



Overview of international standards on victims' involvement during pre-trial investigations and court proceedings

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Abbreviations

Convention - European Convention on Human Rights.
 Court / European Court - European Court of Human Rights.
 EU - European Union.
 IAC - international armed conflict.
 ICC - International Criminal Court.
 IHL - international humanitarian law.
 NIAC – non-international armed conflict.
 UN – United Nations.

1. INTRODUCTION

As part of the Council of Europe project on 'Fostering Human Rights in the Criminal Justice System in Ukraine'¹, Professor Philip Leach² was commissioned in August 2024 to prepare a guide providing an overview of the standards of the Council of Europe on victims' involvement during pre-trial investigation and court proceedings, together with a description of the minimum standards of victims' rights, the implementation of which must be ensured during pre-trial investigations and proceedings in court (with a reference to the Court's case-law, taking particular account of the context of war or other serious international crimes).

On its face, the text of the European Convention on Human Rights (the Convention) does not appear to provide for the rights of victims of crime. However, its interpretation by the European Court of Human Rights (the Court or the European Court) has established, over many decades, that the Convention does confer very specific and detailed rights on victims, primarily arising from the positive obligations which are imposed on state authorities, for example, to protect the right to life and prevent ill-treatment, and to provide an effective remedy (under Articles 2, 3 and 13 of the Convention). More recent soft law standards developed by the United Nations (UN) have set out principles of justice for victims,³ as well as the elements of victims' rights to a remedy and reparations.⁴ Furthermore, within the last 20 years, Council of Europe treaties have elaborated further specific rights for the victims of trafficking,⁵ sexual abuse, and gender-based or domestic violence.⁶ A 2023 Committee of Ministers Recommendation on the rights of victims of crime not only includes the general right of victims of crime to understand and be understood (Article 5) and to receive information (Article 6), but also a separate right to information concerning their case (Article 8), a right to interpretation and translation (Article 9), a right to be heard (Article 10) and a right to victim support (Article 19).⁷

Within the European Union (EU) the 2012 Victims' Rights Directive also provides substantial legal rights to victims of crime.⁸ Its purpose is 'to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings'. Furthermore, states are required to ensure that 'victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings'.⁹

The primary focus of this guide is the Convention and the case-law of the Court. It also refers, where relevant, to other relevant international and regional standards. As this guide is intended for use by the 'War Crimes Department' of the Ukrainian Office of the Prosecutor General and other institutions in Ukraine working with victims of war crimes and gross human rights violations, the majority of the cases and examples cited in the guide have been selected for their relevance to those fields.

¹ The project is implemented in the frames of the Council of Europe Action Plan for Ukraine 'Resilience, Recovery and Reconstruction' 2023-2026.

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³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), 2005.

⁵ Convention on Action against Trafficking in Human Beings (2005).

⁶ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (2007); Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (2011).

⁷ Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime.

⁸ Directive 2012/29/EU.

⁹ Article 1 of the Victims' Rights Directive.

2. THE RIGHT TO AN EFFECTIVE REMEDY AND THE DUTY ON THE STATE TO CARRY OUT AN EFFECTIVE INVESTIGATION – AN OVERVIEW

Under the Convention, victims' rights arise first and foremost as a result of the right to an effective remedy (Article 13 the Convention) and the closely related duties on the state authorities to carry out an effective investigation into fatal incidents (Article 2 the Convention) and serious attacks or ill-treatment (Article 3 the Convention). This section firstly analyses the right to an effective remedy, before discussing the obligations on state authorities to carry out effective investigations.

i) The right to an effective remedy (Article 13 of the Convention)

Article 13 of the Convention guarantees an effective remedy before a national authority for everyone who claims that their rights and freedoms under the Convention have been violated.¹⁰ It gives 'direct expression to the states' obligation to protect human rights first and foremost within their own legal system'.¹¹ Its object is to allow individuals the potential relief at the national level before having to invoke the international machinery of the Convention.¹² The effect of Article 13 is therefore to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.

The remedy provided must be effective *in practice* as well as in theory, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the state authorities.¹³ For example, *Al-Saadoon and Mufdhi v United Kingdom*¹⁴ concerned the applicants' detention by the British armed forces in southern Iraq in 2003, and their subsequent transfer to the Iraqi authorities. The applicants successfully argued that, as the transfer had breached the Court's Rule 39 interim measures indication, there was a violation of both Article 34 and Article 13 of the Convention because, at the time of their transfer, the national courts had not considered their appeal.

Whilst Article 13 does not require a domestic remedy in relation to *any* grievance under the Convention, it can be properly invoked in relation to any *arguable claim* of a violation of another Convention right.¹⁵ It is important to note that in spite of the literal wording of the Article, no other Convention right need be violated in order to establish a breach of Article 13.¹⁶ The Court has not defined the notion of what is 'arguable', which it has said must be determined in the light of the particular facts and the nature of the legal issues raised in each case.¹⁷ While Article 13 guarantees the availability of a suitable forum to obtain a remedy, it cannot of course require that the applicant's claim is in fact successful, and Article 13 does not, as such, guarantee a remedy to challenge domestic legislation.

The remedy required by Article 13 need not necessarily be provided by a court, but the body in question providing the remedy must be capable of affording effective redress and must be sufficiently independent of the body being challenged. Remedies that are discretionary, or unenforceable, will not generally comply with Article 13.

¹⁰ *Klass and others v Germany*, No. 5029/71, 6 September 1978, para. 64.

¹¹ *Kudla v Poland*, No. 30210/96, 26 October 2000, para. 152.

¹² Collected Editions of the 'Travaux Préparatoires' of the European Convention on Human Rights, Vol. II, pp. 485, 490 and Vol. III, p. 651; *Kudla v Poland*, No. 30210/96, 26 October 2000, para. 152.

¹³ *Aksoy v Turkey*, No. 21987/93, 18 December 1996, para. 95. See also *Hasan and Chaush v Bulgaria*, No. 30985/96, 26 October 2000, para. 101.

¹⁴ No. 61498/08, 2 March 2010.

¹⁵ See, e.g., *Silver v UK*, No. 5947/72 et seq., 25 March 1983.

¹⁶ *Klass and others v Germany*, No. 5029/71, 6 September 1978, para. 64.

¹⁷ *Boyle and Rice v UK*, Nos. 9659/82 and 9658/82, 27 April 1988, para. 55.

The scope of Article 13 will vary depending upon the nature of the Convention complaint. For example, where there has been a fatal incident (or a disappearance), and also in the context of allegations of torture or where a person's home has been destroyed by state agents, the Court has held that the notion of an 'effective remedy' under Article 13 requires 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure'.¹⁸

Cases concerning fatalities may raise particular issues under Article 13. In *Keenan v United Kingdom*,¹⁹ which concerned the suicide of the applicant's son in prison, there was a violation of Article 13 because the inquest could not provide a remedy by determining the liability of the authorities for any alleged ill-treatment or by providing compensation. The Court found that 'no effective remedy was available . . . which could have established where responsibility lay' for the death of Mr Keenan²⁰ and also that 'in the case of a breach of Articles 2 and 3 of the Convention . . . compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies'.²¹

ii) The state's duty to carry out an effective investigation in order to protect the right to life (Article 2 of the Convention)

In addition to the right to an effective remedy (discussed above), international human rights standards also impose more specific duties on state authorities in respect of the investigation of both fatal (or near fatal) incidents (Article 2 the Convention) and where individuals have been subject to serious ill-treatment (Article 3 the Convention).

In summary, Article 2 the Convention requires the state authorities to ensure that an investigation into a fatality meets the following four criteria:²²

- it is **independent**. This means that the officials responsible for carrying out the investigation should be independent from those implicated in the events; and
- it is **effective**. Therefore, the investigation must be capable of ascertaining the circumstances in which the incident took place and of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible; and
- it is carried out **promptly** and with **reasonable expedition**; and
- there must be a **sufficient element of public scrutiny** of the investigation and it is **accessible to the victim's family**²³ to the extent necessary to safeguard their legitimate interests.

¹⁸ See, e.g., *Aksoy v Turkey*, No. 21987/93, 18 December 1996, para. 98. The Court found a series of violations of Article 13 because of the ineffectiveness of the criminal law system in respect of actions of the security forces in south-east Turkey in the 1990s. See, e.g., *Akkoç v Turkey*, Nos. 22947/93 and 22948/93, 10 October 2000; *Mahmut Kaya v Turkey*, No. 22535/93, 28 March 2000, paras. 94–8; *Oğur v Turkey*, No. 21594/93, 20 May 1999, para. 91; *Bilgin v Turkey*, No. 23819/94, 16 November 2000, para. 119; *Gül v Turkey*, No. 22676/93, 19 December 2000, para. 102.

¹⁹ No. 27229/95, 3 April 2001.

²⁰ *Ibid.*, para. 132.

²¹ *Ibid.*, para. 130.

²² See, for example, *Armani Da Silva v UK*, No. 5878/08, 30 March 2016, paras. 231–40.

²³ This term is *not* restrictively interpreted by the Court. It can include wider family members, civil partners etc, especially those actually involved in seeking information and/or redress in respect of the victim.

It is important to understand that these elements are inter-related and that the Court will assess the degree of effectiveness of an investigation by looking at these criteria taken jointly.²⁴

These obligations arise both in peacetime and in times of war (see also section 9.iv) below). For example, in the 2011 judgment in *Al-Skeini and others v United Kingdom*²⁵ concerning the British armed forces' occupation of parts of southern Iraq in 2003, the Grand Chamber reiterated that these procedural obligations under Article 2 still apply in difficult security conditions, and during armed conflict (acknowledging, at the same time, that in such circumstances there may inevitably be constraints on the effectiveness of investigations).

The duty to carry out an effective investigation may have important implications for the wider establishment of the truth. For example, the case of *Association '21 December 1989' and others v Romania*²⁶ concerned the inadequacy of the investigations into the crackdown on anti-government protests in Romania in December 1989, shortly before the then Head of the State Nicolae Ceaușescu was overthrown. The Court found a series of failings in the investigations (including excessive delays, a lack of independence and the failure to provide information to the victims' families). The Court emphasised that a speedy resolution of the investigation was significant for Romanian society as a whole, and reiterated 'the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life'.²⁷ Furthermore, in the case of *El-Masri v former Yugoslav Republic of Macedonia*,²⁸ concerning the practice of 'extraordinary rendition', the Court underlined 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened'.²⁹

The duty to investigate fatalities applies not only to cases concerning deaths at the hands of state officials, but also to any case in which the authorities are informed of a fatal incident.³⁰ It is an obligation of means, *not* of result.³¹ The authorities must therefore take reasonable steps to secure relevant evidence (including eyewitness testimony and forensic evidence, and an autopsy must be carried out, as appropriate) in order that the investigation is *capable* of identifying and punishing the perpetrators. Therefore, failure to pursue an obvious line of inquiry in the course of an investigation may lead to a finding of a violation of Article 2.³² However, it is important to stress that Article 2 does not entail the *right* to have third parties prosecuted or convicted for a criminal offence.³³ In other words, the duty to investigate does not of course guarantee a conviction or sentencing.³⁴

Once the authorities have been notified of a fatality, or it has otherwise come to their attention, they will be obliged to investigate, without the next of kin necessarily having to lodge a formal complaint as such.³⁵

It is not unusual for multiple failings in investigations to be discerned, leading to a finding of a violation of the Convention, as occurred in the case of *Jaloud v Netherlands*.³⁶ That case concerned the death

²⁴ *Mustafa Tunç and Fecire Tunç v Turkey*, No. 24014/05, 14 April 2015, para. 225.

²⁵ No. 55721/07, 7 July 2011, para. 164.

²⁶ No. 33810/07, 24 May 2011.

²⁷ *Association '21 December 1989' and others v Romania*, No. 33810/07, 24 May 2011, para. 144.

²⁸ No. 39630/09, 13 December 2012.

²⁹ *Ibid.*, para. 191.

³⁰ See, e.g., *Ergi v Turkey*, No. 23818/94, 28 July 1998, para. 82, and *Yaşa v Turkey*, No. 22495/93, 2 September 1998, para. 100; *Tanrikulu v Turkey*, No. 26763/94, 8 July 1999, para. 103; *Demiray v Turkey*, No. 27308/95, 27 November 2000, para. 50.

³¹ See, e.g., *Avşar v Turkey*, No. 25657/94, 10 July 2001, para. 404.

³² See, e.g., *Kolevi v Bulgaria*, No. 1108/02, 5 November 2009, para. 201.

³³ *Hanan v Germany*, No. 4871/16, 16 February 2021, para. 210.

³⁴ See also: *Mustafić-Mujić and Others v. the Netherlands* (dec.), No. 49037/15, 30 August 2016, para. 117.

³⁵ *Ilhan v Turkey*, No. 22277/93, 27.6.00, para. 63.

³⁶ No. 47708/08, 20 November 2014.

of Azhar Sabah Jaloud when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Dutch army officer, in south-eastern Iraq in 2004. The Grand Chamber found a procedural violation of Article 2 because of several inadequacies in the investigation of the incident by the Royal Military Constabulary (a branch of the Netherlands armed forces) which impaired its effectiveness:

- a) the military court did not make a full assessment of the proportionality of the use of force at the checkpoint (and did not have access to the official record of the questioning of members of the Iraqi Civil Defence Corps who manned the checkpoint);
- b) there was a delay of six hours before the Dutch officer who had fired at the car was questioned (and no steps were taken to reduce the risk of collusion);
- c) there was a failure to include in the investigation file a list of the names of Iraqi personnel who had fired their weapons, and the number of rounds fired;
- d) there were several failings in relation to the autopsy carried out; and
- e) the bullet fragments were not properly stored and examined.

iii) Investigations into cases of ill-treatment (Article 3 the Convention)

As noted above, in addition to fatalities, concomitant duties of investigation arise in cases of serious ill-treatment. Accordingly, there is an obligation on states to carry out an effective official investigation into allegations of serious ill-treatment which are *capable* of leading to the identification and punishment of those responsible.³⁷ As is the case for Article 2, the investigation must be independent,³⁸ subject to public scrutiny, and the authorities must act diligently and promptly.³⁹ There must also be effective access for the victim and/or complainant to the investigation procedure (which may require the provision of free legal representation).⁴⁰

For example, a series of failings were identified in *Virabyan v Armenia*,⁴¹ where, as a result, the domestic investigation into the applicant's allegations of ill-treatment in police custody was held to be 'ineffective, inadequate and fundamentally flawed'. That case also confirmed that an investigation must encompass any alleged political motivations for a person's ill-treatment:

'...when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events. Failing to do so and treating politically induced violence and brutality on an equal footing with cases that have no political overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights'.⁴²

Examples of cases from Ukraine include *Savin v Ukraine*⁴³ where the inadequacies of the investigation carried out into a case of police torture were so evident that the Court found a situation of virtual total impunity for torture or ill-treatment by law-enforcement agencies. In *Karabet and others v Ukraine*⁴⁴ the Court found a violation of the procedural aspect of Article 3 because of multiple failings

³⁷ *Assenov and others v Bulgaria*, No. 24760/94, 28 October 1998, para. 102; *Sakik and others v Turkey*, No. 31866/96, 10 October 2000, para. 62.

³⁸ See, e.g., *Yazgöl Yılmaz v Turkey*, No. 36369/06, 1 February 2011, paras. 61–3.

³⁹ See, e.g., *Isayeva and others v Russia*, Nos. 57947/00, 57948/00 and 57949/00, 24 February 2005, paras. 208–13; *Premiininy v Russia*, No. 44973/04, 10 February 2011, paras. 108–14.

⁴⁰ *Savitsky v Ukraine*, No. 38773/05, 26 July 2012, para. 117 (applicant severely disabled and without any legal education).

⁴¹ No. 40094/05, 2 October 2012.

⁴² *Virabyan v Armenia*, No. 40094/05, 2 October 2012, para. 218 (violation of Article 14 taken together with Article 3).

⁴³ No. 34725/08, 16 February 2012.

⁴⁴ Nos. 38906/07 and 52025/07, 17 January 2013.

in the investigation into a special forces operation taken against prisoners who had led a hunger strike. The investigation was ineffective (factors included: inadequate medical examinations and the prosecution's passive and formalistic approach), not independent (it was carried out by the local prosecutor who also supervised the penal institutions), insufficiently prompt and lacked the requisite public scrutiny.

There have been numerous Court cases relating to the systemic failure of the Russian authorities to investigate credible allegations of torture at the hands of the police, including delays in opening criminal proceedings, the denial of victim status to the applicants and various specific deficiencies and omissions in the 'pre-investigation inquiry'.⁴⁵ The pre-investigation inquiry is the initial stage in dealing with a criminal complaint under the domestic law of a number of European states (in Ukraine it is regulated by Article 214 of the Criminal Procedure Code of Ukraine). Such an inquiry should usually be carried out expediently, and it should be followed by the opening of a criminal case and the carrying out of a criminal investigation if the information gathered discloses elements of a criminal offence.

iv) New evidence

In *Brecknell v United Kingdom*,⁴⁶ the Court considered the nature and extent of the investigative obligation where new evidence subsequently comes to light: 'the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further'.⁴⁷

As to what steps need to be taken, the authorities are entitled to take account of the lapse of time and the prospects of success of a prosecution. *Brecknell* concerned the murder of the applicant's husband by loyalist paramilitaries in Northern Ireland. The Court found that where plausible allegations were made years later of security force collusion in systematic targeting of innocent civilians, the authorities were obliged to verify the reliability of the information and assess whether a full investigation was required. Article 2 was violated because the allegations were initially investigated by the police force (the Royal Ulster Constabulary) that was itself implicated.

3. THE ELEMENTS OF AN EFFECTIVE INVESTIGATION: INDEPENDENCE, ADEQUACY AND PROMPTNESS

This section provides further analysis of the requirements of the elements of an effective investigation (in respect of independence, adequacy and promptness) and considers examples of their application in relevant cases. Section four below then considers victims' rights of participation during pre-trial investigations and court proceedings (whether there are sufficient element of public scrutiny and sufficient accessibility to victim's family in the course of an investigation).

i) Independence

This obligation means that those responsible for the investigation must be independent of those implicated—both in terms of hierarchical and institutional independence, but also 'practical

⁴⁵ See, e.g., *Lyapin v Russia*, No. 46956/09, 24 July 2014 (and the cases listed at para. 133 of that judgment).

⁴⁶ No. 32457/04, 27 November 2007.

⁴⁷ *Ibid.*, para. 70.

independence'.⁴⁸ The Court has underlined that this requires a 'concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment'.⁴⁹

For example, the case of *Ramsahai and others v Netherlands*⁵⁰ concerned the fatal shooting by the police of the applicants' relative. Officers from the same police force as those involved in the incident took various essential steps at the beginning of the investigation, prior to the involvement of the state Criminal Investigation Department, 15 hours and a half after the death. The Court accordingly found a procedural violation of Article 2 because the police investigation was not sufficiently independent. Similarly, the requirement of independence was breached in *Sergey Shevchenko v Ukraine*⁵¹ because the military body investigating the death of a serviceman was itself implicated. There was also a procedural violation of Article 2 in *Al-Skeini and others v United Kingdom*,⁵² as the bodies tasked with investigating fatalities allegedly caused by British soldiers during the United Kingdom's occupation of southern Iraq in 2003 were not independent of the military chain of command. The Court was also critical of the delays in the investigations, the failure to interview certain Iraqi witnesses and the narrow focus of the criminal proceedings brought against soldiers accused of being responsible for one of the deaths. By contrast, there was no violation of Article 2 in the case of *Mustafa Tunç and Fecire Tunç v Turkey*,⁵³ where military prosecutors were involved in an investigation into the death of a soldier, as there were no direct hierarchical, institutional or other ties between the prosecutors and the main suspect and the Court found that the way they conducted the investigation did not reflect any lack of independence or impartiality.

The Georgian authorities were the subject of excoriating criticism in the Court's judgment in *Enukidze and Girgvliani v Georgia*⁵⁴ which concerned the abduction and death of the applicants' son at the hands of Ministry of Interior officials. The Court identified a catalogue of failings in the investigation of the case, concluding that it 'manifestly lacked the requisite independence, impartiality, objectivity and thoroughness' and finding that different branches of state had acted in concert to prevent justice being done.

ii) Adequacy

This overarching obligation to ensure that an investigation is adequate means that it must be 'capable of leading to the establishment of the facts, a determination of whether the force used was justified in the circumstances and of identifying and – if appropriate – punishing those responsible'.⁵⁵ This very clearly means that the obligations under Article 2 cannot be satisfied merely by awarding damages.⁵⁶ It also requires that the authorities 'take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death'.⁵⁷

The Court has stipulated that 'any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required

⁴⁸ *Oğur v Turkey*, No. 21954/93, 20 May 1999, paras. 91–2. See also, e.g., *Celniku v Greece*, No. 21449/04, 5 July 2007; *Jasinskis v Latvia*, No. 45744/08, 21 December 2010; *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011; *Mustafa Tunç and Fecire Tunç v Turkey*, No. 24014/05, 14 April 2015.

⁴⁹ *Mustafa Tunç and Fecire Tunç v Turkey*, No. 24014/05, 14 April 2015, para. 222.

⁵⁰ No. 52391/99, 15 May 2007.

⁵¹ No. 32478/02, 4 April 2006.

⁵² No. 55721/07, 7 July 2011, paras 164, 172-174. See also *Kamil Uzun v Turkey*, No. 37410/97, 10 May 2007.

⁵³ No. 24014/05, 14 April 2015

⁵⁴ No. 25091/07, 26 April 2011.

⁵⁵ *Armani Da Silva v United Kingdom*, No. 5878/08, 30 March 2016, para. 233.

⁵⁶ See, for example, *Bazorkina v Russia*, No. 69481/01, 27 July 2006, para. 117.

⁵⁷ *Hanan v Germany*, No. 4871/16, 16 February 2021, para. 202.

standard of effectiveness'⁵⁸ and that its conclusions must be based on thorough, objective and impartial analysis of all relevant elements.

For example, 'where an expert medical examination is of crucial importance in determining the circumstances of a death, significant shortcomings in the conduct of that examination may amount to serious failings capable of undermining the effectiveness of the domestic investigation'.⁵⁹ The Court will also carefully review the adequacy of investigators' analysis of any expert evidence, which was highlighted in *Estemirova v Russia*,⁶⁰ concerning the abduction and murder of human rights activist, Natalia Estemirova.

It is important to underline that Article 2 does not, however, confer on victims a *right* to have third parties prosecuted or sentenced for a criminal offence, nor does it create an absolute obligation for all prosecutions to result in conviction, or in a particular sentence. The Court has explained that it will

*'grant substantial deference to the national courts in the choice of appropriate sanctions for homicide by State agents. Nevertheless, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed...'*⁶¹

Clearly, where suspects are tried, convicted and sentenced for a killing, it will not usually be possible to claim that the procedure has not proved capable of identifying and punishing the perpetrators. However, if there are nevertheless substantial shortcomings in the prosecution or sentencing then issues may still arise under Article 2. For example, in *Avşar v Turkey*,⁶² there was a violation of Article 2 due to the inadequacies of an investigation, even though six 'village guards' had been convicted of killing the applicant's brother. The reason for this was that the authorities had nevertheless failed to address a crucial issue which had arisen, namely the role of a seventh man, a member of the security forces. The case of *Mazepa and Others v Russia*⁶³ concerned the 'contract killing' of the journalist Anna Politkovskaya. Although five people had been convicted for their involvement, there was still a breach of Article 2 because of the failure of the investigators to take sufficient steps to identify the 'intellectual author' of the crime (in other words, those who commissioned the crime), and their focus on only one particular line of inquiry.

There was a violation of Article 2 in *Jelić v Croatia*,⁶⁴ concerning the investigation into the kidnapping and killing of an ethnic Serb in the early 1990s. Although a military officer with command responsibility had been prosecuted and found guilty, the investigation was deficient primarily because of the failure to follow up leads relating to the direct perpetrators.

Article 2 also requires an adequate examination of the use of lethal force by the state. This requirement was breached in *Tagayeva and Others v Russia*⁶⁵ which related to the Russian security

⁵⁸ See, e.g., *Ramsahai and others v Netherlands*, No. 52391/99, 15. May 2007, para. 324 and *Putintseva v Russia*, No. 33498/04, 10 May 2012, para. 51. Having reviewed the circumstances of the *Putintseva* case, the Court concluded that the authorities had carried out a thorough, impartial and careful examination into the killing of the applicant's son (paras. 52–8) and therefore there was no procedural violation of Article 2.

⁵⁹ *Gaggio v Italy*, No. 23458/02, 24 March 2011, para. 316.

⁶⁰ No. 42705/11, 31 August 2021, para. 69.

⁶¹ See, for example, *Armani Da Silva v United Kingdom*, No. 5878/08, 30 March 2016, para. 238.

⁶² No. 25657/94, 10 July 2001. See also *Kamil Uzun v Turkey*, No. 37410/97, 10 May 2007 (procedural violation of Article 2 notwithstanding a conviction for abuse of authority); *Feyzi Yıldırım v Turkey*, No. 40074/98, 19 July 2007 (procedural violation of Article 2 notwithstanding officer's conviction for 'ill-treatment'); *Mojsiejew v Poland*, No. 11818/02, 24 March 2009, para. 61 (death of applicant's son in sobering-up centre—concurrent criminal proceedings against centre's employees would not absolve state from its Convention obligations); *Agache and others v Romania*, No. 2712/02, 20 October 2009 (four persons convicted but did not serve their sentences as no steps were taken to extradite them—procedural violation of Article 2).

⁶³ No. 15086/07, 17 July 2018.

⁶⁴ No. 57856/11, 12 June 2014.

⁶⁵ No. 26562/07, 13 April 2017.

forces' handling of the Beslan School siege, following a terrorist attack, in September 2004. The authorities were found not to have fully assessed the evidence suggesting the use of indiscriminate weapons by state agents. In addition, the forensic evidence on the causes of death and injuries was inadequate, and there were deficiencies in the steps taken to secure and collect the relevant evidence at the site.

A failure by the authorities to carry out adequate enquiries into alleged motivations for the commission of crimes may breach the requirement of effectiveness, whether for example there could be political reasons⁶⁶ or because of a person's work as a journalist.⁶⁷

iii) Investigation carried out promptly and with reasonable expedition

This obligation relates to both the timing of the opening of the investigation and its total duration. The Court has stated that the requirement of promptness is essential for maintaining public confidence in the rule of law and also for preventing any appearance of collusion.⁶⁸ Therefore, delays will require plausible and convincing reasons from the authorities.

The Court has reiterated how important it is in practice that cases of deaths in contentious situations are investigated promptly: '[t]he passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as dragging out the ordeal for the members of the family'.⁶⁹

The assessment of any delays in investigations will depend upon the particular circumstances of the case, and the reasons for the delays. For example, there was a violation of Article 2 in *Mazepa and Others v Russia*⁷⁰ concerning the killing of journalist Anna Politkovskaya. In that case, the criminal investigation was opened in 2006 and was still pending when the Court issued its judgment in 2018, which was found to breach the promptness and reasonable expedition requirement. In *McCaughey and others v United Kingdom*⁷¹ the Court found a breach of Article 2 because of the excessive delays in concluding an inquest into the deaths of the applicants' relatives in 1990 (members of an IRA active service unit who had been shot dead by the British Army). The inquest hearing had not started until 21 years after their deaths. The Court noted there were protracted disputes over disclosure, inordinately long periods of inactivity and various legal actions and initiatives which appeared to be necessary to drive the inquest process forward. As a result of the pervasive problem in Northern Ireland, the Court directed the United Kingdom Government to take 'all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 of the Convention are complied with expeditiously'.⁷²

In some cases, delays have clearly discernible consequences. For example, in *Al-Skeini v United Kingdom*, there was a long delay between the death and the court martial, with the Court concluding that this delay seriously undermined the effectiveness of the investigation, because some of the soldiers accused of involvement in the incident had become untraceable.⁷³

⁶⁶ *Virabyan v Armenia*, No. 40094/05, 2 October 2012.

⁶⁷ See e.g. *Huseynova v Azerbaijan*, No. 10653/10, 13 April 2017.

⁶⁸ See, for example, *Armani Da Silva v United Kingdom*, No. 5878/08, 30 March 2016, para. 237.

⁶⁹ See, for example, *Estamirov and Others v Russia*, No. 60272/00, 12 October 2006, para. 89.

⁷⁰ No. 15086/07, 17 July 2018.

⁷¹ No. 43098/09, 16 July 2013.

⁷² *Ibid.*, para 145.

⁷³ No. 55721/07, 7 July 2011, para. 74.

4. THE ELEMENTS OF AN EFFECTIVE INVESTIGATION: VICTIMS' RIGHTS OF PARTICIPATION DURING PRE-TRIAL INVESTIGATIONS AND COURT PROCEEDINGS - SUFFICIENT ELEMENT OF PUBLIC SCRUTINY AND SUFFICIENT ACCESSIBILITY FOR THE VICTIM'S FAMILY

As noted in the introduction, recently drafted international standards, including the 2012 Victims' Rights Directive and the 2023 Committee of Ministers Recommendation on the rights of victims of crime have substantially elaborated victims' rights of participation in trial proceedings. For example, both standards include a right of victims of crime to understand and be understood, to receive information concerning their case, to interpretation and translation, as well as a right to be heard and a right to victim support.⁷⁴

i) Public scrutiny and sufficient accessibility

As regards the Convention, the obligation on the authorities to ensure investigations have both a sufficient element of public scrutiny and provide sufficient accessibility to victim's families has significant implications for victims' rights of participation during pre-trial investigations and court proceedings. The issues of public scrutiny and sufficient accessibility are often closely intertwined, and the Court accepts that what is required will inevitably vary from case to case.

The degree of public scrutiny that is possible in any case will of course depend on what is made publicly available by the authorities. For example, in *McKerr v United Kingdom*⁷⁵ the Court found that because independent police inquiry reports and their findings were not published (either in full or extracts), there was no public scrutiny of the investigation.

In *Paul and Audrey Edwards v United Kingdom*⁷⁶ the Court was required to consider whether a private, non-statutory inquiry was compliant with Article 2 in respect of the killing of a remand prisoner by his cellmate.⁷⁷ The inquiry heard a large number of witnesses and produced a 388-page report, which the Court described as a 'meticulous document'. It found numerous defects leading up to the killing of the applicants' son and made a series of recommendations for reform. Nevertheless, the inquiry was held to violate Article 2 because it lacked the powers to compel witnesses to attend to give evidence. It also lacked sufficient public scrutiny: the Court found that the nature of the case required the 'widest exposure possible', yet the inquiry sat in private and the applicants themselves were only able to attend the inquiry for the three days when they gave evidence. The applicants were unrepresented and were unable to question the witnesses; accordingly, they were not involved in the process to the extent necessary to safeguard their interests.

ii) Involvement in the procedure

As regards accessibility for the victim's family, the Court had repeatedly underlined that the next of kin of the victim 'must be involved in the procedure to such an extent as is necessary to safeguard his or her legitimate interests'.⁷⁸ This notion of 'involvement in the procedure' encompasses various

⁷⁴ Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime.

⁷⁵ No. 28883/95, 4 May 2001, para. 141.

⁷⁶ No. 46477/99, 14 March 2002.

⁷⁷ There was no inquest and as the defendant pleaded guilty to manslaughter there were no criminal proceedings involving the examination of witnesses.

⁷⁸ See, for example, *Aliyeva and Aliyev v Azerbaijan*, No. 35587/08, 31 July 2014, para. 70.

matters including the disclosure of case documents, being informed about key decisions in the investigation and being able to participate in the proceedings.

iii) Legal aid

The ability of families to be granted legal aid so that they can participate properly in legal proceedings may be a material factor.⁷⁹ For example, in *Rantsev v Cyprus and Russia*,⁸⁰ the Court noted that the Cypriot Government ought to have advised the applicant of the appropriate procedure for making a request for free legal assistance.

iv) Access to the case file

Clearly, the total denial of access to the case file will violate Article 2 even if an individual is granted 'victim status' in the domestic proceedings.⁸¹ In some cases, the failure to permit access to documentation may give rise to discernible inequality. This was the situation in *McKerr* where the inability of the applicant's family to have access to witness statements before the appearance of the witness at the inquest was found by the Court to have placed them at a disadvantage in terms of both their preparation and their ability to participate in questioning.⁸² Victims' access to expert reports may be especially important in some cases.⁸³

Of course, the investigative materials (such as police reports) may include sensitive issues, which could have prejudicial effects on other individuals or investigations, and so the Court has clarified that 'disclosure cannot be regarded as an automatic requirement under Article 2'.⁸⁴

In *Anik and Others v. Turkey*,⁸⁵ which concerned the killings of the applicants' relatives by members of the security forces, a decision was made not to bring a prosecution, and the applicants were not given any documents from the case file (other than their own statements). Therefore, Article 2 was breached because the decision not to prosecute could not be challenged effectively without the relatives having prior knowledge of the material in the investigation file.

v) Provision of information and requests for investigatory actions

There is also a requirement for victims or their relatives to be informed of 'significant developments' in the investigation,⁸⁶ which certainly includes the outcome of the investigation.⁸⁷ Furthermore, sufficient reasoning should be provided.⁸⁸

It may also be possible for applicants to make proposals to the investigating authorities as regards investigatory steps which they consider should be taken. However, the investigating authorities are not obliged to satisfy every request for a particular investigative measure made by a relative in the

⁷⁹ See also Article 47 of the Charter of Fundamental Rights.

⁸⁰ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 240.

⁸¹ *Huseynova v Azerbaijan*, No. 10653/10, 13 April 2017; *Oğur v Turkey*, No. 21594/93, 20.5.99.

⁸² *McKerr v. United Kingdom*, No. 28883/95, 4 May 2001, para. 148.

⁸³ See, e.g., *Abuyeva and Others v Russia*, No. 27065/05, 2 December 2010; *Tagayeva and Others v Russia*, No. 26562/07, 13 April 2017.

⁸⁴ *McKerr v. United Kingdom*, No. 28883/95, 4 May 2001, para. 129. Silva, 236.

⁸⁵ No. 63758/00, 5 June 2007, paras 76-77.

⁸⁶ See, for example, *Khadzhaliyev and Others v Russia*, No. 3013/04, 6 November 2008, para. 106.

⁸⁷ ⁸⁷ *Damayev v. Russia*, No. 36150/04, 29 May 2012, para. 87.

⁸⁸ See, for example, *Trufin v. Romania*, No. 3990/04, 20 October 2009, para. 52.

course of the investigation.⁸⁹ In the case of *Koseva v Bulgaria*,⁹⁰ the Court acknowledged that the authorities took reasonable investigative steps ‘with due consideration of the applicant’s requests for specific investigatory actions’, including an exhumation and second autopsy. However, in *Gül v Turkey*, which concerned the fatal shooting of the applicant’s son at his home by the police, it was noted that the applicant and members of his family were not even informed that criminal proceedings were going on and were therefore not given the opportunity of telling the court of ‘their very different version of events’.⁹¹

Problems may also arise because victims or their families are not told when court decisions are going to be made. For example, in *Rantsev* the applicant was not personally advised of the date of the inquest and so he was not present when the verdict was handed down. Furthermore, he was only informed about the findings of the inquest 15 months after the hearing had taken place.⁹² In *Velcea and Mazăre v Romania*,⁹³ the applicants had not been informed about court decisions discontinuing the proceedings, which the European Court found might have prevented them from challenging those decisions effectively. Similarly, in *Oğur v Turkey*⁹⁴ a court decision was not communicated to the applicant who was therefore prevented from appealing.

A series of failings were identified in the case of *Sergey Shevchenko v Ukraine*⁹⁵ concerning the death of a serviceman. His father was excluded from the domestic proceedings, because he was denied victim status, which meant that he was unable to intervene in any way during the course of the investigation. The Court acknowledged that certain investigative steps were taken following the father’s complaints to the higher prosecutor, but he was denied access to the case file. He was also never informed or consulted about any proposed evidence or witnesses, which meant that he could not be involved in instructing experts or challenging their conclusions. Nor did he receive any information about the progress of the investigation, and he was only provided with a copy of the final report eight months after the proceedings were discontinued. There was a breach of Article 2 in *Movsesyan v Armenia*⁹⁶ in which the applicant complained about the adequacy of the investigation into his daughter’s death during pregnancy. As the prosecutor only instigated an inquiry, not criminal proceedings, he did not have the official status of a victim and so was not permitted to submit documents or other materials to the casefile and in practice the arguments he raised were not addressed. Nor was the applicant, or other relatives, ever questioned about the woman’s prior state of health.

5. SPECIFIC FAILINGS IN INVESTIGATIONS

This section provides some examples of particular failings in investigations which have been identified by the Court, grouped in particular categories, which have resulted in findings of a violation of the Convention. It does not purport to be comprehensive (as there is voluminous caselaw), but it does show very clearly the high standards required by the Convention in a number of areas.

⁸⁹ *Velcea and Mazăre v Romania*, No. 64301/01, 1 December 2009, para. 113.

⁹⁰ No. 6414/02, dec. 22 June 2010.

⁹¹ No. 22676/93, 14 December 2000, para. 93.

⁹² *Ibid.*, para. 239.

⁹³ No. 64301/01, 1 December 2009.

⁹⁴ No. 21594/93, 20 May 1999.

⁹⁵ No. 32478/02, 4 April 2006.

⁹⁶ No. 27524/09, 16 November 2017.

i) At the scene of the incident

- failure to visit the site;⁹⁷
- failure to collect or preserve evidence at the scene;⁹⁸
- no photographs taken⁹⁹—of weapons at location;¹⁰⁰
- no or inadequate sketch map;¹⁰¹
- failure to take measurements;¹⁰²
- failure to carry out reconstruction of events;¹⁰³
- failure to record or number empty cartridges found, or to record their location;¹⁰⁴
- no attempt to determine bullet's trajectory;¹⁰⁵
- failure to commission and/or delays in carrying out ballistics examination;¹⁰⁶
- no or inadequate ballistics report;¹⁰⁷
- failure to find spent bullets;¹⁰⁸
- improper recording of alleged finding of two guns and spent cartridge;¹⁰⁹
- failure to examine victim's body¹¹⁰ or carry out forensic tests of victim's body or clothes;¹¹¹

⁹⁷ *Demiray v Turkey*, No. 27308/95, 21 November 2000; *Ipek v Turkey*, No. 25760/94, 17 February 2004; *Nihayet Arıcı and others v Turkey*, Nos. 24604/04 and 16855/05, 23 October 2012.

⁹⁸ *Nachova and others v Bulgaria*, Nos. 43577/98 and 43579/98, 26 February 2004, para. 132; *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Yüksel Erdoğan and others v Turkey*, No. 57049/00, 15 February 2007; *Udayeva and Yusupova v Russia*, No. 36542/05, 21 December 2010; *Benzer and others v Turkey*, No. 23502/06, 12 November 2013; *Tagayeva and Others v Russia*, No. 26562/07, 13 April 2017.

⁹⁹ *Önen v Turkey*, No. 22876/93, 14 May 2002; *Yüksel Erdoğan and others v Turkey*, No. 57049/00, 15 February 2007.

¹⁰⁰ *Gül v Turkey*, No. 22676/93, 14 December 2000.

¹⁰¹ *Önen v Turkey*, No. 22876/93, 14 May 2002; *Nachova and others v Bulgaria*, Nos. 43577/98 and 43579/98, 26 February 2004, para. 132; *Perk and others v Turkey*, No. 50739/99, 28 March 2006; *Yüksel Erdoğan and others v Turkey*, No. 57049/00, 15 February 2007.

¹⁰² *Nachova and others v Bulgaria*, Nos. 43577/98 and 43579/98, 26 February 2004, para. 132.

¹⁰³ *Ibid.*; *Sergey Shevchenko v Ukraine*, No. 32478/02, 4 April 2006; *Perk and others v Turkey*, No. 50739/99, 28 March 2006; *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007; *Abik v Turkey*, No. 34783/07, 16 July 2013; *Makbule Kaymaz and others v Turkey*, No. 651/10, 25 February 2014. But, by contrast, see *Camekan v Turkey*, No. 54241/08, 28 January 2014.

¹⁰⁴ *Önen v Turkey*, No. 22876/93, 14 May 2002.

¹⁰⁵ *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007.

¹⁰⁶ *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Zengin v Turkey*, No. 46928/99, 28 October 2004; *Nagmetov v Russia*, No. 35589/08, 5 November 2015 (see also the Grand Chamber judgment as to just satisfaction: 30 March 2017).

¹⁰⁷ *Fatma Kaçar v Turkey*, No. 35838/97, 15 July 2005; *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005; *Nihayet Arıcı and others v Turkey*, Nos. 24604/04 and 16855/05, 23 October 2012.

¹⁰⁸ *Gül v Turkey*, No. 22676/93, 14 December 2000; *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Makaratzis v Greece*, No. 50385/99, 20 December 2004; *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005.

¹⁰⁹ *Gül v Turkey*, No. 22676/93, 14 December 2000.

¹¹⁰ *Mojsiejew v Poland*, No. 11818/02, 24 March 2009; *Benzer and others v Turkey*, No. 23502/06, 12 November 2013.

¹¹¹ *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Estamirov v Russia*, No. 60272/00, 12 October 2006; *Udayeva and Yusupova v Russia*, No. 36542/05, 21 December 2010.

- no testing of traces of victim's hands to link him to gun fired;¹¹²
- failure to test officers' hands for gunshot residue;¹¹³
- failure to recover firearms used by police;¹¹⁴
- no testing of guns for fingerprints;¹¹⁵
- lack of report on police officer's weapon and ammunition;¹¹⁶
- failure to track down military vehicle identified by numberplate.¹¹⁷

ii) Post-mortem and autopsy

- failure of autopsy to fully record injuries or other data;¹¹⁸
- post-mortem defective in fundamental aspects (an autopsy should provide 'a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death');¹¹⁹
- autopsy did not include drawings or photographs showing entry and exit wounds of fatal bullet;¹²⁰
- autopsy performed by general practitioner.¹²¹

iii) Treatment of witnesses

- insufficient evidence obtained from eye-witnesses or other key witnesses;¹²²
- only one witness statement taken by public prosecutor;¹²³
- inadequate questioning of police/security forces/military officers/state officials;¹²⁴

¹¹² *Gül v Turkey*, No. 22676/93, 14 December 2000.

¹¹³ *Sergey Shevchenko v Ukraine*, No. 32478/02, 4 April 2006; *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007.

¹¹⁴ *Makaratzis v Greece*, No. 50385/99, 20 December 2004, para. 76.

¹¹⁵ *Gül v Turkey*, No. 22676/93, 14 December 2000. *Yüksel Erdoğan and others v Turkey*, No. 57049/00, 15 February 2007; *Makbule Kaymaz and others v Turkey*, No. 651/10, 25 February 2014.

¹¹⁶ *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007.

¹¹⁷ *Luluyev and others v Russia*, No. 69480/01, 9 November 2006.

¹¹⁸ *Anguelova v Bulgaria*, No. 38361/97, 13 June 2002; *Tepe v Turkey*, No. 27244/95, 9 May 2003; *Kakoulli v Turkey*, No. 38595/97, 22 November 2005.

¹¹⁹ *Tanlı v Turkey*, No. 26129/95, 10 April 2001, para. 149.

¹²⁰ *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007.

¹²¹ *Demiray v Turkey*, No. 27308/95, 21 November 2000.

¹²² *Önen v Turkey*, No. 22876/93, 14 May 2002; *Orhan v Turkey*, No. 25656/94, 18 June 2002; *Tepe v Turkey*, No. 27244/95, 9 May 2003; *Tekdağ v Turkey*, No. 27699/95, 15 January 2004; *Ipek v Turkey*, No. 25760/94, 17 February 2004; *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Ahmet Özkan and others v Turkey*, No. 21689/93, 6 April 2004; *Tahsin Acar v Turkey*, No. 26307/95, 8 April 2004; *Özalp and others v Turkey*, No. 32457/96, 8 April 2004; *Estamirov v Russia*, No. 60272/00, 12 October 2006; *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010; *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011.

¹²³ *Fatma Kaçar v Turkey*, No. 35838/97, 15 July 2005.

¹²⁴ *Önen v Turkey*, No. 22876/93, 14 May 2002; *Anguelova v Bulgaria*, No. 38361/97, 13 June 2002; *Demiray v Turkey*, No. 27308/95, 21 November 2000; *Aktaş v Turkey*, No. 24351/94, 24 April 2003; *Ahmet Özkan and others v Turkey*, No. 21689/93, 6 April 2004; *Özalp and others v Turkey*, No. 32457/96, 8 April 2004; *Makaratzis v Greece*, No. 50385/99, 20 December 2004; *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010; *Amuyeva and others v Russia*, No. 17321/06, 25 November 2010; *Udayeva and Yusupova v Russia*, No.

- failure to resolve conflicting testimony;¹²⁵
- taking only the briefest of statements;¹²⁶
- delays in taking statements;¹²⁷
- failure to show photos of suspect to the applicant, or to carry out a formal confrontation;¹²⁸
- questioning carried out by officials from a body implicated in the incident in question.¹²⁹

iv) Other failings in the investigation process

- delay in gendarmerie alerting competent authority of a death in custody;¹³⁰
- delay in instigating official investigation;¹³¹
- failure to obtain, or delay in obtaining, forensic medical report;¹³²
- failure to ask security forces adequately to account for their actions¹³³ or assumption that the security forces were not responsible;¹³⁴
- no prompt or effective investigation of allegations of collusion by the security forces;¹³⁵
- inadequate steps taken to reduce risk of collusion between police officers;¹³⁶
- lack of independence of investigating officers from those implicated;¹³⁷

36542/05, 21 December 2010; *Nihayet Arıcı and others v Turkey*, Nos. 24604/04 and 16855/05, 23 October 2012; *Benzer and others v Turkey*, No. 23502/06, 12 November 2013.

¹²⁵ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010.

¹²⁶ *Orhan v Turkey*, No. 25656/94, 18 June 2002.

¹²⁷ *Orak v Turkey*, No. 31889/96, 14 February 2002; *Orhan v Turkey*, No. 25656/94, 18 June 2002; *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007; *Makbule Kaymaz and others v Turkey*, No. 651/10, 25 February 2014; *Mezhiyeva v Russia*, No. 44297/06, 16 April 2015.

¹²⁸ *Önen v Turkey*, No. 22876/93, 14 May 2002.

¹²⁹ *Aktaş v Turkey*, No. 24351/94, 24 April 2003.

¹³⁰ *Ibid.*

¹³¹ *Çiçek v Turkey*, No. 25704/94, 27 February 2001; *Estamirov v Russia*, No. 60272/00, 12 October 2006; *Luluyev and others v Russia*, No. 69480/01, 9 November 2006; *Šilih v Slovenia*, No. 71463/01, 9 April 2009.

¹³² *Soare and others v Romania*, No. 24329/02, 22 February 2011; *Kerimova and others v Russia*, No. 17170/04 et al, 3 May 2011.

¹³³ *Ipek v Turkey*, No. 25760/94, 17 February 2004.

¹³⁴ *Önen v Turkey*, No. 22876/93, 14 May 2002; *Ahmet Özkan and others v Turkey*, No. 21689/93, 6 April 2004.

¹³⁵ *Shanaghan v UK*, No. 37715/97, 4 May 2001.

¹³⁶ *Makbule Kaymaz and others v Turkey*, No. 651/10, 25 February 2014.

¹³⁷ *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001; *McShane v UK*, No. 43290/98, 28 May 2002; *Aktaş v Turkey*, No. 24351/94, 24 April 2003; *Finucane v UK*, No. 29178/95, 1 July 2003; *Ipek v Turkey*, No. 25760/94, 17 February 2004; *Akpınar and Altun v Turkey*, No. 56760/00, 27 February 2007; *Ramsahai and others v Netherlands*, No. 52391/99, 15 May 2007; *Şandru and others v Romania*, No. 22465/03, 8 December 2009; *Jasinskis v Latvia*, No. 45744/08, 21 December 2010; *Soare and others v Romania*, No. 24329/02, 22 February 2011; *Alikaj and others v Italy*, No. 47357/08, 29 March 2011; *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011; *Association '21 December 1989' and others v Romania*, No. 33810/07, 24 May 2011; *Benzer and others v Turkey*, No. 23502/06, 12 November 2013; *Mocanu and others v Romania*, Nos. 10865/09, 32431/08 and 45886/07, 17 September 2014.

- failure of police and public prosecutors adequately to co-ordinate investigation;¹³⁸
- investigation not carried out with reasonable expedition;¹³⁹
- investigation lacked requisite objectivity and thoroughness;¹⁴⁰
- short and cursory investigation¹⁴¹ or relevant information ignored;¹⁴²
- investigation of limited scope and/or short duration;¹⁴³
- failure to obtain important evidence or documentation,¹⁴⁴ or to investigate crucial documents adequately;¹⁴⁵
- failure to look beyond what was stated on the face of custody records;¹⁴⁶
- failure to examine whether there existed a causal link between detainee's death and his treatment in custody;¹⁴⁷
- investigation carried out by 'Administrative Council', which was not independent from the security forces under investigation;¹⁴⁸
- investigation under control of the very officials whom the victim and victim's relatives had accused;¹⁴⁹
- failure to obtain photographs of missing people;¹⁵⁰
- failure of public scrutiny and/or accountability or to inform or involve next-of-kin;¹⁵¹

¹³⁸ *Tepe v Turkey*, No. 27244/95, 9 May 2003; *Tekdağ v Turkey*, No. 27699/95, 15 January 2004; *Nuray Şen v Turkey* (No. 2), No. 25354/94, 30 March 2004; *Tahsin Acar v Turkey*, No. 26307/95, 8 April 2004; *Buldan v Turkey*, No. 28298/95, 20 April 2004.

¹³⁹ *McKerr v UK*, No. 28883/95 4 May 2001; *McShane v UK*, No. 43290/98, 28 May 2002; *Tahsin Acar v Turkey*, No. 26307/95, 8 April 2004; *Buldan v Turkey*, No. 28298/95, 20 April 2004; *Fatma Kaçar v Turkey*, No. 35838/97, 15 July 2005; *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005; *Agache and others v Romania*, No. 2712/02, 20 October 2009; *Şandru and others v Romania*, No. 22465/03, 8 December 2009; *Kerimova and others v Russia*, No. 17170/04 et seq., 3 May 2011; *Tashukhadzhiyev v Russia*, No. 33251/04, 25 October 2011; *Nihayet Arıcı and others v Turkey*, Nos. 24604/04 and 16855/05, 23 October 2012; *Mocanu and others v Romania*, Nos. 10865/09, 32431/08 and 45886/07, 17 September 2014; *Mezhiyeva v Russia*, No. 44297/06, 16 April 2015.

¹⁴⁰ *Angelova v Bulgaria*, No. 38361/97, 13 June 2002.

¹⁴¹ *Orhan v Turkey*, No. 25656/94, 18 June 2002.

¹⁴² *Çiçek v Turkey*, No. 25704/94, 27 February 2001.

¹⁴³ *Akkoç v Turkey*, Nos. 22947/93 and 22948/93, 10 October 2000; *Tekdağ v Turkey*, No. 27699/95, 15 January 2004; *Ipek v Turkey*, No. 25760/94, 17 February 2004; *Buldan v Turkey*, No. 28298/95, 20 April 2004; *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005; *Kerimova and others v Russia*, No. 17170/04 et seq., 3 May 2011.

¹⁴⁴ *Tahsin Acar v Turkey*, No. 26307/95, 8 April 2004; *Buldan v Turkey*, No. 28298/95, 20 April 2004.

¹⁴⁵ *Benzer and others v Turkey*, No. 23502/06, 12 November 2013.

¹⁴⁶ *Orhan v Turkey*, No. 25656/94, 18 June 2002; *Ipek v Turkey*, No. 25760/94, 17 February 2004.

¹⁴⁷ *Ahmet Özkan and others v Turkey*, No. 21689/93, 6 April 2004.

¹⁴⁸ *Orhan v Turkey*, No. 25656/94, 18 June 2002; *Aktaş v Turkey*, No. 24351/94, 24 April 2003; *Ipek v Turkey*, No. 25760/94, 17 February 2004; *Özalp and Others v Turkey*, No. 32457/96, 8 April 2004.

¹⁴⁹ *Kolevi v Bulgaria*, No. 1108/02, 5 November 2009.

¹⁵⁰ *Orhan v Turkey*, No. 25656/94, 18 June 2002.

¹⁵¹ *Orhan v Turkey*, No. 25656/94, 18 June 2002. *Fatma Kaçar v Turkey*, No. 35838/97, 15 July 2005; *Estamirov v Russia*, No. 60272/00, 12 October 2006; *Luluyev and others v Russia*, No. 69480/01, 9 November 2006; *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011; *Kerimova and others v Russia*, No. 17170/04 et al, 3 May 2011; *Mocanu and others v Romania*, Nos. 10865/09, 32431/08 and 45886/07, 17 September 2014; *Mezhiyeva v Russia*, No. 44297/06, 16 April 2015.

- failure to make connections between killings that may have been linked;¹⁵²
- lack of accountability of officers for their weapons.¹⁵³

v) Inquests and inquiry procedures

- failure to commence promptly and/or not sufficiently expedited;¹⁵⁴
- key witnesses could not be required to attend to give evidence;¹⁵⁵
- failure to provide legal aid to victim's family;¹⁵⁶
- inability of victim's family to take part in the inquest¹⁵⁷ or the inquiry to establish cause of death;¹⁵⁸
- non-disclosure of witness statements to victim's family;¹⁵⁹
- use of public interest immunity certificates which prevented the inquest investigating relevant matters;¹⁶⁰
- inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution;¹⁶¹
- scope of inquest too narrow;¹⁶²
- lack of public scrutiny.¹⁶³

vi) Failings of the prosecuting authorities

- failure of public prosecutor to take statements from those involved (including the applicant);¹⁶⁴
- failure of public prosecutor to inspect custody records or places of detention;¹⁶⁵

¹⁵² *Ekinci v Turkey*, No. 27602/95, 16 July 2002.

¹⁵³ *Gül v Turkey*, No. 22676/93, 14 December 2000.

¹⁵⁴ *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001; *McShane v UK*, No. 43290/98, 28 May 2002; *Finucane v UK*, No. 29178/95, 1 July 2003; *McCaughey and others v UK*, No. 43098/09, 16 July 2013.

¹⁵⁵ *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *McShane v UK*, No. 43290/98, 28 June 2002; *Paul and Audrey Edwards v UK*, No. 46477/99, 14 March 2002.

¹⁵⁶ *Jordan v UK*, No. 24746/94, 4 May 2001; *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010.

¹⁵⁷ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010.

¹⁵⁸ *Slimani v France*, No. 57671/00, 27 July 2004.

¹⁵⁹ *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001.

¹⁶⁰ *McKerr v UK*, No. 28883/95, 4 May 2001.

¹⁶¹ *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001; *McShane v UK*, No. 43290/98, 28 May 2002.

¹⁶² *Shanaghan v UK*, No. 37715/97, 4 May 2001; *Finucane v UK*, No. 29178/95, 1 July 2003 (in both cases, preventing investigation of allegations of collusion by the security forces).

¹⁶³ *Paul and Audrey Edwards v UK*, No. 46477/99, 14 March 2002; *Finucane v UK*, No. 29178/95, 1 July 2003; *Benzer and others v Turkey*, No. 23502/06, 12 November 2013.

¹⁶⁴ *Gül v Turkey*, No. 22676/93, 14 December 2000; *Ipek v Turkey*, No. 25760/94, 17 February 2004.

¹⁶⁵ *Çiçek v Turkey*, No. 25704/94, 27 February 2001.

- public prosecutor did not doubt the ‘official version’ of the death or accepted police officers’ accounts without question;¹⁶⁶
- prosecutor ignored significant facts, thus effectively shielding police officer from prosecution;¹⁶⁷
- prosecuting authorities’ investigation amounted to little more than a defence of police officers concerned;¹⁶⁸
- non-commissioned officers forced to give false statements to investigators;¹⁶⁹
- failure to bring criminal proceedings against senior gendarmerie officers or police officers (and absence of judicial explanation for the omission);¹⁷⁰
- public prosecutor reached hasty conclusions on scant evidence;¹⁷¹
- lack of public scrutiny (and failure to provide information to victims’ family) of the reasons for the prosecuting authority’s decision not to prosecute any police officers;¹⁷²
- domestic court’s refusal to allow victim’s family sufficient time and facilities to study case materials;¹⁷³
- delays in instituting or conducting criminal proceedings¹⁷⁴ (leading to charges against perpetrators becoming time-barred).¹⁷⁵

6. SENTENCING, DISCIPLINARY PROCEEDINGS AND IMMUNITIES

i) Sentencing and disciplinary proceedings

As noted above, Article 2 does not give victims the *right*, as such, to have third parties prosecuted or convicted for a criminal offence,¹⁷⁶ nor does it provide a right to demand a particular sentence or other outcome. There is also no right to have state agents discharged. For example, in *McBride v United Kingdom*,¹⁷⁷ two British army soldiers, who had been convicted of murder for shooting the applicant’s son, were imprisoned for six years, before being allowed to rejoin the army. The Court rejected the applicant’s arguments that the soldiers should also have been discharged from the army.

However, the Court will exercise ‘a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed’.¹⁷⁸

¹⁶⁶ *Orak v Turkey*, No. 31889/96, 14 February 2002; *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005.

¹⁶⁷ *Nachova and others v Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005, para. 116.

¹⁶⁸ *Dink v Turkey*, No. 2668/07, 14 September 2010.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Demiray v Turkey*, No. 27308/95, 21 November 2000.

¹⁷² *Jordan v UK*, No. 24746/94, 4 May 2001; *McKerr v UK*, No. 28883/95, 4 May 2001; *Kelly v UK*, No. 30054/96, 4 May 2001; *Shanaghan v UK*, No. 37715/97, 4 May 2001; *Finucane v UK*, No. 29178/95, 1 July 2003.

¹⁷³ *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011.

¹⁷⁴ *Mojsiejew v Poland*, No. 11818/02, 24 March 2009; *Šilih v Slovenia*, No. 71463/01, 9 April 2009; *Kerimova and others v Russia*, No. 17170/04 et al, 3 May 2011; *Association ‘21 December 1989’ and others v Romania*, No. 33810/07, 24 May 2011; *Camekan v Turkey*, No. 54241/08, 28 January 2014.

¹⁷⁵ *Alikaj and others v Italy*, No. 47357/08, 29 March 2011.

¹⁷⁶ *Hanan v Germany*, No. 4871/16, 16 February 2021, para. 210.

¹⁷⁷ No. 1396/06, dec. 9 May 2006.

¹⁷⁸ *Armani Da Silva v United Kingdom*, No. 5878/08, 30 March 2016, para. 238.

Where a state agent has been charged with crimes involving torture or ill-treatment, the Court has stipulated that they should be suspended from duty during the investigation and the trial, and they should be dismissed if convicted.¹⁷⁹

Problems may arise if there is undue leniency in sentencing perpetrators.¹⁸⁰ For example, Article 3 was breached in *Okkali v Turkey*¹⁸¹ because an investigation into police ill-treatment of a 12-year-old boy led to minimal, suspended sentences for the police officers involved. The Court found that 'the judges exercised their discretion more in order to minimise the consequences of an extremely serious unlawful act than to show that such acts could in no way be tolerated'. There was a similar outcome in *Zontul v Greece*,¹⁸² which concerned the rape with a truncheon of a migrant on a boat after it was boarded by the Greek coastguard. The perpetrator was sentenced to a six-month suspended prison term, which was later commuted to a fine of €792. The Court accordingly found that the leniency of the penalty was manifestly disproportionate, in violation of Article 3, in view of the seriousness of the treatment inflicted on the applicant (which was found to be an act of torture). A further factor was the applicant's effective exclusion from participation in the criminal proceedings as a civil party.

Article 2 may also be violated if the courts provide inadequate reasoning for acquitting state agents. That was the outcome in the case of *Gül v Turkey*¹⁸³ because the domestic court's decision to acquit three police officers was insufficiently grounded: in particular, there was no explanation as to why the police officers' account was preferred to that of the family. The Court also found fault in the court's over-reliance on the opinions of experts in the case, without sufficient explanation.

Article 2 is likely to be violated in circumstances where convicted perpetrators do not in fact serve their sentences. This was the case in *Agache and others v Romania*¹⁸⁴ which concerned the fatal attack on a militia officer during the 1989 anti-communist demonstrations. Several people were convicted of manslaughter but the sentences imposed were not executed, as one person was pardoned and another was granted conditional release. The other people convicted were located in Hungary, and the Romanian authorities did not take the requisite steps to have them extradited.

ii) Amnesties, pardons and statutes of limitation

The Court has held that pardons and amnesties are primarily matters of member States' domestic law and are not in principle contrary to international law, unless they relate to acts amounting to grave breaches of fundamental human rights.¹⁸⁵

For example, in the case of *Ali and Ayşe Duran v Turkey*,¹⁸⁶ police officers were found guilty of killing the applicants' son by beating him, after he had been detained in a police station accused of a robbery. However, Article 2 was breached because the officers' prison sentences were suspended following the introduction of a new law, which the Court considered to amount to a partial amnesty. *E.G. v Moldova* concerned the granting of an amnesty to a man convicted of gang sexual assault and the failure to enforce his five-year sentence of imprisonment. The Court found that the sexual assault amounted to a serious breach of the victim's right to physical and mental integrity, and accordingly potentially breached the state's obligations under Articles 3 and 8 of the Convention. The Court was

¹⁷⁹ See, for example, *Abdülşamet Yaman v. Turkey*, No. 32446/96, 2 November 2004, para. 55; *Ali and Ayşe Duran v Turkey*, No. 42942/02, 8 April 2008, para. 64.

¹⁸⁰ *Şimşek and others v Turkey*, Nos. 35072/97 and 37194/97, 26 July 2005; *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26 April 2011.

¹⁸¹ No. 52067/99, 17 October 2006. See also *Ali and Ayşe Duran v Turkey*, No. 42942/02, 8 April 2008; *Atalay v Turkey*, No. 1249/03, 18 September 2008.

¹⁸² No. 12294/07, 17 January 2012.

¹⁸³ No. 22676/93, 14 December 2000, para. 94.

¹⁸⁴ No. 2712/02, 20 October 2009.

¹⁸⁵ See, for example, *Marguš v. Croatia*, No. 4455/10, 27 May 2014, para. 139.

¹⁸⁶ No. 42942/02, 8 April 2008.

critical of the Court of Appeal for using its discretion 'to minimise the consequences of an extremely serious unlawful act rather than to show that such acts could not in any way be tolerated'.¹⁸⁷

In the rendition case of *Nasr and Ghali v Italy*,¹⁸⁸ the Court found that there had been an effective investigation into the first applicant's allegations of ill-treatment which had led to the convictions of 26 US nationals and two Italians, with the Court paying tribute to the high calibre of the work of the Italian investigators, judges and prosecutors. However, the convictions of the Italians were quashed on grounds of state secrecy, and only one of the US citizens was made the subject of an extradition request (which was ineffective in any event) and three of them were pardoned by the Italian President. Accordingly, there was a violation of Article 3 because the investigation had not led to the punishment of those responsible.

A presidential pardon was also granted in *Makuchyan and Minasyan v Azerbaijan and Hungary*¹⁸⁹ which concerned the murder of an Armenian military officer by an Azerbaijani officer, during a language course in Budapest. The perpetrator was convicted of murder in Hungary and was transferred back to Azerbaijan after having served eight years of his sentence. On his return, as well as being pardoned, he was granted a number of other benefits, including his salary arrears for the period spent in prison, a flat in Baku and a promotion in military rank. Accordingly, the Court found these steps in effect granted the perpetrator immunity for his crimes. The Court stated that

'...when an agent of the State is convicted of a crime that violates Article 2 or Article 3 of the Convention, the subsequent granting of an amnesty or pardon could scarcely be said to serve the purpose of an adequate punishment. On the contrary, States are to be all the more stringent when punishing their own agents for the commission of serious life-endangering crimes than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity the offenders may consider themselves to enjoy by virtue of their very office'.¹⁹⁰

The effect of statutes of limitation, by barring criminal proceedings, may give rise to issues under Article 2. This happened in *Angelova and Iliev v Bulgaria*¹⁹¹ which related to a homicidal attack on a Roma man by a group of seven teenagers. As a result of a series of delays in the criminal proceedings, the Bulgarian statute of limitations expired in respect of the majority of the assailants and the authorities terminated the criminal proceedings against them. In addition, Article 2 was breached because the authorities failed to consider the racial motives of the attack and the need to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.¹⁹²

7. PROTECTION OF VULNERABLE VICTIMS

This section considers the position of victims who may be particularly vulnerable. It addresses the overarching obligation on states to prevent discrimination, as well as the need to protect people with disabilities and the victims of sexual violence and trafficking.

¹⁸⁷ No. 37882/13, 13 April 2021, paras 43-44.

¹⁸⁸ No. 44883/09, 23 February 2016.

¹⁸⁹ No. 17247/13, 26 May 2020.

¹⁹⁰ *Makuchyan and Minasyan v Azerbaijan and Hungary*, No. 44883/09, 23 February 2016, para. 157.

¹⁹¹ No. 55523/00, 26 July 2007.

¹⁹² *Ibid*, para. 105.

i) Prohibition of discrimination

In the seminal case of *Nachova and others v Bulgaria*, which concerned the fatal shooting of the Roma applicants' two relatives by the military police, the Court emphasised that stricter obligations will arise in investigating allegedly racist violence:¹⁹³

'where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the state's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin'.

Furthermore, the state is obliged to 'do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence'.¹⁹⁴ In view of the serious omissions and inadequacies in the investigation in *Nachova*, and in view of similar findings in *Velikova*¹⁹⁵ and *Angelova*,¹⁹⁶ the Court found serious doubts about the objectivity and impartiality of the investigators and prosecutors involved.

Where investigations are found to be discriminatory in one way or another, Article 14 of the Convention (the prohibition of discrimination) may come into play, together with Articles 2 or 3.¹⁹⁷ For example, there was a finding of a violation of Article 14 taken together with Article 3 in *Bekos and Koutropoulos v Greece*,¹⁹⁸ which concerned assaults on two Roma men during their arrest by the police. Despite plausible information that the assaults had been racially motivated (it was claimed that they were racially verbally abused), the authorities failed to examine this question.¹⁹⁹

In *Makuchyan and Minasyan v Hungary and Azerbaijan* (see above) the Court sought to establish whether or not the Armenian ethnic origin of the victims and the nature of the Azerbaijani officer's crimes played a role in the measures taken by the Azerbaijani authorities following his return to Azerbaijan from prison in Hungary (including his pardoning by the Azerbaijani President). It concluded that the actions taken by the Azerbaijani authorities were indeed racially motivated and accordingly there was a violation of Article 14 taken together with Article 2.

ii) People with disabilities

In addition to the protections provided by the anti-discrimination measures discussed above, international standards have incorporated a number of specific provisions designed to assist people

¹⁹³ Nos. 43577/98 and 43579/98, 26 February 2004, para. 157 (endorsed by the Grand Chamber in its judgment of 6 July 2005, para. 160). See also *Menson and others v UK*, No. 47916/99, dec. 6 May 2003; *Angelova and Iliev v Bulgaria*, No. 55523/00, 26 July 2007; *Soare and others v Romania*, No. 24329/02, 22 February 2011 (police shooting of Roma man—no violation of Article 14 taken together with Article 2 (by four votes to three)).

¹⁹⁴ Nos. 43577/98 and 43579/98, 26 February 2004, para. 159 (endorsed by the Grand Chamber in its judgment of 6 July 2005, para. 160).

¹⁹⁵ No. 41488/98, 18 May 2000.

¹⁹⁶ No. 38361/97, 13 June 2002.

¹⁹⁷ As regards the duty under Article 8 to investigate incidents of racial abuse, see *R.B. v Hungary*, No. 64602/12, 12 April 2016. For states which have ratified it, Protocol No. 12 to the Convention may be in issue.

¹⁹⁸ No. 15250/02, 13 December 2005.

¹⁹⁹ See also, e.g., *Stoica v Romania*, No. 42722/02, 4 March 2008; *B.S. v Spain*, No. 47159/08, 24 July 2012; *Abdu v Bulgaria*, No. 26827/08, 11 March 2014; *Sakir v Greece*, No. 48475/09, 24 March 2016 (flawed investigation into attack on Afghan migrant).

with disabilities. For example, Article 3 of the Victims' Rights Directive provides for the right to understand and be understood and further stipulates that the authorities' communication with victims must 'take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood'.²⁰⁰ Article 22 of the Directive obliges states to carry out an '[i]ndividual assessment of victims to identify specific protection needs', giving due consideration to victims with disabilities.²⁰¹

iii) Victims of sexual violence

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) requires states to adopt a 'gendered understanding of violence', to ensure the effective investigation and prosecution of offences.²⁰²

The European Court has held that states have a positive obligation inherent in Articles 3 and 8 'to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution',²⁰³ and furthermore the positive obligation requires the criminalisation and effective prosecution of all non-consensual sexual acts (which includes the effective enforcement of sentences).²⁰⁴

In *MC v Bulgaria*²⁰⁵ the Court found that Bulgarian law did not comply with the state's positive obligations because of the practice of prosecuting alleged perpetrators of rape only where there was evidence of significant physical resistance. Article 3 was also breached as a result of various inadequacies in the manner in which the investigation of the offence was carried out.²⁰⁶ The state's positive obligation to investigate and prosecute cases of sexual abuse effectively was violated in *Y. v Slovenia*²⁰⁷ where criminal proceedings brought against a man accused of sexually assaulting the applicant (when aged 14) took more than seven years.

The case of *E.G. v Moldova*²⁰⁸ concerned the applicant's sexual assault by three men. One of the perpetrators was sentenced to five years' imprisonment for sexual assault, but the sentence was not enforced. He was granted amnesty, which was set aside after a year (during which time he left Moldova). The Court was also critical of the authorities for the delays in attempting to enforce the sentence and the lack of coordination, and accordingly Articles 3 and 8 were breached.

iv) Victims of trafficking

In *Siliadin v France*,²⁰⁹ the Court confirmed that Article 4 (the prohibition of slavery and forced labour) imposes a specific positive obligation on states to penalise and prosecute effectively any act aimed

²⁰⁰ Article 3(2) of the Victims' Rights Directive. See also Article 5 of the 2023 Committee of Ministers' Recommendation.

²⁰¹ Article 22(3) of the Victims' Rights Directive. See also Article 4 of the 2023 Committee of Ministers' Recommendation.

²⁰² Article 49(2) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (2011).

²⁰³ *MC v Bulgaria*, No. 39272/98, 4 December 2003, para. 153. Article 8 may impose a broader obligation on States to adopt adequate positive measures in the sphere of criminal-law protection to protect individuals against acts of violence by other individuals—see *Sandra Janković v Croatia*, No. 38478/05, 5 March 2009.

²⁰⁴ *E.G. v Moldova*, No. 37882/13, 13 April 2021, para. 39.

²⁰⁵ No. 39272/98, 4 December 2003.

²⁰⁶ See also *S.Z. v Bulgaria*, No. 29263/12, 3 March 2015 (delayed and ineffective investigation of rape case, in which the Court identified a systemic problem as regards the ineffectiveness of investigations in Bulgaria).

²⁰⁷ No. 41107/10, 28 May 2015. There was also a violation of Article 8 because of the failure to protect the applicant's personal integrity during the cross-examination process.

²⁰⁸ No. 37882/13, 13 April 2021.

²⁰⁹ No. 73316/01, 26 July 2005.

at maintaining a person in a situation of slavery, servitude or forced or compulsory labour, which therefore requires a legislative and administrative framework to prohibit and punish trafficking.

The case of *Rantsev v Cyprus and Russia*,²¹⁰ highlighted the serious problems in Cyprus (since the 1970s) involving young women, frequently from the countries of the former Soviet Union, being forced to work in the sex industry. The applicant's daughter, Oxana Rantseva, had died a few days after arriving in Cyprus on a 'cabaret-artiste' visa. The Court held in *Rantsev* that national laws must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. With extensive references to the Palermo Protocol²¹¹ and the Anti-Trafficking Convention,²¹² the Court clarified that Article 4 includes a procedural obligation to investigate situations of potential trafficking, which is equivalent to the duties arising under Articles 2 and 3 the Convention. Furthermore, in cross-border trafficking cases, states will be required to co-operate effectively with other states.²¹³ The Court found fault with the Cypriot authorities for failing to seek assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. Russia was also held to be in violation of Article 4 for failing to investigate the 'recruitment' of Ms Rantseva and other victims of trafficking in Russia.

There was also a breach of Article 4 in *L.E. v Greece*²¹⁴ because of the authorities' inadequate responses to a criminal complaint of human trafficking. The applicant complained that after arriving in Greece her passport had been confiscated by the individual who had helped her travel there (for a debt pledge) and that he had forced her into prostitution. Although the domestic legislation itself was considered to provide the applicant with sufficient protection, the operational measures taken were deemed inadequate. Procrastination by the police in obtaining the requisite evidence meant that there was a nine-month delay in the applicant being formally recognised as a victim of trafficking. There were also delays in the criminal investigation against the alleged traffickers and other specific shortcomings as to how it was conducted.

v) Protection against secondary or repeat victimisation, re-traumatisation, intimidation and retaliation

International standards have increasingly, and more explicitly, recognised the importance of the need to provide various forms of protection for witnesses. For example, Article 18 of the Victims' Rights Directive provides that:

'Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members'.²¹⁵

²¹⁰ No. 25965/04, 7 January 2010.

²¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

²¹² The Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005.

²¹³ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 286–9.

²¹⁴ No. 71545/12, 21 January 2016. See, by contrast, *J. and others v Austria*, No. 58216/12, 17 January 2017 (prosecutor's decision not to pursue investigation into alleged human trafficking offences committed abroad by non-nationals - no violation of Article 4).

²¹⁵ Article 18 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the European Union, L 315/57, 14 November 2012.

This includes protection from re-traumatisation, as reflected in the 2005 UN Basic Principles:

*‘The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation’.*²¹⁶

8. VICTIMS’ RIGHTS IN PARTICULAR CONTEXTS

i) Deaths in custody

Deaths in state custody will be the subject of particular scrutiny by the Court:

*‘... where a positive obligation to safeguard the life of persons in custody is at stake, the system required by Article 2 must provide for an independent and impartial official investigation that satisfies certain minimum standards as to effectiveness. Thereby, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations which would be capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved. The requirement of public scrutiny is also relevant in this context. . .’*²¹⁷

For example, Article 2 was found to have been violated in *Trubnikov v Russia*.²¹⁸ There, an initial investigation by a prison governor into an inmate’s suicide was not sufficiently independent and its scope was too limited. A subsequent investigation only took place three years after the incident and completely excluded the applicant and his family.

See also the cases (referred to above) of *Enukidze and Girgvliani v Georgia*,²¹⁹ and *Paul and Audrey Edwards v United Kingdom*.²²⁰

ii) Disappearances and missing persons

The Court’s jurisprudence makes a clear distinction between the obligation to investigate a death, and the duty to investigate a case of a disappearance, in that the latter creates an ongoing obligation:

‘A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred... This situation is very often drawn out over time, prolonging the torment of the victim’s relatives. It cannot therefore be said that a disappearance is, simply, an “instantaneous” act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long

See also: Article 15 of the Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime.

²¹⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), 2005, para. VI. As regards the protection of children, see also Articles 30(2), 35 and 36 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (2007).

²¹⁷ *Trubnikov v Russia*, No. 49790/99, 5 July 2005, para. 88.

²¹⁸ No. 49790/99, 5 July 2005.

²¹⁹ No. 25091/07, 26 April 2011.

²²⁰ No. 46477/99, 14 March 2002.

as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation'.²²¹

In a series of cases against Turkey, the Court has found that there were no effective investigations to clarify the whereabouts and fate of Greek Cypriot missing persons who disappeared in life-threatening circumstances in Cyprus in the mid-1970s. It also specifically found that the work carried out by the United Nations Committee on Missing Persons (CMP) did not meet the requirements of Article 2 because there was no analysis of the circumstances of the deaths (or even their dating), no attempt to interview witnesses and no efforts to hold potential perpetrators to account through criminal prosecutions.²²²

There have been many cases of violations arising from the actions of the Russian security services in the north Caucasus region of Russia, in which the Court has frequently identified 'inexplicable delays' in investigations, as well as investigations being repeatedly adjourned and reopened, in addition to many other issues.²²³ For example, a number of failings were identified in *Khadzhialiye v Russia*:²²⁴ the prosecutor's office only instituted an investigation into the kidnapping of the applicants' relatives two days later, regardless of the need to promptly carry out investigative measures in order to find the abducted men, and a post-mortem was only ordered three weeks after the discovery of bodies. Furthermore, the father of the men, who had witnessed their abductions, was only interviewed after six weeks.

The relatives of the victims of enforced disappearances may themselves suffer treatment considered as inhuman and in violation of Article 3 of the Convention, due to 'the agony of not knowing whether family members were killed...or are still in detention or, if detained, have since died'.²²⁵ For example, in the case of *Gongadze v Ukraine*,²²⁶ concerning the death and disappearance of journalist, Georgiy Gongadze, the Court found a breach of the Article 2 procedural obligation and was highly critical that the authorities 'were more preoccupied with proving the lack of involvement of high-level State officials in the case than with discovering the truth about the circumstances of the disappearance and death of the applicant's husband'. As the authorities provided the applicant with contradictory information about her husband's fate, even after his decapitated body had been found, and refused her access to key materials in the file, the Court found that this caused her serious suffering which amounted to degrading treatment contrary to Article 3.

iii) Cases with cross-border elements

A number of cases have raised issues relating to investigations which have cross-border or transnational elements. As discussed in relation to the case of *Rantsev* above, in cross-border trafficking cases, states will be required to co-operate effectively with other states.²²⁷ This was also the crux of the issue in *Güzelyurtlu and Others v Cyprus and Turkey*²²⁸ which related to the murder of three members of a family in Cyprus. The suspects later identified were located in the 'Turkish

²²¹ *Varnava and Others v Turkey*, No. 16064/90 et seq., 18 September 2009, para. 148.

²²² See, for example, *Cyprus v Turkey*, No. 25781/94, 10 May 2001; *Varnava and Others v Turkey*, No. 16064/90 et seq., 18 September 2009. As to the award of compensation to relatives of missing people, see, in particular, *Cyprus v Turkey*, No. 25781/94, 12 May 2014.

²²³ See, for example, *Bazorkina v Russia*, No. 69481/01, 27 July 2006, paras 121-125.

²²⁴ No. 3013/04, 6 November 2008.

²²⁵ *Cyprus v Turkey*, No. 25781/94, 10 May 2001, para. 157.

²²⁶ No. 34056/02, 8 November 2005, para. 179.

²²⁷ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010, paras 286–9. See also, e.g., Article 32 of the Convention on Action against Trafficking in Human Beings (2005); Article 38 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (2007); Article 20 of the Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime.

²²⁸ No. 36925/07, 29 January 2019.

Republic of Northern Cyprus' (TRNC) and accordingly, the Court found that both Cyprus and Turkey were subject to a 'two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance',²²⁹ assessed in the light of international treaties or agreements applicable between the states in question.²³⁰ The Court may also consider any informal or *ad hoc* channels of cooperation available, especially as regards de facto entities (like the TRNC).²³¹ On the facts of the case, the Court found Turkey to have breached Article 2 (but not Cyprus) for failing to reply to extradition requests submitted to it by the Cypriot government.

The case of *Huseynova v Azerbaijan*²³² concerned the murder of prominent independent journalist, Elmar Huseynov, who was shot dead in his apartment building, and the inadequacy of the ensuing investigation. Two suspects were identified who were located on Georgian territory and the Georgian authorities refused to extradite them. In those circumstances, the Court acknowledged that such obstacles could arise which would hinder the progress of a criminal investigation. Nevertheless, the Court was critical of the Azerbaijani authorities for failing to consider the feasibility of transferring the criminal case to the Georgian authorities so that the murder case could be prosecuted there.²³³

9. ARMED CONFLICT AND OCCUPATION

i) Jurisdiction

In situations of occupation of one state's territory by another, the question of the occupying state's jurisdiction under Article 1 the Convention will need to be considered carefully.

Extra-territorial jurisdiction will arise where a state exercises 'effective control over an area'.²³⁴ For example, in *Ilaşcu and others v Russia and Moldova*,²³⁵ the applicants complained of various Convention violations in the 'Moldavian Republic of Transdniestria', a region of Moldova which declared its independence in 1991 but which has not been recognised by the international community. The Court found that the responsibility of the Russian Government was engaged, in respect of:

'...the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova'.²³⁶

Other factors that led the Court to conclude that Russia's responsibility was engaged included the continuing Russian military presence in the region, and its financial support. Thus, the 'Moldavian Republic of Transdniestria' remained 'under the effective authority, or at the very least under the

²²⁹ *Ibid.*, para. 233.

²³⁰ *Ibid.*, para. 236.

²³¹ *Ibid.*, paras 237-238.

²³² No. 10653/10, 13 April 2017.

²³³ As is permitted, for example, by the European Convention on Extradition, the 1993 Minsk Convention and the 1996 Treaty on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.

²³⁴ By contrast, situations in which a state carries out extra-territorial aerial or artillery bombardment may not amount to 'effective control of an area'. See, e.g., *Banković and others v Belgium and Others*, No. 52207/99, dec. 12 December 2001; *Ohanyan v Azerbaijan*, No. 74508/16, dec. 12 September 2023.

²³⁵ No. 48787/99, 8 July 2004.

²³⁶ *Ibid.*, para. 382.

decisive influence, of the Russian Federation, and in any event . . . it survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation'.²³⁷

On a similar basis, the European Court has found that Russia exercised effective control over South Ossetia and Abkhazia in August 2008 (after the cessation of hostilities).²³⁸ Furthermore, more recent European Court judgments have confirmed jurisdiction as regards Russia's control over parts of Ukraine,²³⁹ including Crimea.²⁴⁰ A similar decision was made as regards Armenia's effective control over Nagorno-Karabakh in *Chiragov and others v Armenia*.²⁴¹

However, in the context of armed conflict, there is a significant proviso as regards jurisdiction on the basis of effective control. The Court has held that jurisdiction will *not* be established during the 'active phases of hostilities' in the context of an international armed conflict (on the basis that the state does not in fact exercise effective control of territory during such phases of conflict).²⁴²

In addition to the effective control of an area, a state's extra-territorial jurisdiction may result from 'state agent authority and control', for example where state agents operating outside its territory, detain, or otherwise use force against, an individual.²⁴³

The application of extra-territorial jurisdiction also includes acts on board vessels registered in, or flying the flag of, the state.²⁴⁴

Whilst 'jurisdiction' is presumed to be exercised normally throughout a state's territory, the Court has confirmed that this presumption may exceptionally be limited, particularly where a state is prevented from exercising its authority in part of its territory. The Court has acknowledged that this may result from military occupation by the armed forces of another state which effectively controls the territory concerned, from acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state.²⁴⁵ However, even in such a situation, the state may still have jurisdiction, because the state will be required to exercise its positive obligations: both in relation to measures needed to re-establish control over the territory in question, and measures to ensure respect for the applicant's individual rights (which may require undertaking judicial, political or administrative measures).²⁴⁶ In *Ilașcu and others v Russia and Moldova*²⁴⁷ the Moldovan Government asserted that it was not in control of the region of Transdniestria. This was a point which the Court accepted, nevertheless the applicants were considered to come within the jurisdiction of the Republic of Moldova for the purposes of Article 1 and the Court found that the Moldovan authorities had failed to take sufficient steps to secure the applicants' release from detention since 2001. Therefore, the Court concluded that the Moldovan Government's responsibility was engaged under the Convention, for failing to comply with its positive obligations.²⁴⁸

²³⁷ *Ibid.*, para. 392. See also *Catan and others v Moldova and Russia*, Nos. 43370/04, 8252/05 & 18454/06, 19 October 2012.

²³⁸ *Georgia v. Russia* (II) [GC], No. 38263/08, 21 January 2021, para. 175.

²³⁹ *Ukraine and the Netherlands v Russia*, Nos. 8019/16, 43800/14 & 28525/20, 30 November 2022, para. 696.

²⁴⁰ *Ukraine v Russia (re Crimea)*, Nos. 20958/14 & 38334/18, 25 June 2024, para. 873.

²⁴¹ No. 13216/05, 16 June 2015, para. 186.

²⁴² *Georgia v. Russia* (II) [GC], No. 38263/08, 21 January 2021, paras 138 & 144.

²⁴³ See, e.g., *Al-Jedda v United Kingdom*, No. 27021/08, 7 July 2011; *Al-Skeini and Others v United Kingdom*, No. 55721/07, 7 July 2011; *Jaloud v Netherlands*, 47708/08, 20 November 2014; *Hassan v United Kingdom*, No. 29750/09, 16 September 2014.

²⁴⁴ See, e.g., *Medvedev and Others v France*, No. 3394/03, 29 March 2010.

²⁴⁵ *Ilașcu and others v Russia and Moldova*, No. 48787/99, 8 July 2004, para. 312.

²⁴⁶ *Ibid.*, paras. 333–9.

²⁴⁷ No. 48787/99, 8 July 2004.

²⁴⁸ See also *Ivanțoc and others v Moldova and Russia*, No. 23687/05, 15 November 2011 and *Mozer v Moldova and Russia*, No. 11138/10, 23 February 2016.

ii) Substantive rights in the context of armed conflict

In situations of armed conflict, international humanitarian law (IHL) will be applicable, in addition to international human rights law. The four Geneva Conventions of 1949 and Additional Protocol I impose obligations on states to investigate and prosecute alleged grave breaches of the Conventions in the course of international armed conflict (IAC). States have a legal obligation to search for individuals believed to have committed or ordered such grave breaches, regardless of their nationality, and to carry out criminal proceedings (or extradition), which includes investigations in order to bring the perpetrators to justice.

Furthermore, customary international humanitarian law requires states involved in both IACs and non-international armed conflicts (NIAC) to investigate war crimes²⁴⁹ allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.²⁵⁰ IHL may also impose duties on military commanders, for example to bring disciplinary or penal proceedings against their subordinates or other persons under their control.²⁵¹

Suspected violations of the law of armed conflict which do not amount to war crimes must also be investigated, as they may incur the civil liability of a state party. For example, the failure by an occupying power to facilitate the working of an institution providing for the care and education of children may result in a breach of the law of armed conflict (Article 50 of Geneva Convention IV), but not give rise to individual criminal responsibility.²⁵²

Other international treaties also impose obligations on states to take appropriate measures as a result of violations of their provisions, including the Hague Cultural Property Convention and its Second Protocol, the Chemical Weapons Convention, the Amended Landmines Protocol, the Ottawa Convention on Landmines, and the Dublin Convention on Cluster Munitions.²⁵³

²⁴⁹ In Ukrainian domestic law, the term 'war crime' is defined in Article 438 of the Criminal Code. However, it is important to note that the term is variously defined and categorised in international law. For example, the updated 2016 ICRC commentaries to the Geneva Conventions state as follows : '... grave breaches of the Geneva Conventions today form part of a complex set of crimes under international law, consisting of serious violations of international humanitarian law often referred to as war crimes, as well as gross violations of human rights such as crimes against humanity and genocide. Grave breaches are part of the wider category of serious violations of international humanitarian law that States are called upon to suppress in both international and non-international armed conflicts. They remain "segregated from other categories of war crimes" as the list of grave breaches contained in the Geneva Conventions and Additional Protocol I is a limitative one which is only applicable in international armed conflicts' (para. 2907) (see: [IHL Treaties - Geneva Convention \(I\) on Wounded and Sick in Armed Forces in the Field, 1949 - Commentary of 2016 Article | Article 50 - Grave breaches | Article 50](#)). Furthermore, customary IHL provides that 'any serious violation of international humanitarian law constitutes a war crime' (see: [Customary IHL - Rule 156. Definition of War Crimes](#)). In the *Tadić case*, the ICTY stipulated that 'the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim' (para. 94). See also: Noam Lubell, Jelena Pecic and Claire Simmons, '*Guidelines on investigating violations of IHL: Law, policy and good practice*' (Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross, 2019), paras. 13 and 14, available at: https://www.icrc.org/sites/default/files/document/file_list/guidelines_on_investigating_violations_of_ihl_final.pdf accessed 3 September 2024.

²⁵⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I - Rules, ICRC and Cambridge University Press, 2005, Rule 158.

²⁵¹ See, e.g., Article 87 of Additional Protocol I. See also: *Georgia v Russia* (II), No. 38263/08, 21 January 2021, paras 323-325.

²⁵² Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2016, para. 17.21

²⁵³ As noted in: Noam Lubell, Jelena Pecic and Claire Simmons, '*Guidelines on investigating violations of IHL: Law, policy and good practice*' (Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross, 2019), para. 17, available at:

iii) The International Criminal Court

The International Criminal Court (ICC) has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute of the ICC enables victims to participate in the proceedings before the ICC at any stage, provided that their personal interests are affected (Article 68(3)).²⁵⁴ Thus, victims are able to make statements and submit representations to the ICC at various stages, as well as request measures to protect their safety, psychological well-being, dignity and privacy.²⁵⁵ The ICC has the power to make order for reparations to victim, including restitution, compensation and rehabilitation (Article 75). An independent Trust Fund for Victims can also play an important role in granting reparations awards to victims (Article 79) or in financing projects for the benefit of victims and their families.

iv) The investigation of violations of IHL

The Guidelines on investigating violations of IHL: Law, policy and good practice ('the 2019 Guidelines') define an 'effective investigation' in the context of armed conflict as one that is:

'capable of enabling a determination of whether there was a violation of international humanitarian law, of identifying the individual and systemic factors that caused or contributed to an incident, and of laying the ground for any remedial action that may be required'.²⁵⁶

The 2019 Guidelines explain that:

'While an underlying requirement for investigations can be extrapolated from international humanitarian law, this body of law has very few provisions on the specific way in which investigations should be carried out. International human rights law bodies have had an opportunity to more precisely elaborate on this matter and also on how the general principles of an effective investigation should be implemented. These bodies have indicated that the fulfilment of the respective requirements should be assessed taking into account the specific circumstances of armed conflict'.²⁵⁷

Furthermore, the 2019 Guidelines note that '[t]here should be no fundamental difference between the general principles of an effective investigation in armed conflict and outside it, as their application will depend on what is feasible in each situation'.²⁵⁸

Drawing on the principles of independence, impartiality, thoroughness, promptness and transparency, the 2019 Guidelines set out 16 guidelines relating to state obligations to investigate breaches of IHL, including the following:

- A commander present at the scene of an incident should take all feasible steps to ensure the securing and preservation of relevant information and evidence if more appropriate authorities are not available (guideline 2);
- Accessible and effective processes for receiving external allegations of an incident should be provided for (guideline 5);

https://www.icrc.org/sites/default/files/document/file_list/guidelines_on_investigating_violations_of_ihl_final.pdf
accessed 3 September 2024.

²⁵⁴ See further: ICC, The Office of Public Counsel for Victims, 'Representing Victims before the International Criminal Court - A Manual for legal representatives', 5th revised edition, 2020, available at: <https://www.icc-cpi.int/sites/default/files/manual-victims-legal-representatives-fifth-edition-rev1.pdf>

²⁵⁵ In accordance with Article 68(1) of the Rome Statute and Rule 87(1) of the ICC Rules of Procedure and Evidence.

²⁵⁶ 2019 Guidelines, para. 32.

²⁵⁷ *Ibid.*, para. 33.

²⁵⁸ *Ibid.*, para. 34.

- Internal reports or externally received allegations related to an incident should be passed on to the appropriate authority for an assessment of the action to be taken in response. The appropriate authority should be competent to launch a criminal and/or administrative investigation, to determine that no investigative action is necessary, or to establish that more facts are needed prior to a decision (guideline 6);
- An independent and impartial investigative authority must be available to carry out criminal investigations if there are reasonable grounds to believe that an individual has committed a war crime (guideline 7);
- Investigations must be thorough. All feasible steps must be taken to collect, analyse, preserve, and store evidence. Action that cannot be undertaken must be documented and justified (guideline 8);
- A criminal investigation must be opened promptly after an assessment determines that reasonable grounds exist to believe a war crime has been committed. The investigative process must be carried out without unreasonable delay (guideline 9);

A criminal investigation should be as transparent as possible taking into account the circumstances (guideline 10).

v) Caselaw of the European Court of Human Rights²⁵⁹

In the case of *Hanan v Germany*,²⁶⁰ which concerned an extra-territorial airstrike near Kunduz in Afghanistan in 2009 which killed the applicant's two sons, the Court decided that there was no substantive normative conflict in respect of the requirements of an effective investigation as between IHL and the Convention (and therefore it focused its examination under Article 2 the Convention).

In the context of an armed conflict, the Court fully accepts that there may be differences in what is feasible as compared with investigations carried out in peace time, as was acknowledged in *Hanan v Germany*.²⁶¹

'...the procedural duty under Article 2 must be applied realistically...the challenges and constraints for the investigation authorities stemming from the fact that the deaths occurred in active hostilities in an (extraterritorial) armed conflict pertained to the investigation as a whole and continued to influence the feasibility of the investigative measures that could be undertaken throughout the investigation...'

Thus, the Court accepts there may be 'concrete constraints' on investigations, and yet 'even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life'.²⁶²

In *Musayev and others v Russia*,²⁶³ which concerned extra-judicial killings by Russian servicemen in Novye Aldy in Grozny in February 2000, the Court decried that:

'...notwithstanding the domestic and international public outcry caused by the cold-blooded execution of more than 50 civilians, almost six years after the tragic events in Novye Aldy no meaningful result whatsoever has been achieved in the task of identifying and prosecuting the individuals who had committed the crimes'.

In *Al-Skeini v United Kingdom*²⁶⁴ in circumstances where the United Kingdom was in occupation of parts of southern Iraq (discussed above), the Court underlined that for any investigation into acts

²⁵⁹ See also the case of *Jaloud v Netherlands*, No. 47708/08, 20 November 2014 (discussed above).

²⁶⁰ No. 4871/16, 16 February 2021.

²⁶¹ No. 4871/16, 16 February 2021, para. 200.

²⁶² *Ibid.*, para. 204.

²⁶³ Nos. 57941/00, 58699/00 and 60403/00, 26 July 2007, para. 164.

²⁶⁴ No. 55721/07, 7 July 2011, para. 169.

allegedly committed by British soldiers to be effective, it was particularly important that the investigating authority was operationally independent of the military chain of command.

The obligation to carry out an effective investigation was found to have been violated in the case of *Georgia v Russia (II)*²⁶⁵ relating to the August 2008 armed conflict between the two states, on the basis that the investigations carried out by the Russian authorities were not prompt, effective or independent. This decision was made in reliance on evidence and statements issued by the Monitoring Committee of the Council of Europe, the United Nations Human Rights Committee, the ICC and Human Rights Watch.

In the decision in *Ukraine and the Netherlands v Russia*,²⁶⁶ concerning Russia's occupation of parts of eastern Ukraine, including Crimea, as well as the downing of flight MH17, the Court found admissible the Dutch Government's claim that Russia had breached the procedural limb of Article 2 of the Convention by failing to conduct an effective official investigation and by failing to cooperate by not responding adequately to the Dutch Government's requests for legal assistance. In *Ukraine v Russia (re Crimea)*,²⁶⁷ the Court held that the Russian authorities failed to carry out an effective investigation into the incidents underlying the credible allegations made by relevant international organisations (and the Russian Ombudsperson) of an administrative practice of enforced disappearances. It also found that there no effective investigations into allegations of the ill-treatment of Ukrainian political prisoners.

²⁶⁵ No. 38263/08, 21 January 2021, para. 336.

²⁶⁶ Nos. 8019/16, 43800/14 & 28525/20, 30 November 2022.

²⁶⁷ Nos. 20958/14 & 38334/18, 25 June 2024.

Annex A. Selected international standards

United Nations

[Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985](#); [Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime \(Palermo Protocol\) \(2000\)](#); [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law \(A/RES/60/147\), 2005](#).

Council of Europe

[Europe Convention on Human Rights \(Arts 2, 3, 4, 6, 8, 13, 14\)](#); [Convention on Action against Trafficking in Human Beings \(2005\)](#); [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse \(Lanzarote Convention\) \(2007\)](#); [Council of Europe Convention on preventing and combating violence against women and domestic violence \(Istanbul Convention\) \(2011\)](#); [Recommendation No. R\(85\) 11 of the Council of Europe's Committee of Ministers on the Position of the Victims in the Framework of Criminal Law and Procedure](#); [Recommendation CM/Rec\(2023\)2 of the Committee of Ministers to member States on rights, services and support for victims of crime](#).

European Union

[Charter of Fundamental Rights \(Art 47\)](#); [Directive 2012/29/EU \(the Victims' Rights Directive\)](#); [Directive on compensation to crime victims \(2004\)](#); [Directive concerning the sexual abuse of children \(2011\)](#); [Human Trafficking Directive](#); [Directive on Combatting Terrorism \(2017\)](#); [Directive on the European protection order \(EPO\) \(2011\)](#) and the [Regulation on mutual recognition of protection measures in civil matters \(2013\)](#).

International Humanitarian Law

[1949 Geneva Conventions and their Additional Protocols](#); [Convention for the Protection of Cultural Property in the Event of Armed Conflict \(1954\)](#); [Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict \(1999\)](#); [Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction \(1993\)](#); [Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Amended Protocol II \(1996\)](#); [Convention on the Prohibition of the Development, Production, Stockpiling and Transfer of Anti-Personnel Mines and on their Destruction \(1997\)](#); [Convention on Cluster Munitions \(2008\)](#).

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Henckaerts, J.-M. and Doswald-Beck, L., '*Customary International Humanitarian Law, Volume I – Rules*', ICRC and Cambridge University Press, 2005.²⁶⁹

²⁶⁸ Available at: <https://www.icc-cpi.int/sites/default/files/2021.03.01-ENG-5th-Rev-Rev.pdf>

²⁶⁹ Available at: <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

Noam Lubell, Jelena Pecic and Claire Simmons, '*Guidelines on investigating violations of IHL: Law, policy and good practice*' (Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross, 2019).²⁷⁰

²⁷⁰ Available at:

https://www.icrc.org/sites/default/files/document/file_list/guidelines_on_investigating_violations_of_ihl_final.pdf