a possibility is not required under the European Convention. Thus, no violation of Article 6(1) was found where an application to be joined as civil parties to the proceedings was declared inadmissible on the ground that the defendant was a judge and thus entitled to immunity from jurisdiction but there was still a possibility of bringing a civil action against others named in the complaint and also against the State in respect of the same matters as those set out in it<sup>45</sup>.
46. However, where the possibility of joining criminal proceedings as a civil party does exist, those proceedings are likely to be regarded by the European Court as decisive for the civil rights of the victim of the offence from the moment he or she joins them and thus rendering Article 6(1) of the European Convention applicable to them as regards the victim<sup>46</sup>. It will not take that view, however, where "civil-party complaints for punitive purposes"<sup>47</sup> are involved on account of the conclusion by the European Court that the right to have third parties prosecuted or sentenced for a criminal offence is not secured under the European Convention<sup>48</sup>.
47. Where the possibility of joining criminal proceedings as a civil party exists, it is important that any insistence on the formalities to be observed should not be such as affects the very substance of the right of access to court of the person concerned. Thus, the European Court found a violation of Article 6(1) of the European Convention where a foreign association was precluded from becoming a civil party because of a failure to make a prior declaration in the prefecture of the department in

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<sup>44</sup> *Beganović v. Croatia*, no. 46423/06, 25 June 2009, at paras. 80-87 (the positive obligations arose under Article 3 in respect of an act of serious violence).

<sup>45</sup> *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.

<sup>46</sup> *Perez v. France* [GC], 47287/99, 12 February 2004, paras. 57-72. This ruling resolved some uncertainty in the case law as to whether criminal proceedings that have been joined by the victim as a civil party are generally decisive for the latter's civil rights.

<sup>47</sup> Something recognised by the French Court of Cassation.

<sup>48</sup> *Perez v. France* [GC], 47287/99, 12 February 2004, paras. 69-71.

which the head office of its principal place of business was supposedly situated when it had none in the country where the proceedings had been brought<sup>49</sup>.

48. Furthermore, it will be essential that the judicial body dealing with the case satisfies the requirement in Article 6(1) that it be independent and impartial. This was not found to be the case in a system where prosecutors acted as magistrates had issued orders dismissing the victim's complaint<sup>50</sup>.
49. The European Court has accepted that - notwithstanding the requirement under Article 6(1) of the European Convention for judgments to be delivered in public - the hearing of an application to join criminal proceedings as a civil party may be heard in private and the decision not delivered in private. In its view, the secrecy of the hearing could be justified on grounds relating to the protection of the privacy of the parties to the proceedings and the interests of justice and a public pronouncement of the ruling was not required as it could be consulted at the registry of the court concerned<sup>51</sup>.
50. Although the possibility of joining the proceedings as a civil party may only arise at a certain stage of the criminal proceedings, the conferment on victims of certain rights or powers prior to that point is likely to be sufficient to make Article 6(1) applicable. Thus, in Italy injured parties cannot join the proceedings until the preliminary hearing but the European Court considered that their ability to exercise rights and powers at the preliminary investigation stage such as requesting the prosecutor to apply to the investigating judge for the immediate production of evidence, to appoint a statutory representative and to submit pleadings was sufficient to make Article 6(1) applicable<sup>52</sup>.
51. An additional consideration in this regard was the fact that the exercise of the rights concerned could prove to be essential for effective participation in the proceedings as a civil party, especially where certain evidence was likely to deteriorate over time and would no longer be obtainable at later stages in the proceedings.
52. The European Court has recognised the importance of civil parties being able throughout the proceedings to submit their views, positions and arguments to the competent authorities in full freedom. However, this does mean that authorities need to comply with all of their requests for the production of evidence so long as this is not the result of arbitrariness or manifest irrationality. In its view, it was for the prosecution or the courts in charge of a case to assess the appropriateness of requests from stakeholders in this matter<sup>53</sup>.

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<sup>49</sup> *Ligue du Monde Islamique and Organisation Islamique Mondiale du Secours Islamique v. France*, no. 36497/05, 15 January 2009.

<sup>50</sup> *Forum Maritime SA v. Romania*, no. 63610/00, 4 October 2007, paras. 115-122. This finding led the European Court to conclude that it was unnecessary to determine whether there was also a lack of impartiality.

<sup>51</sup> *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003.

<sup>52</sup> *Sottani v. Italy* (dec.), no. 26775/02, 24 February 2005.

<sup>53</sup> *Lacerda Gouveia and Others v. Portugal*, no. 11868/07, 1 March 2011, paras. 81-85. The European Court considered that in this case the authorities had always given ample reasons for their decisions.

53. In particular, it has been accepted by the European Court that some restriction on a civil party's access to the prosecution file could be justified on grounds of the protection of the private life of the parties to the proceedings and the interests of justice. Thus, it has considered that the inability of a civil party to have access to the case file after he had ceased to be represented by a lawyer<sup>54</sup> or where he was never so represented<sup>55</sup> did not involve a violation of Article 6(1). The ruling in the latter instance entails a much more strict approach in this regard because in the former one the European Court took account of the fact that there was no overall unfairness since the civil party could have had access to the file through his lawyer for most of the period during which the investigations were being carried out. However, in both cases it was the choice of the civil party to dispense with the assistance of a lawyer who either had or could have had access to the file and it cannot be assumed that a similar conclusion would be reached where the civil party was not in a position to instruct a lawyer<sup>56</sup>.
54. However, in the absence of such grounds, the inability of the a civil party or his or her lawyer to have access to the documents filed by the accused in the prosecution file and those compiled by the prosecution (i.e., the documents and testimonies of witnesses and the accused) has been regarded by the European Court as having tainted the proceedings which determined the criminal complaint filed by the civil party. This situation was undoubtedly exacerbated by the fact that this decision was taken by the prosecutor and was not subject to judicial review but the emphasis placed by the European Court on the principles of equality of arms and the right to adversarial proceedings – albeit with the recognition that their application in the prosecution stage according to the particularities of the proceedings and the circumstances of the case - suggests that such restrictions on access to the file would be regarded as unacceptable even where the decision was taken by a court and was appealable<sup>57</sup>.
55. Nonetheless, the European Court considered that a civil party's right under Article 6(1) of the European Convention to submit any observations that he or she considers relevant to his or her case can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court.

In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant<sup>58</sup>

56. While the European Court has also accepted that Article 6(1) obliges the courts to give reasons for their decisions, it has emphasised that such an obligation cannot be understood as requiring a detailed answer to every argument. It thus rejected as misconceived a victim's complaint as to the failure of the cassation court to mention

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<sup>54</sup> *Frangy v. France*, no. 42270/98, 1 February 2005, paras. 36-43.

<sup>55</sup> *Menet v. France*, no. 39553/02, 14 June 2005, paras. 47-53

<sup>56</sup> See para. 32 above regarding the provision of legal aid to victims.

<sup>57</sup> *Forum Maritime SA v. Romania*, no. 63610/00, 4 October 2007, paras. 128-138.

<sup>58</sup> *Perez v. France* [GC], 47287/99, 12 February 2004, para. 80

all the domestic legislative provisions she had relied on when it dismissed her appeal against the investigating judge's ruling that there was no case to answer<sup>59</sup>

57. *There is thus a need to ensure that a victim enjoys all the rights arising under Article 6(1) of the European Convention where there is a possibility of joining a prosecution as a civil party.*

## G. Discontinuance and dismissal of a prosecution

58. As previously noted<sup>60</sup>, the subject matter of an offence will in most, if not all, instances necessarily engage the “civil rights” of the victim so that the outcome of any criminal proceedings which have been instituted – whether in the form of a public prosecution or a private one where this exists and whether or not the victim has the status of civil party in the proceedings – may be decisive for those rights. Insofar as that is their effect, then it is possible that the circumstances leading to the discontinuance or dismissal of the proceedings will result in a violation of the fair trial rights of the victim under Article 6(1) of the European Convention.
59. Such a violation has been found by the European Court to have occurred where a court found there was no case to answer in respect of a complaint that letters from a parliamentarian that had no clear connection to parliamentary activity had damaged the applicant's honour and reputation<sup>61</sup>. The crucial considerations for the European Court in finding in this case that there had been a violation of the right of access to court under Article 6(1) was the conclusion that the lack of any clear connection with a parliamentary activity meant that a narrow interpretation should be adopted of the concept of proportionality between the aim sought to be achieved and the means employed and the fact that there was no possibility of any other proceedings being brought to secure the protection of the applicant's reputation. It thus took the view that a fair balance had not been struck between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals
60. There was also a finding of a violation of Article 6(1) where a victim was unable to give evidence in an appeal against the dismissal of a private prosecution, as well as a claim for compensation, that he had instituted<sup>62</sup>. In this particular case, the European Court found that the appeal court had been called upon to examine both questions of fact and questions of law and, in particular, to make a full assessment of the defendants' guilt or innocence. In this regard it was significant that the victim had challenged the lower court's findings. The European Court thus considered that the appeal court could not, as a matter of fair trial, have been properly determined the issue of the defendant's guilt without a direct assessment of the evidence given in person by the victim and by the defendants, who claimed that they were innocent of

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<sup>59</sup> Ibid, at para. 83. The European Court also agreed with the Government that some of the provisions invoked by the victim were plainly inapplicable.

<sup>60</sup> See para. 10 above.

<sup>61</sup> *Cordova v. Italy (No. 1)*, no. 40877/98, 30 January 2003

<sup>62</sup> *Helmets v. Sweden*, no. 11826/85, 29 October 1991, at paras. 35-39.

the accusations brought against them. Furthermore, it considered that there were no special features of the case to justify the denial of the possibility of the victim to be heard in person<sup>63</sup>.

61. Moreover, a civil party's right of access to a court was not considered to have been violated when the cassation court held that, in the absence of any appeal by the prosecution, her appeal against the upholding of the order of the investigating judge to discontinue proceedings was inadmissible<sup>64</sup>. The order for discontinuance had been based on a finding that the conduct in question did not fall within the criminal law but involved matters governed by civil or commercial law. Such a ruling did not affect any ruling that the civil party might have had in the civil courts. Furthermore, the European Court noted that the interests of the civil party had actually been safeguarded by the cassation court since, in accordance with its usual practice, it had examined the appeal that to ensure that the decision appealed against had been properly reached before declaring it inadmissible.
62. Although the European Court agreed with the respondent government that civil parties should not have an unlimited right to appeal to the cassation court against judgments discontinuing the proceedings, it should also be noted that, notwithstanding the absence of a right of appeal in the specific circumstances of the case, the criminal procedure code did provide that appeals to the cassation court against rulings of the investigation division would be admissible in other situations where these might affect the interests of the civil party<sup>65</sup>.
63. Furthermore, the European Court has accepted that a civil party's request to the prosecutor to appeal on points of law against an acquittal could be regarded as a dispute over a civil right for the purposes of Article 6(1) even though the possibility of making such requests was founded on practice rather than law<sup>66</sup>. However, it did not consider that such a practice could require the prosecutor to give more than a summary response regarding the decision ultimately taken. In its view, a requirement for the prosecutor to give detailed reasoning would place on him or her an additional burden that is not imposed by the nature of the civil party's request. The European Court thus found that, by indicating that there were no legal or well-founded grounds of appeal, the prosecutor had given sufficient reasons for his decision to reject the request<sup>67</sup>.

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<sup>63</sup> See also para. 53 above.

<sup>64</sup> *Berger v. France*, no. 48221/99, 3 December 2002.

<sup>65</sup> Namely, where (a) the investigation division has stated in the judgment that there are no grounds for an investigation, (b) the investigation division has declared the civil party's action inadmissible, (c) the investigation division has upheld an objection terminating the criminal proceedings, (d) the investigation division has declared, of its own motion, or on an objection by the parties, that it has no jurisdiction, (e) the investigation division has omitted to rule on a charge, (f) the judgment does not formally satisfy the conditions essential for its legal validity and (g) a breach of personal rights has been alleged. The cassation court had considered these possibilities compatible with Article 6 of the European Convention. By contrast, an appeal by the prosecution against judgments of the investigation divisions was admissible only if the decision in question affected the general interest rather than merely private interests.

<sup>66</sup> *Gorou v. Greece (No. 2)* [GC], no. 12686/03, 20 March 2009.

<sup>67</sup> *Ibid.*, para. 42.

64. Where a victim is able to appeal to the cassation court against the dismissal of the case, there should be disclosure to him or her of all the submissions made in the proceedings except where these, or part of them, relate to the secrecy of the deliberations. Thus, the failure to disclose that part of the reporting judge's report which concerned the statement of the facts, the procedure and the grounds of appeal when these had been provided to the advocate-general was considered by the European Court to be in violation of Article 6(1) as it made it impossible for the victim to respond to them<sup>68</sup>. However, there was no obligation to disclose another part of the report which was intended for the deliberations.
65. Moreover, although considering that submissions unrelated to the deliberations should have been disclosed to the civil party in an appeal against the dismissal of a case, the European Court did not consider that the failure to do this had infringed the principle of equality of arms. This is because it agreed with the Government's submission that "a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different"<sup>69</sup>. However, while this might point to the principle not being fully applicable, it is doubtful that the European Court does not consider it relevant at all as in a subsequent case it questioned whether one rule allowing only the prosecutor and the person being investigated may apply to the investigating judge for the immediate production of evidence and another one only the public prosecutor could apply directly to the investigating judge for such an autopsy to be performed respected the rights of the injured party to equality of arms and access to a court under Article 6(1) of the European Convention<sup>70</sup>.
66. *Although there is no explicit ruling of the European Court that requires the establishment of a right of appeal against a decision not to prosecute someone, the rulings considered in this and in the preceding section all point to the need for effective judicial control – in which the rights under Article 6(1) of the European Convention are respected - over such a decision.*
67. A civil party is likely to be regarded as having been denied his or her right to effective access to court under Article 6(1) of the European Convention where the criminal court refuses to examine his or her claim for compensation after the proceedings have been terminated on account of the statute of limitations in circumstances attributable to the authorities<sup>71</sup>, notwithstanding that there was still a possibility of bringing proceedings before the civil courts.

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<sup>68</sup> *Chesnay v. France*, no. 56588/00, 12 October 2004.

<sup>69</sup> *Berger v. France*, no. 48221/99, 3 December 2002, para.38

<sup>70</sup> *Sottani v. Italy* (dec.), no. 26775/02, 24 February 2005

<sup>71</sup> No violation of Article 6(1) was found in *Lacerda Gouveia and Others v. Portugal*, no. 11868/07, 1 March 2011, which concerned an attempt by civil parties to re-open criminal proceedings failing because of the statute of limitations and there had been no negligence or culpable inaction on the part of the authorities in respect of the conduct of those proceedings. It was also a material consideration for the European Court that several courts had previously ruled in favour of dismissing the criminal proceedings

68. The European Court has concluded that this was indeed the situation on at least two occasions. In the first, the investigating judge had only summoned the accused 4 years after the complaint had been lodged and they had been sent for trial 5 years after the date of the alleged offences, by which time the limitation period had become applicable<sup>72</sup>. In the second case, the refusal had the effect of requiring the victim of an offence to bring a new civil action more than 10 years after the offence had occurred and 8 years after she had been constituted as a civil party<sup>73</sup>. The length of the proceedings that led to the prosecution becoming barred was again the fault of the authorities and the European Court was also conscious that, if new proceedings had to be initiated, the burden would be on the victim to reassemble the evidence and the establishment of any liability on the part of the driver would be extremely difficult.

69. *There is a need to ensure that any decision not to prosecute or to discontinue a prosecution does not preclude judicial determination of a victim's civil claims against the perpetrator of an offence.*

## H. The conclusion of a plea bargain

70. The primary concern of the European Court about the use of plea bargains to dispose of pending cases has been that their conclusion should not be incompatible with the right of the defendant to a fair trial<sup>74</sup>. However, it is also clear from its case law that such bargains should not be concluded at the expense of any rights of the victim under the European Convention that might be affected by the offences concerned.

71. The European Court has thus found that the conclusion of plea bargains in circumstances where the requirements relating to investigation already considered have not been respected<sup>75</sup> and where this entailed a failure to maintain and apply in practice an adequate legal framework affording protection against acts of violence by

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<sup>72</sup> *Anagnostopoulos v. Greece*, no. 54589/00, 3 April 2003. Judges Lorenzen and Vajic dissented on the basis that it was still open to the victim to institute civil proceedings against the defendants and that it would have been appropriate to follow other cases that treated the situation concerned as a matter of length of proceedings rather than one of access to a court. Cf. *Stokas v. Greece* (dec.), no. 51308/99, 29 November 2001, in which outcome of the proceedings before the criminal courts were not considered decisive for the victim's right to compensation when the European Court found that civil claims which he had already submitted to the civil court had been left intact after criminal proceedings had become statute-barred. It was emphasised in this case that the civil court was not in any way bound by the decisions of the criminal courts.

<sup>73</sup> *Atanasova v. Bulgaria*, no. 72001/01, 2 October 2008. Judges Jaeger and Villiger dissented from this finding on the basis that they did not consider the difficulties in bringing a civil action to be insurmountable and that the closure of the criminal proceedings and the failure to examine the civil action in the context of them were not disproportionate to a legitimate aim of the proper administration of justice.

<sup>74</sup> The leading case is *Natsvlshvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014, in which the plea-bargaining process was found to be entirely consistent with the requirements of Article 6 of the European Convention.

<sup>75</sup> See *Dimitrova and Others v. Bulgaria*, no. 44862/04, 27 January 2011, in which the authorities were found to have manifestly failed to take into account important evidence collected during their investigation into a death, as well as being responsible for a number of other investigative failings. Furthermore, the victim's next of kin were not able to participate effectively in the investigation into his death. As a result, the European Court held that there had been a violation of Article 2.

private individuals<sup>76</sup>. Furthermore, given the case law already considered concerning the need for adequate penalties<sup>77</sup>, it can also be expected that any penalties imposed under plea bargains that are seen as an inadequate response to conduct affecting a right under the European Convention will also be found by the European Court to be in violation of the rights concerned.

72. The European Court has not, so far, considered from the victim's perspective the compatibility with the European Convention of a plea bargain concluded with one perpetrator of certain offences where the aim is to bring proceedings against others involved in their commission<sup>78</sup>. However, it seems unlikely that this would be regarded by it as justifying a departure from the requirements discussed in the preceding paragraph.
73. Even where no right under the European Convention is affected by an offence, the conclusion of a plea bargain should not have the effect of preventing the victim from pursuing any civil claims that might arise from the impugned conduct. However, a victim who has joined criminal proceedings as a civil party cannot object to the termination of those proceedings by the conclusion of a plea bargain if it is still possible for him or her to institute suitable proceedings in the civil courts<sup>79</sup>.
74. Although the importance attached by the European Court to the involvement of the victim in the plea-bargaining process arose in cases where the offence committed had involved an interference with a right under the European Convention that imposes a duty to conduct a thorough and effective investigation, the absence of such involvement generally could result in potential prejudice to the civil rights of the victim and thus give rise to violations of Article 6 and Article 1 of Protocol No. 1<sup>80</sup>.

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<sup>76</sup> See *Eremia v. Republic of Moldova*, no. 3564/11, 28 May 2013, in which the prosecutor had suspended for one year the investigation into a husband who had breached a court protection order and who admitted to having physically and psychologically abused three members of his family subject to the condition that it would be reopened should he commit another offence during that time. The European Court considered that the suspension of the criminal investigation in such circumstances had the effect of shielding the husband from criminal liability rather than deterring him from committing further violence against his wife, resulting in his virtual impunity. As a result of the failure to take effective measures against the husband and to ensure his punishment under the applicable legal provisions, the positive obligations of the State under Article 3 of the European Convention had been violated.

<sup>77</sup> See paras. 23-24 above.

<sup>78</sup> Such a possibility might have been the factual background in *X and Y v. Georgia* (dec.), no. 5358/14, 9 September 2014 but the application was found inadmissible because of the six-month rule.

<sup>79</sup> This was the situation in *Nikolov v. Bulgaria* (dec.), no. 39672/03, 28 September 2010; the European Court was satisfied that, considering the manner in which the criminal proceedings unfolded, no serious prejudice had occurred to the applicant's right to seek compensation and, given the alternative remedy immediately available to him, it could not be said that the restriction impaired the essence of his "right to court" or was disproportionate for the purposes of Article 6(1) of the European Convention.

<sup>80</sup> See, e.g., *Ünsped Paket Servisi SaN. Ve Tic. A.Ş. v. Bulgaria*, no. 3503/08, 13 October 2015, in which the employer of the offender had been unable to argue against the confiscation of its property where this had been used to commit the offence and this measure had been part of a plea bargain concluded with the offender. The absence of such an opportunity led the European Court to conclude that the fair balance which should be struck between the protection of the employer's right to property and the requirements of the general interest had been upset, violating Article 1 of Protocol No. 1 to the European Convention.

## I. Protection of victims

75. The European Court has accepted that shortcomings in the investigation of complaints about the commission of offences or the prosecution of them may be a factor in the failure to protect the life or physical integrity of the victim<sup>81</sup>.

76. There does not seem to be any case law dealing with the inclusion of victims in witness protection schemes but the European Court has recognised that such schemes may be required to protect a person's rights under Articles 2 and 3<sup>82</sup>.

77. Furthermore, the European Court has recognised on several occasions that the actual conduct of criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty, security and Article 8 interests of victims who are called upon to testify so long as the measures taken can be reconciled with an adequate and effective exercise of the rights of the defence.

78. Such measures could include:

- the investigating judge taking the victim's statement in the absence of the accused/defendant<sup>83</sup>;
- the prevention of the public from seeing victims when testifying and the prohibition of their personal details (identity and address) being reported or otherwise published<sup>84</sup>;
- the exclusion of the public from the hearing when the victim testifies<sup>85</sup>;
- the withholding the identity of victims from the defendant<sup>86</sup>;
- a restriction on the defendant's ability of the defendant to put questions to the victim and to make remarks about him or her during cross-examination<sup>87</sup>;
- the removal of the defendant from the courtroom when the victim testifies<sup>88</sup>;
- the prevention of a particular lawyer from conducting the cross-examination of a victim because of a potential conflict of interest<sup>89</sup>; and
- a restriction on access to the court record<sup>90</sup>.

The particular circumstances in which all such measures are used should not, however, be such as to render unfair the trial the accused<sup>91</sup>.

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<sup>81</sup> See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009, at paras. 141-146 and 173-174.

<sup>82</sup> See *R R v. Hungary*, no. 19400/11, 4 December 2012, at paras. 26-32.

<sup>83</sup> See *Gani v. Spain*, no. 61800/08, 19 February 2013.

<sup>84</sup> See *Crook and National Union of Journalists v. United Kingdom* (dec.), no. 11552/85, 15 July 1988

<sup>85</sup> See *B and P v. United Kingdom*, no. 36337/97, 24 April 2001, at para. 37.

<sup>86</sup> See *Doorson v. Netherlands*, no. 20524/92, 26 March 1996.

<sup>87</sup> See *Oyston v. United Kingdom* (dec.), no. 42011/98, 22 January 2002 and *Y v. Slovenia*, no. 41107/10, 28 May 2015.

<sup>88</sup> See *Accardi v. Italy* (dec.), no. 30598/02, 20 January 2005.

<sup>89</sup> See *Y v. Slovenia*, no. 41107/10, 28 May 2015.

<sup>90</sup> See, e.g., *Z v. Finland*, no. 22009/93, 25 February 1997.

<sup>91</sup> See *Al-Khawaja and Tahery v. the United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

79. *There is a need, therefore, to ensure appropriate measures are taken to protect a victim during the investigation and prosecution of a criminal offence where the risk to his or her life or physical and mental integrity is well-founded.*

## J. Delay

80. The excessive length of criminal proceedings to which a civil claim has been joined will, contrary to Article 6(1) of the European Convention, entail a violation of the victim's right to the determination of his or her civil rights within a reasonable time<sup>92</sup>.

81. *The manner in which criminal proceedings are conducted must, therefore, take into the effect of delay on the right of a victim to the determination of his or her civil rights within a reasonable time and ensure that this right is not violated.*

## K. Participation in sentencing

82. There is no case law concerned with the role that a victim might play in determining the sentence to be imposed on an offender.

## L. Compensation

83. As already noted<sup>93</sup>, the commission of a criminal offence will in many, if not all, instances amount to a civil wrong and an interference with the ability to seek a remedy by way of civil proceedings would, therefore, entail a violation of his or her right of access to court.

84. However, any civil liability in such cases will be against the perpetrator of the offence and public authorities would only become liable where the administrative or private law recognised the principle of vicarious liability so they could be sued for the actions or inactions of an employee that given rise to the offence concerned.

85. There is no case law concerned with the need to make orders for compensation in criminal proceedings. However, as has been seen<sup>94</sup>, the failure to deal with the issue of compensation where a prosecution is discontinued and the pursuit of civil proceedings is impracticable could result in a violation of Article 6(1) of the European Convention.

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<sup>92</sup> As in, e.g., *Tomasi v. France*, no. 12859/87, 27 August 1992, *Maini v. France*, no. 31801/96, 26 October 1999, *Boudier v. France*, no. 41857/98, 21 March 2000, *De Moucheron and Others v. France*, no. 37051/97, 17 October 2000, *Slimane-Kaïd v. France (No. 3)*, no. 45130/98, 6 April 2004, *Atanasova v. Bulgaria*, no. 72001/01, 2 October 2008 and *L E v. Greece*, no. 71545/12, 21 January 2016.

<sup>93</sup> See para. 10 above.

<sup>94</sup> See paras. 67-68 above.

86. There would not seem to be any obligation for the State to establish schemes to compensate victims of criminal offences in addition to any liability imposed by law on the perpetrator, notwithstanding that such schemes are particularly beneficial where the perpetrator is not actually in a position to compensate the victim. Thus, the European Court has held that the right to respect for private life under Article 8 did not include any right to compensation for someone who was a victim of a crime of violence. Furthermore, it did not consider that the making of an ex gratia award by the State to the applicant formed “part of a deterrent framework necessary to give “practical and effective” protection of children against abuse by adult offenders”<sup>95</sup>. In reaching this conclusion, the European Court laid on emphasis on the absence of any argument in the present case that the authorities were in some way responsible for allowing the abuse to take place such that they should be held liable for any damage which the applicant suffered had been sexually abused while a child.
87. Moreover, although the applicability to only certain types of offences of any scheme providing ex gratia compensation to victims could be regarded as constituting a difference in treatment, the European Court considered that its restriction to crimes perceived as being particularly serious due to the element of violence involved fell within the Contracting State’s margin of appreciation and may be regarded as having objective and reasonable justification so that Article 14 could not be invoked
88. However, it cannot be asserted by a defendant who has been acquitted that the right to be presumed innocent until proved guilty under Article 6(2) of the European Convention necessarily precludes the victim from bringing a civil claim for compensation in respect of the facts that were the basis for his or her prosecution.
89. This provision could only be invoked if the proceedings in respect of the civil claim could be regarded as a consequence and the concomitant of the preceding criminal proceedings or if the compensation decision were to contain a statement imputing criminal liability to the respondent party<sup>96</sup>. The former would not be possible where the compensation issue was assessed by reference to significantly different criteria and evidentiary standards from those that applied to criminal liability and outcome of the criminal proceedings was not decisive for the determination of this issue, notwithstanding some overlap in the objective constitutive elements applicable<sup>97</sup>. The latter would require the relevant ruling to state, whether expressly or in substance, that all the conditions were fulfilled for holding the former defendant criminally liable with respect to the charges of which he had previously been acquitted<sup>98</sup>.

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<sup>95</sup> *August v. United Kingdom* (dec.), no. 36505/02, 21 January 2003.

<sup>96</sup> *Ringvold v. Norway*, no. 34964/97, 11 February 2003.

<sup>97</sup> As in *Ringvold v. Norway* and *NA v. Norway*, no. 27473/11, 18 December 2014.

<sup>98</sup> As occurred in *Y v. Norway*, no. 56568/00, 11 February 2003, in which the European Court noted that the relevant judgment began: “Considering the evidence adduced in the case as a whole, the High Court finds it *clearly probable that [the applicant] has committed the offences* against Ms T. with which he was charged and that an award of compensation to her parents should be made under Article 3-5 (2) of the Damage Compensation Act. ...” (emphasis added). See also *Orr v. Norway*, no. 31283/04, 15 May 2008 and *Diacenco v.*

## M. Conclusion

90. The case law of the European Court can thus be seen as having established a fairly significant array of rights for victims in respect of criminal proceedings and the implications of those proceedings for the right of access to court in connection with the determination of “civil rights”.
91. The case law reflects only the issues that have been raised before the European Court. Its scope, as presented above, is certainly far from comprehensive in its coverage of the concerns that victims might have but that account should not be regarded as exhaustive. Rather this case law can be expected to continue to evolve in the light of applications brought to the European Court by the victims of criminal offences.
92. Certainly it is now clear that it would now be inappropriate to regard a victim of an offence as not having a significant interest in the conduct of criminal proceedings, even if the prosecution and the defence understandably have a greater role in them.

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*Romania*, no. 124/04, 7 February 2012 where the language used also proved problematic but *cf. Vella v. Malta*, no. 69122/10, 11 February 2014 and *NA v. Norway*, in which it did not.