

*Aleksandra Mężykowska** ■

DOES THE VICTIM OF A CRIME HAVE THE RIGHT TO A FAIR TRIAL? – REMARKS ON THE PROTECTION OF CRIME VICTIMS IN THE LIGHT OF THE GUARANTEES IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

None of the provisions guaranteeing the right to a fair trial contained in the principal international agreements were explicitly drafted to assure such a right to victims of crimes. Therefore, over the last two decades one could observe a shift in the attitude of the European Court of Human Rights towards the rights of victims, in order to extend the protection granted under the provisions of the European Convention on Human Rights to victims taking part in criminal proceedings. The Court directly extends the rights of victims by elaborating the procedural obligations of States (mainly under Articles 2 and 3 of the Convention), and through a broader understanding of the concept of civil rights and obligations, which enables the extension of the guarantees granted under Article 6 to victims participating in criminal proceedings. The purpose of this analysis is to attempt to answer the questions: under what circumstances in criminal proceedings may victims benefit from the right to a fair trial, and to what extent are they entitled to claim the protection of the guarantees provided for under the Convention?

* **Aleksandra Mężykowska, PhD**, Assistant professor, Department of Public International Law, Lazarski University, Warsaw, Poland; Deputy Plenipotentiary of the Minister of Foreign Affairs of Poland for cases and procedures before the European Court of Human Rights.

INTRODUCTION

None of the provisions guaranteeing the right to a fair trial contained in the principal international agreements were explicitly drafted to assure such a right to victims of crimes.¹ Victims, or their relatives, are entitled to protection in general terms when they are a party in civil proceedings. For a long period of time the only person involved in criminal proceedings who could rely on the provisions guaranteeing the right to a fair trial was the accused. In proceedings initiated before the reviewing bodies of the European Convention on Human Rights (ECHR or “Convention”), applications under Article 6 lodged by victims of crimes were rejected as inadmissible *ratione personae*.² At the same time, the Court consistently underlined that the Convention does not guarantee the right to “private revenge.”³ Such a strict interpretation of the provisions safeguarding the right to a fair trial, excluding the possibility of extending the protection granted under those provisions to victims taking part in criminal proceedings, was irreconcilable with the State’s general obligation under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention.” Additionally, it did not reflect the general trend in criminal policy aimed at protecting the rights of the accused while at the same time recognising the rights of victims.⁴ Therefore, over the last two decades one can observe a shift in the Court’s attitude towards the rights of victims. A thorough analysis of the case law of the Court leads to the conclusion that the above-mentioned process is taking place in a twofold manner.⁵ Firstly, the rights of the victims are realised *indirectly*, as a result of the fact that the rights of the accused are no longer treated in an absolute manner and limits are set to the procedural guarantees afforded

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended (ECHR), Article 6; International Covenant on Civil and Political Rights, Article 14; American Convention on Human Rights, Article 8.

² See also, S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford: 2005, p. 37.

³ *Asociacion de victimas del terrorismo v Spain* (54102/00), ECHR 29 March 2001, Reports of Judgments and Decisions 2001-V. All judgments of the European Court of Human Rights referred to in the present article are available at <http://www.echr.coe.int>.

⁴ Trechsel, *supra* note 2, p. 38.

⁵ M. Wąsek-Wiaderek, *Prawo do rzetelnego procesu dla ofiar przestępstw na gruncie art. 6 Europejskiej Konwencji Praw Człowieka – rzeczywistość czy postulat?* (Right to a fair trial for the victims of crimes under Article 6 of the European Convention on Human Rights – reality or postulate?) in C. Mik (ed.), *Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej* (Human Rights in the XXI century. Challenges for the legal protection), Toruń: 2005, pp. 145-159.

to them, while at the same time the interests of the victim are increasingly being taken into consideration *directly*. The latter occurs in criminal proceedings in two types of instances: when there is a need to guarantee protection to victims acting as witnesses for the prosecution, and when a minor is the victim of a sexually-related crime. Secondly, the Court directly extends the rights of victims by elaborating the concept of the procedural obligations of States in its case law, mainly under Articles 2 and 3 of the Convention, and through a broader understanding of the concept of civil rights and obligations, which enables the extension of the guarantees granted under Article 6 to victims participating in criminal proceedings.

Parallel with the development of the Court's case-law in regard to victims, for over thirty years a debate concerning the issue of the legal status of the victim in criminal proceedings has been taking place within the institutions of the Council of Europe. The main issue under consideration has been compensation for victims, which led to the adoption of the European Convention on the Compensation of Victims of Violent Crimes.⁶ There are also several other non-binding documents adopted in the framework of the Council of Europe concerning compensation and the position of victims in criminal proceedings. The most important are the following recommendations of the Committee of Ministers: Recommendation no. R (85) 11 on the position of the victim in the framework of criminal law and procedure;⁷ Recommendation no. R (87) 21 on the assistance to victims and the prevention of victimization,⁸ replaced by Recommendation Rec (2006) 8

⁶ European Convention on the Compensation of Victims of Violent Crimes, Strasbourg 24 November 1983, European Treaties – E.T.S. 116.

⁷ Recommendation no. R (85) 11 on the position of the victim in the framework of criminal law and procedure (28 June 1985), states, *inter alia*, the following:

“(...) 5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender;

6. The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information;

7. The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.”

⁸ Recommendation no. R (87) 21 on the assistance to victims and the prevention of victimization (17 September 1987) states, *inter alia*, the following:

„(...) 4. Ensure that victims and their families, especially those who are most vulnerable, receive in particular:

(...)- information on the victim's rights;

- assistance during the criminal process, with due respect to the defence;

- assistance in obtaining effective reparation of the damage from the offender, payments from insurance companies or any other agency and, when possible, compensation by the state (...).”

on assistance to crime victims;⁹ and Recommendation Rec (2000) 19 on the role of the public prosecutor in the criminal justice system.¹⁰ Despite the fact that these documents were based on minimal assumptions with regard to the status of victims in criminal proceedings, they nevertheless have influenced to a significant extent on the direction of the Court's jurisprudence. The Court has referred on numerous occasions to the non-binding instruments of the Council of Europe as constituting important guidelines for the interpretation of the Convention.¹¹

This article analyses the case law of the Court that directly affords rights to victims under Articles 2 and 6 of the Convention. The purpose of the analysis is to attempt to answer the interlinked questions: under what circumstances in criminal proceedings may victims benefit from the right to a fair trial, and to what extent they are entitled to the guarantees provided for under the Convention?

The first part discusses the scope of the applicability of Articles 2 and 6 to crime victims; the second part provides an analysis concerning the specific rights guaranteed to victims by said provisions; and the third one compares the scope of protection under Articles 2 and 6.

1. LEGAL STATUS OF VICTIMS IN DOMESTIC PROCEEDINGS – APPLICABILITY OF ARTICLES 2 AND 6 TO VICTIMS

1.1. Limits on the application of Article 2 to victims – positive obligations of States

Under the European Convention, States' obligations are classified as two-fold: negative and positive.¹² The effect of negative obligations, requiring States' non-interference with the rights of the individual, is reinforced by positive obligations,

⁹ Recommendation Rec (2006) 8 on assistance to crime victims (14 June 2006).

¹⁰ Recommendation Rec (2000) 19 on the role of public prosecutor in the criminal justice system (6 October 2000).

¹¹ *Kauczor v Poland* (45219/06) ECHR judgment of 3 February 2009.

¹² See generally, A. Mowbray, *The Creativity of the European Court of Human Rights*, 5(1) *Human Rights Law Review* (2005), pp. 57-79; A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford: 2004; J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights*, Human Rights Handbooks, No. 7, Strasbourg 2007; M. Wąsek-Wiaderek, *O proceduralnych obowiązkach państwa na gruncie art. 2 i 3 Europejskiej Konwencji Praw Człowieka – wykładnia czy tworzenie prawa?* (Procedural obligations of the State under Articles 2 and 3 of the European Convention on Human Rights – interpretation or creation of rights?), *Materiały Pokonferencyjne UKSW, II Warszawsko-Toruńskie Kolokwium Naukowe Praw Człowieka i Międzynarodowego Prawa Humanitarnego*, Warszawa: 2011.

which require national authorities to take the necessary measures for safeguarding those rights. The European Court has consistently broadened the latter category of obligations, and distinguishes between two types of positive obligations: procedural and substantive. While in its negative aspect, for example, Article 2 requires States to refrain from the intentional and unlawful deprivation of life, by providing that “Everyone’s right to life shall be protected by law,” this provision simultaneously gives rise to a positive substantive obligation on the States-Parties to, e.g., “secure the right to life by putting in place effective criminal law provisions” and “to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”¹³ In order to guarantee to individuals the effective enjoyment of the rights secured in the Convention, the Court has expanded States’ duties to include procedural obligations as well. Prominent among such obligations is the obligation to carry out an investigation.¹⁴ As the Court stresses, “the essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”¹⁵

The effective enjoyment of the right to life requires that an effective official investigation be conducted in instances where there are doubts as to the cause of death.¹⁶ However, the scope of the obligations thus imposed on States with respect to the investigation depends on the specific circumstances of each case. It will be different in cases where the loss of life is the result of the use of lethal force by persons acting in an official capacity, in cases where the agents of the State potentially bear responsibility for the unintentional loss of life, e.g. in the sphere of medical negligence, and in cases of violations committed between individuals.¹⁷ The development, in the Court’s case law, of the doctrine of procedural obligations on the basis of Article 2, in particular the obligation to carry out an effective investigation, has wielded an enormous influence on the scope of the rights of victims. In fact, it first created and then gradually broadened the scope of States’ obligations

¹³ *Osman v UK* (23452/94), ECHR 28 October 1998, Reports 1998-VIII, para. 115.

¹⁴ See also, *Akandji-Kombe*, *supra* note 12, p. 32.

¹⁵ *Nachova and Others v Bulgaria* (43577/98 and 43579/98), ECHR 6 July 2005, Reports of Judgments and Decisions 2005-VII, para. 110.

¹⁶ *Kaya v Turkey* (22729/93), ECHR 19 February 1998, Reports 1998-I, para. 10; *Bazorkina v Russia* (69481/01), ECHR 27 July 2006, paras. 117-119.

¹⁷ *Ramsahai v the Netherlands* (52391/99), ECHR 15 May 2007, Reports of Judgments and Decisions 2007-II, para. 325; *Calvelli and Ciglio v Italy* (32967/96), ECHR 17 January 2002, Reports of Judgments and Decisions 2002-I, para. 51; *Rucińska v Poland* (33752/96), ECHR 27 January 2000.

towards victims by indicating that their involvement in the proceedings is indispensable for fulfilment of the efficiency requirement. One has to remember that the Court's first significant judgment under Article 2 was adopted only in 1995.¹⁸ A number of important judgments in this respect were issued by the Court against the background of the conflicts in Northern Ireland, Chechnya, and Turkey.

1.2. Limits on the application of Article 6 to victims

It follows from the wording of Article 6 that this provision is of a general nature, guaranteeing rights to everyone „[i]n the determination of his civil rights and obligations or of any criminal charge against him”. The guarantees set forth in this article are applicable to victims of crimes to the extent that it is possible to prove that their position in the proceedings can be qualified under one of the cited titles. The limits to the application of Article 6 to victims of crimes arise from the fact that the Convention does not create the right to „private revenge” or to an *actio popularis*.¹⁹ Already in the 1970s it had become a well-established principle in the case law of the Court that an injured party cannot rely on the guarantees provided for in the Article 6 provisions referring to criminal charges.²⁰ Under Article 6 it is not the victim of a crime, or his or her relative, that is entitled to a fair trial, but the person that is suspected or accused of having committed the offence. The Convention does not guarantee an independent right to demand the prosecution and punishment of third persons for the commission of a crime.²¹ The legal position of a victim in criminal proceedings may be governed by the guarantees laid down in Article 6 only when it can be established that that person's participation in the proceedings is related to the determination of his or her civil rights and obligations. Hence, the Court examines the motives that inclined the applicant to join the criminal proceedings. Article 6 shall not be applicable if the only aim of the applicant (victim) is to ensure the conviction of the accused, and not the protection of civil rights and obligations in relation to the offence committed.²² As a result, even if a given person participates in domestic criminal proceedings as a party, e.g. as an auxiliary prosecutor or a private prosecutor, if his or her purpose in joining the proceedings is only to ensure the sentencing of the persons responsible for the commission of the crime, applications concerning

¹⁸ *McCann v UK* (18984/91), ECHR 27 September 1995, A 324.

¹⁹ *Athanassoglou and Others v Switzerland* (27644/95), ECHR 6 April 2000, Reports of Judgments and Decisions 2000-IV.

²⁰ *Wallen v Sweden* (10877/84), ECHR 16 May 1985, D.R. 43; *Kuśmierk v Poland* (10675/02), ECHR 21 September 2004, para. 48.

²¹ *Asociacion de victimas del terrorismo*, *supra* note 3.

²² *Sigalas v Greece* (19754/02), ECHR 22 September 2005, paras. 27-30.

the conduct of those proceedings do not fall within the *ratione materiae* jurisdiction of the Court.²³ An exception was made for proceedings that concern the protection of reputation and have been initiated with a private indictment.²⁴ It should be noted that the position taken by the Court, which makes the application of the guarantees set forth in Article 6 dependent on the victim's motives, has been criticised in the legal doctrine for being too formalist.²⁵ It has been rightly emphasised that victims of crimes have a legitimate interest in participating in the proceedings against the offender, and their motivation should play a secondary role.

In exercising its supervisory role, the Court is guided by the general guidelines as to the object and purpose of the Convention.²⁶ By subjecting the legal situation of victims of crimes to the protections afforded under the Convention, the Court has pointed out the importance of ensuring victims their rights and an appropriate position in the criminal proceedings. Recognising the fundamental differences in the requirements posed for a fair trial in civil and criminal proceedings in accordance with Article 6, the Court has held that the fact that the guarantees differ may not lead to ignoring the difficult situation in which victims of offences find themselves, nor to diminishing the importance of their rights.²⁷ Therefore, in light of the object and purpose of the Convention, only in exceptional circumstances may the guarantees laid down in Article 6 not be applied.²⁸ For these reasons, the Court has found that proceedings conducted by the national authorities should be subjected to the scrutiny of public opinion, and in all cases the victims' relatives and/or the victims themselves must be involved in the proceedings to the extent necessary to ensure that their legitimate interests are respected.²⁹

²³ *Asociacion de victimas del terrorismo*, *supra* note 3.

²⁴ *Kuśmierek*, *supra* note 20, paras. 48-49.

²⁵ *See also*, Trechsel, *supra* note 2, p. 42.

²⁶ *Perez v France* (47287/99), ECHR 12 February 2004, Reports of Judgments and Decisions 2004-I, para. 57.

²⁷ *Ibidem*, para. 72.

²⁸ *Pellegrin v France* (28541/95), ECHR 8 December 1999, Reports of Judgments and Decisions 1999-VIII, para. 64.

²⁹ *Güleç v Turkey* (21593/93), ECHR 27 July 1998, Reports 1998-IV, para. 82; *Öğür v Turkey* (21594/93), ECHR 20 May 1999, Reports of Judgments and Decisions 1999-III, para. 92; *Gül v Turkey* (22676/93), ECHR 12 December 2000, para. 93.

1.3. Determining civil rights and obligations for the purposes of Article 6

1.3.1. Autonomous meaning

The victim of a crime is entitled to the guarantees set forth in Article 6 when his or her participation in the proceedings is related to the determination of his or her civil rights and obligations, irrespective of the type of proceedings in which he or she participates. However, the Convention does not directly ensure various forms of participation in court proceedings, and the guarantees set forth therein apply to persons who have been granted by domestic legislation the possibility to participate in a proceeding.³⁰ Furthermore, this matter may be regulated differently in the various legal systems. Thus the autonomous meaning granted to the notion of civil rights and obligations by the Convention reviewing bodies is meant to prevent differentiation in various member states between the guarantees provided to victims of crimes under the Convention. As has been underlined in the legal literature, Article 6 may be applied to proceedings in which civil rights and obligations are determined only when three criteria are fulfilled: a) the right or obligation stems from domestic law; b) there is a dispute, the outcome of which is directly decisive for that right or obligation; c) the right or obligation is of a civil nature.³¹

Article 6 will primarily be applicable to cases in which the adjudication of civil rights and obligations is the principal purpose and object of the proceedings.³² At the same time, Article 6 can also be the source of guarantees in proceedings in which the civil aspect is so closely connected to the main (e.g. criminal) aspect of the proceedings that the outcome of the case may be decisive for the adjudication of the civil rights and obligations.³³ In its early years the Court indicated that Article 6 could be used by victims as the basis for formulating an appeal for assessment of criminal proceedings only in situations where the outcome of

³⁰ Kuśmierk, *supra* note 20, paras. 48-49.

³¹ See, L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18*, tom I (European Convention on Human Rights. Commentary to Articles 1-18, vol. 1), Warszawa: 2010, p. 254. Slightly different qualifications can also be found in the legal literature, according to which, in order for Article 6 to be applicable the following requirements should be met: a civil right or obligation should exist, there must be a dispute concerning a civil right, as well as a settlement of the dispute. P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford: 2005, p. 244.

³² See also Garlicki et al, *supra* note 31, p. 260.

³³ *Ringelsen v Austria* (2614/65), ECHR 16 July 1971, A13, para. 94.

the proceedings was directly decisive for civil rights and obligations.³⁴ Over time however the Court began to apply broader terms, as a result of which a growing number of situations could be subject to review based on the guarantees set forth in Article 6. The Court therefore found that Article 6 could be applicable to proceedings that affect the adjudication of civil rights³⁵ or concern the settling of those rights or obligations.³⁶

1.3.2. Evolution of the Court's case law

In discussing application of the principles mentioned above to the situation of victims of crimes, one should note that the injured party shall enjoy the protection afforded by the Convention when asserting his or her civil rights, both of a material and non-material nature. From the case law it follows that the protection enjoyed under Article 6 shall be afforded primarily to a victim who is entitled under domestic law to bring a compensation suit against the offender, within the ambit of the criminal proceedings, for the damage caused by the offence. In such a situation the criminal proceedings are considered decisive for the civil rights of the victim. The Court's case law has evolved significantly as regards the form whereby a victim can participate in criminal proceedings if entitled to benefit from the guarantees laid down in Article 6. As a result, an increasing number of situations are covered by Article 6.

At the beginning of the 1990s, in the case of *Moreira de Azevedo v. Portugal*, the Court found that a person having the status of an "assistente" in criminal proceedings against the brother-in-law, who had shot the applicant in the head, may benefit from the guarantees laid down in Article 6. The Court noted that although the applicant had not formally filed a compensation claim, in light of the general principles concerning the participation in proceedings by victims, which had been formulated by the Portuguese Supreme Court in its case law, an intervention by a person having the status of "assistente" was equivalent to lodging a claim for damages in civil proceedings. The Court found that the applicant had shown in the course of the proceedings that it was not only important for him to bring about the conviction of the accused, but also to receive financial compensation for the damage sustained.³⁷ In its subsequent case law, however, the Court did not consistently maintain the same approach, although this may have been due to the fact that

³⁴ *Ibidem*, para. 94.

³⁵ *Winterwerp v. the Netherlands* (6301/73), ECHR 24 October 1979, A33, para. 75.

³⁶ *A.B. v. Slovakia* (41784/98), ECHR 4 March 2003, paras. 46-48.

³⁷ *Moreira de Azevedo v Portugal* (11296/84), ECHR 23 October 1990, A 189, paras. 63-67.

the qualification of the applicant's status in the *Moreira de Azevedo* case had been the subject of controversy among domestic lawyers. In a subsequent important judgment in the case of *Hamer v France*, the Court refused to grant the victim protection under Article 6 on account of the fact that she had not made a compensation claim in the criminal proceedings, even though she had been forced to wait until the end of those proceedings to initiate a civil case.³⁸ However, in another case, *Ait-Mouhoub v France*, the Court was of the view that Article 6 was applicable even though the applicants had not filed a claim for compensation, because the outcome of the criminal proceedings were decisive for the civil proceedings.³⁹ The Court found that in such situations one should accept that even if the criminal proceedings only decide the criminal accusation, in determining the applicability of Article 6 of the Convention, both as regards its criminal and civil component, the decisive issue is whether the civil branch of the proceedings remains closely connected to the criminal one, *i.e.* whether the criminal proceedings influence the civil proceedings. In the case of *Calvelli and Ciglio v Italy*, which concerned *inter alia* the length of criminal proceedings against a doctor who was allegedly responsible for delivering the applicant's baby in a negligent manner, the Court reached the conclusion, that the factor that had been decisive for its ruling that the guarantees stemming from the civil component of Article 6 were applicable to the criminal proceedings, had been the fact that from the moment the applicants joined the proceedings as civil parties until the conclusion of those proceedings by a final ruling, finding that prosecution of the offence was time-barred, the civil branch of the proceedings remained closely linked to the criminal one.⁴⁰

In its judgment in the case of *Perez v France* the Court undertook an attempt to homogenise its case law concerning the granting of protection under Article 6 to a victim participating in criminal proceedings. In accordance with the Court's earlier case law, a victim could rely on the guarantees stemming from Article 6 if he or she had claimed compensation, even if he or she had not specified the amount claimed, if the criminal proceedings were decisive for the applicant's chances of receiving compensation. In the *Perez* judgment the Court indicated that in the assessment of the nature of the given right it is guided not only by its legal classification but also its substantive content and effects under the domestic law of the State concerned.⁴¹ It observed that French law gave the victim of an

³⁸ *Hamer v France* (19953/92), ECHR 7 August 1996, Reports 1996-III, paras. 77-78.

³⁹ *Ait-Mouhoub v France* (22924/93), ECHR 28 October 1998, Reports 1998-VIII, para. 44; *Maini v France* (31801/96), 26 October 1999, paras. 28-29.

⁴⁰ *Calvelli and Ciglio*, *supra* note 17, para. 62.

⁴¹ *Perez v. France*, *supra* note 26, para. 57.

offence the option of choosing between civil and criminal proceedings. The criminal option is exercised by way of a civil-party complaint, in the framework of which the injured party may, above all, obtain compensation from the criminal courts for the damage he or she has suffered. In the light of this observation the Court stated that there can be no doubt that civil-party proceedings constitute, in French law, a civil action for the reparation of damage caused by an offence. The Court added that “by acquiring the status of civil parties, victims demonstrate the importance they attach not only to the criminal conviction of the offender but also to securing financial reparation for the damage sustained.”⁴² In the *Perez* case the Court found that the mere participation in proceedings as a civil party, without filing a formal compensation claim, is tantamount to bringing a claim for damages. This led the Court to the conclusion that under the French law “proceedings whereby someone claims to be the victim of an offence are decisive for his ‘civil rights’ from the moment he or she is joined as a civil party. In fact, Article 6 is applicable to proceedings involving civil-party complaints even during the preliminary investigation stage taken on its own.”⁴³

After the *Perez* judgment the Court underlined in its jurisprudence that in order to qualify for the applicability of Article 6 a case must fulfill two premises. Firstly, inasmuch as Article 6 § 1 under its “civil head” applies only to proceedings concerning the “determination of a civil right” the Court must ascertain whether there was a dispute over a “civil right” which can be said to be recognised under domestic law: the dispute must be genuine and serious; but even in the absence of a claim for financial reparation it was sufficient if the outcome of the proceedings was decisive for the “civil right” in question. In the Court’s words this meant that the victim’s participation in the criminal proceedings “must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a ‘good reputation’.”⁴⁴ Secondly, the Court took into account domestic regulations concerning the status of the injured party in criminal proceedings. It examined whether the injured parties could join the proceedings as a civil party; whether they could exercise the rights and powers expressly recognised by law, whether the exercise of those rights might prove to be essential for their effective participation in the proceedings as a civil party, and whether the injured party was entitled

⁴² *Ibidem*, para. 64.

⁴³ *Ibidem*, para. 66.

⁴⁴ *Schwarkmann v France* (52621/99), ECHR, 8 February 2005, § 41; *Gorou v Greece* (N° 2) (12686/03), ECHR 14 February 2006; *Tormala and Others v. Finland* (41258/98), ECHR decision of 16 March 2004, p. 9; *Karlsson and Others v Finland* (13265/02), ECHR 5 September 2006; *Biszta v Poland* (4922/02), ECHR decision of 12 September 2006.

to submit pleadings at all stages of the proceedings.⁴⁵ The cumulative application of these premises leads the Court to the conclusion that Article 6 is applicable.

In its recent case law the Court has strongly underlined the fact that the applicants' claims for damages caused by the alleged offence has to be of pecuniary character. The Court has stated that "Article 6 § 1 under its 'civil head' applies to criminal proceedings involving a determination of pecuniary claims asserted by the injured parties (so-called 'civil-party complaints') and, even in the absence of such claims, to those criminal proceedings the outcome of which is decisive for the 'civil right' in question".⁴⁶

Thus, in practical terms, according to the Court's case law the guarantees of Article 6 will apply to: victims who join criminal proceedings as civil-parties with a view of claiming financial compensation for damages caused by the alleged offence, even if only to secure symbolic reparation; to victims who in their private prosecution claim compensation for the alleged offence;⁴⁷ to victims exercising in the criminal proceedings the right to protect a civil right such as the right to "good reputation"; and to victims participating in criminal proceedings without filling a pecuniary claim for damages if they sought damages in separate civil proceedings. In the latter situation Article 6 § 1 would be applicable under its "civil head" to the criminal proceedings at issue only when those civil proceedings were instituted due to the fact that the outcome of the criminal proceedings became relevant for the determination of the applicant's "civil right" to compensation.⁴⁸

Therefore, while taking into consideration the fact that the Convention does not guarantee victims the right to initiate criminal proceedings with the aim of securing the conviction of the persons responsible for the offence, it should be noted that the Court has gradually accepted that the guarantees laid down in the Convention shall apply to legal situations created as a result of the initiation of proceedings if the purpose of the victim participating therein had been at least the symbolic redress of harm, the protection of such a right as the right to reputation,⁴⁹ and as indicated in a general manner in the literature the protection of a right of a civil nature in another manner.⁵⁰

⁴⁵ *Sottani v Italy* (26775/02), ECHR 24 February 2005, Reports of Judgments and Decisions 2005-III (extracts).

⁴⁶ *Jaksevic v Croatia* (18584/05), ECHR decision of 10 January 2008.

⁴⁷ *Tormala*, *supra* note 44.

⁴⁸ *Butolen v Slovenia* (41356/08), ECHR decision of 9 June 2009, paras. 58-61; *Jaksevic*, *supra* note 46; *Jeans v Croatia* (45190/07), ECHR judgment of 13 January 2011, paras. 33-34.

⁴⁹ *Golder v UK* (4451/70), ECHR 21 February 1975, A18, para. 27; *Helmers v Sweden* (11826/85), ECHR 29 October 1991, A 212-A, paras. 27-30; *Tolstoy Miloslavsky v UK* (18139/91), 13 July 1995, A 316-B, para. 58; *Kuśmierk v. Poland*, *supra* note 20.

⁵⁰ See, D. J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford: 2009, p. 228.

1.3.3. New challenges for the Court's case law

In its previous case law the Court rarely pronounced itself on the issue of civil rights of a non-material nature (other than the right to a “good reputation”) claimed in criminal proceedings by persons who sustained damage as a result of an offence. The question arises whether the protection under the Convention encompasses the situation where the victim of an offence, or his or her relative, declares his or her will to participate in domestic proceedings as an injured party, being motivated solely by the desire to learn about the circumstances of the offence, or – in the case of the relative – the wish to obtain reliable, accurate and official information concerning the death of a family member, and sometimes even information about his or her place of burial. Some “victims” may wish to obtain access to the case investigation files, in particular the available evidence, such as mementos of the deceased, which may have great emotional value for the relatives. Moreover, information about the circumstances surrounding the relative's death, as well as the legal qualification of the action(s) that caused the death, may be useful for subsequent proceedings, e.g. relating to the rehabilitation of the deceased person's reputation, where the death occurred as the result of an offence of a judicial nature. In such situations one can argue that the injured party's participation in the proceedings is a way of protecting his or her personal right connected to the memory of the deceased relative. In assessing the nature of the rights the injured party demands to be protected, one must bear in mind that Article 6 is applicable to cases in which such civil rights of a non-material character are claimed, such as, e.g., the right to respect for private or family life.⁵¹ Therefore, the actions of the State that directly affect the scope of that right, as well as the ways in which it is realised, should be covered by the guarantees of Article 6. The right to respect for private and family life surely entails the protection of personal rights, hence there should be no doubt that proceedings in which this right is asserted are subject to the guarantees laid down in the Convention. It also needs to be noted that the list of personal rights contained in national legal systems is essentially a non-exhaustive list. Consequently, nothing precludes the recognition as a civil right, the protection of which is sought by the injured party in the course of criminal proceedings, of a whole series of personal rights, including *inter alia* the obtaining of information concerning the circumstances of death, the place of burial of the next-of-kin, or the identity of the perpetrators. In most cases, the only way to realise these rights is through participation in the procedural activities or through

⁵¹ See, M.A. Nowicki, *Wokół Konwencji Europejskiej, Krótki Komentarz do Europejskiej Konwencji Praw Człowieka* (Issues surrounding the European Convention on Human Rights), Zakamycze, Warszawa: 2006, p. 152.

access to the case-files. The Court's decision to include personal rights – even those related to the memory of the deceased – within the concept of civil rights within the meaning of the Convention would result in a significant broadening of the applicants' rights under Article 6.

In the case law of the Court one can find additional arguments in favour of a broad application of the guarantees of a fair trial with respect to the injured party in criminal proceedings. Where domestic law provides two paths for claiming compensation – *i.e.* within the ambit of the criminal proceedings or in separate civil proceedings – then when an appropriate motion has been filed in the course of the criminal proceedings it is considered that the applicant has met the requirement of exhaustion of domestic remedies before lodging an application with the Court.⁵² An aggrieved person taking part in the proceedings may motivate his or her participation by the aim of realising his or her civil rights, as well as the wish to support the criminal prosecution.

Also, among the objectives of criminal law and proceedings there are important arguments to be found which support the claim of a broader protection of victims under the Convention.⁵³ One of the modern theories used to justify punishment is that of communication. It assumes that criminal proceedings are “an opportunity for communicating with the offender, the victim, and wider society the nature of the wrong done”. Other justifications for providing the victim with an important participatory role in the conduct of criminal proceedings are the aims of justice for victims and recording history.

It is important to note that even when international criminal jurisdictions were established, different models of victims' participation were considered.⁵⁴ However, it is generally assumed that participatory rights may have different purposes and aims, e.g., at ensuring that the truth is exposed. Thus the limitation of participatory rights to the narrow interests of seeking conviction and obtaining reparations seems to be a too narrow approach. It is said that “after all, the explicit general purpose is to enable the victims to present their views and concerns”.⁵⁵

Against this background, the Court's recent decision on admissibility, in the case *Janowiec and Others v Russia*, cannot be said to constitute a step forward in the development of victims' rights.⁵⁶ There the applicants, being relatives

⁵² *Zante-Marathonisi A.E. v Greece* (14216/03), ECHR 1 June 2006.

⁵³ For a broader discussion on this subject see: R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2010.

⁵⁴ *Ibidem*, p. 479

⁵⁵ *Ibidem*, p. 485.

⁵⁶ *Janowiec and Others v Russia* (55508/07 and 29520/09), ECHR 5 July 2011.

of prisoners killed in 1940, participated in criminal proceedings initiated in 1990 and discontinued in 2004, and in subsequent proceedings concerning rehabilitation. The part of the case-file and the decision discontinuing the proceedings had been declared a State secret and for that reason the applicants, as foreign nationals, could not have access to them. The applicants complained under Article 6 of the Convention that the Russian authorities had refused them victim status in the criminal case, that they had been denied access to the documents in the case, that the case had been classified secret without any particular reason, and that their appeals against the decisions by the prosecuting authorities had been rejected.⁵⁷ The Court denied the applicants' right to rely on Article 6, basing its decision on three arguments: 1) the outcome of the criminal proceedings was not decisive for the applicants' civil rights or obligations; 2) as the applicants' relatives were not the defendants in criminal proceedings, it was not apparent to the Court how the disclosure of the case materials could have been conducive to protection of their right to their reputation; and 3) the Court did not qualify as a civil right the applicants' right to obtain information about the circumstances of the death of their relatives and the place of their burial.

The position taken by the Court in *Janowiec* suggests that it is not yet ready to broaden the scope of situations in which victims' rights are protected under Article 6. While the extension of the protection offered by Article 6 § 1 with regard to victims' claims of a pecuniary character can only be welcomed, it is difficult to understand the Court's reluctance to follow the same path with regard to the situation where victims assert non-pecuniary claims.

2. RIGHTS GUARANTEED TO VICTIMS UNDER ARTICLES 2 AND 6

2.1. "Adequate proceedings" under Article 2 and "fair trial" under Article 6 – general remarks

The Court has underlined that proceedings conducted within the ambit of the State's fulfilment of the obligations imposed on it by Article 2 have to be "efficient/adequate", and proceedings subject to the guarantees of Article 6 have to be "fair". In order for an investigation concerning a person's death to be considered efficient under Article 2, a number of conditions need to be met. Hence, the proceedings should be: independent, effective, reasonably prompt, involve a sufficient element of public scrutiny, and engage the next-of-kin to the extent

⁵⁷ *Ibidem*, para. 76.

necessary.⁵⁸ The requirements of effectiveness and the involvement of relatives deserve special attention. The requisite of efficiency of a criminal proceeding means that “it must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible.”⁵⁹ States are obliged to conduct investigations into the circumstances of death conscientiously, though the Convention does not impute a duty to identify the perpetrators in every instance. The obligation does not refer to the result, but to the measures taken. Therefore, the lack of results in criminal proceedings may be justifiable only when the respondent Government can prove that the proceedings conducted were efficient.⁶⁰ Adversarial evidentiary proceedings constitute one of the key elements of an efficient investigation.

In accordance with the Court’s case law, pursuant to Article 2 “the authorities must have taken the reasonable steps and activities available to them to secure the effectiveness of the proceedings aimed at collecting evidence”.⁶¹ During the proceedings the authorities must examine all the facts and assess the case taking into account all the relevant circumstances. This may require measures to gather and record evidence concerning the incident, including *inter alia* taking statements from eye witnesses and other persons involved,⁶² accurately securing traces and evidence (e.g. attempts to find the fired bullet, taking of photographs at the alleged location, taking of fingerprints),⁶³ carrying out forensic tests (e.g. tests on weapons, tests for prints),⁶⁴ performing, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause and exact time of death,⁶⁵ identifying all the

⁵⁸ *Ibidem*, paras. 110-112.

⁵⁹ *Makaratzis v Greece* (50385/99), ECHR 20 December 2004, Reports of Judgments and Decisions 2004-XI, para. 74.

⁶⁰ *Hugh Jordan v UK* (24746/94), ECHR 4 May 2001, para. 107; *Nachova and Others*, *supra* note 15, para. 113.

⁶¹ *Hugh Jordan*, *supra* note 60, para. 107; *Ahmadov and Others v Russia* (21586/02), ECHR 14 November 2008, para. 107.

⁶² *Tanrıkulu v Turkey* (23763/94) Grand Chamber, ECHR 8 July 1998, Reports of Judgments and Decisions 1999-IV, para. 109; *Velikova v Bulgaria* (41488/98), ECHR 18 May 2000, Reports of Judgments and Decisions 2000-VI, paras. 78-79; *Gül*, *supra* note 29, para. 90.

⁶³ *Gül*, *supra* note 29, para. 89; *Makaratzis*, *supra* note 59, para. 76.

⁶⁴ *Gül*, *supra* note 29, para. 89; *Baysayeva v Russia* (74237/01), ECHR 5 April 2007, para 136.

⁶⁵ *Salman v Turkey* (21986/93), ECHR 26 June 2000, Reports of Judgments and Decisions 2000-VII, para. 106; *Kaya*, *supra* note 16, para 89; *Öğür*, *supra* note 29, para. 89; *Giuliani and Gaggio v Italy* (23458/02), ECHR 24 March 2011, para. 249; *Velikova*, *supra* note 62, para. 79.

persons who took part in the events,⁶⁶ and establishing the sequence of events.⁶⁷ The national authorities must ensure that the evidentiary proceedings were fair. In many judgments the Court has pointed out in detail shortcomings in procedural actions that were performed.⁶⁸ The Court has concluded that any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible runs the risk of being considered as non-compliant with the requirements of Article 2 of the Convention.⁶⁹

The Court has underlined that the nature of the examination depends on the circumstances of the particular case. The question of which kind of investigative steps are necessary and may possibly be taken is conditioned upon the relevant facts and actual possibilities connected with the performance of investigative work. However, the Court is reluctant to indicate which procedural actions the authorities should perform, and concludes that “it is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.”⁷⁰ While the Court has stressed that it is not able to make a list containing the required investigation measures, it has at the same time however underlined that there are some “indispensable and obvious investigative steps” that must be taken in the course of the domestic proceedings, and that the failure to perform them without a reliable explanation by the Government may lead to a violation of procedural obligations under Article 2.⁷¹

The Court assesses differently the fairness of evidentiary proceedings under Article 6. It focuses on an assessment whether the proceedings in their entirety, including the way in which evidence and procedural decisions were taken, were fair.⁷²

The main guidelines concerning the right to a fair trial relate to the right to adversarial proceedings and the “equality of arms” principle. In accordance with these principles, the parties to the proceedings shall have the opportunity to “have knowledge of and comment on all evidence adduced or observations filed, (...), with a view to influencing the court’s decision”⁷³ and “be afforded a reasonable opportunity to present his case – including his evidence – under conditions that

⁶⁶ *Makaratzis*, *supra* note 59, para. 76; *Velikova*, *supra* note 62, para. 79.

⁶⁷ *Shanaghan v UK* (37715/97), ECHR 4 May 2001, paras. 122-125.

⁶⁸ For a list of examples of the Court’s findings concerning the inadequacies of specific aspects of criminal investigations, see *Leach*, *supra* note 31, p. 194.

⁶⁹ *Hugh Jordan*, *supra* note 60, para. 107; *Ahmadov*, *supra* note 61, para. 107.

⁷⁰ *Velikova*, *supra* note 6, para. 80; *Shanaghan*, *supra* note 67, para. 123.

⁷¹ *Ibidem*, para. 82.

⁷² *Tamminen v Finland* (40847/98), ECHR 15 June 2004.

⁷³ *Vermeulen v Belgium* (19075/92), ECHR 22 January 1996, Reports 1996-I, para. 33; *Nideröst-Huber v Switzerland* (18990/91), ECHR 27 January 1997, Reports 1997-I, para. 29.

do not place him at a substantial disadvantage vis-à-vis his opponent.”⁷⁴ In cases concerning the guarantees of Article 6 – as opposed to cases considered under Article 2 – the Court does not provide guidelines on how to take evidence in order for the evidentiary proceedings to be fair. An assessment under Article 6 of the fairness of the taking of evidence is limited to the Court’s consideration whether the parties in the proceedings had the opportunity to participate in the case, whether the adversarial and equality of arms principles were respected, whether evidence was collected in accordance with those principles, and that the decisions of the domestic authorities were not taken arbitrarily. The Court allows States a wide margin of discretion as to the rules governing the taking of evidence, and assumes that it is for national legislation and courts to specify the rules on the admissibility of evidence and the way it should be taken and assessed.⁷⁵ The Court has included more detailed considerations on this issue in its pronouncements on the admissibility of certain kinds of evidence (e.g. unlawfully obtained evidence, evidence obtained by torture or inhumane or degrading treatment or punishment, evidence from anonymous witnesses).⁷⁶ The Court’s competence to interfere with the outcome of evidentiary proceedings is restricted to cases where the reasoning and consequences drawn by national authorities were grossly unfair and/or arbitrary.⁷⁷ The Court may decide that minor shortcomings in the proceedings did not affect the fairness of the trial as a whole. However, it may also reach the conclusion that in spite of the fact that all the formal requirements had been met in a particular case, the proceedings in their entirety were not fair.⁷⁸ It has to be borne in mind that the Court has only limited power to examine alleged errors of fact or law imputed to national courts. The Court has repeatedly reiterated that it cannot act as an appeal court of “fourth instance” and that the domestic courts are best placed to assess the relevance of evidence and to interpret and apply the rules of substantive and procedural law.⁷⁹ Unless the relevant domestic decisions disclose manifestly arbitrary reasoning, the applicants cannot request the Court to assess whether the outcome of the domestic proceedings had been fair.⁸⁰

⁷⁴ *Dombo Beheer v the Netherlands* (14448/88), 27 October 1993, A 247, para. 33.

⁷⁵ *García Ruiz v Spain* (30544/96) Grand Chamber, 21 January 1999, Reports of Judgments and Decisions 1999-I, para. 28.

⁷⁶ *Schenk v Switzerland* (10862/84), ECHR 12 July 1998; *Jalloh v Germany* (54810/00), ECHR 11 July 2006, A 140.

⁷⁷ *Herbst v Germany* (20027/02), ECHR 11 January 2007, para. 83.

⁷⁸ E.g., Leach, *supra* note 31, p. 253.

⁷⁹ *Vidal v Belgium* (12351/86), ECHR 22 April 1992, A 235-B, pp. 32-33, para. 32; *Gurepka v Ukraine* (61406/00), ECHR 6 September 2005, para. 45.

⁸⁰ See also, Harris et al, *supra* note 50, p. 202.

2.2. Principle of subsidiarity

The assumption underlying the European system is the principle of subsidiarity, which in terms of the ECHR means that the domestic remedies be exhausted prior to appeal to the Court. The nature of those remedies has been specified in the requirement laid down in Article 13 of the Convention, which provides that the remedy must be effective. A further aspect of the principle of subsidiarity relates to the extent to which the Court may assess the domestic proceedings. In this regard the principle of subsidiarity is applied by the Court to a lesser extent with respect to Article 2 than Article 6.⁸¹ The special nature of the right laid down in Article 2 allows the Court to assess the scope and quality of the steps taken by the national authorities conducting the proceedings, while the assessment of the overall fairness of proceedings in light of the guarantees of Article 6 is handled differently. The Court adjudicating from the point of view of Article 6 interprets the subsidiarity principle broader and, in consequence, the right to a fair trial is treated as a procedural guarantee.⁸² The Court underlines that its role under Article 6 is limited to ensuring that the decisions taken by the national authorities were not affected by any element of arbitrariness and were not otherwise manifestly unreasonable. The assessment of the circumstances of the case however is left to the national authorities. The Court's role is not to substitute its view for that embodied in the case law of the domestic courts.⁸³ When adjudicating, the Court refers to the national law as interpreted and applied by the domestic authorities.⁸⁴ The Court confines itself to an assessment whether the guarantees of Article 6 were respected during the proceedings taken as a whole. Therefore, in the situation where the victim of a crime challenges the fairness and outcome of evidentiary proceedings, the Court may conduct a far more detailed assessment under Article 2 than under Article 6. Paradoxically, Article 6, which constitutes the core of the right to a fair trial, offers the parties to the proceedings, including victims or relatives, fewer possibilities than Article 2 to question the way in which the domestic proceedings were conducted.

2.3. Specific rights guaranteed to victims in criminal proceedings

The Court has consistently stressed in its case law that Article 6 does not include the right to have criminal proceedings brought against a third party with a view to securing his or her conviction.⁸⁵ At the same time, the obligations under

⁸¹ See also, Garlicki et al, *supra* note 31, p. 87.

⁸² Harris et al, *supra* note 50, pp. 14 and 202.

⁸³ *Bata v Czech Republic* (43775/05), 24 June 2008, para. 80.

⁸⁴ *Jantner v Slovakia* (39050/97), ECHR 4 March 2003, paras. 29–33.

⁸⁵ *Asociacion de victimas del terrorismo*, *supra* note 3.

Article 2 are satisfied if the domestic system makes it possible to identify the persons responsible for the death and to hold them accountable; not necessarily in the framework of criminal proceedings. Under certain circumstances an effective judicial system should however offer recourse to criminal law. The Court strongly underlines that in cases where the death was the result of the actions of State agents or bodies, the essential purpose of the investigation is to ensure accountability for the events occurring under their responsibility. Further, the Court states that in such cases the authorities “must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.”⁸⁶ In the opinion of some authors, the obligation to hold those responsible for a death accountable under criminal law is placed upon the State not only in the situation where the offence is committed by State agents or bodies, but also in serious cases where third parties are the perpetrators.⁸⁷ Therefore, a comparison of the rights enjoyed by victims under Article 2 and Article 6 of the Convention leads to the conclusion that the victims can, in practical terms, demand from the authorities the initiation of proceedings in the exercise of the State’s procedural obligations under Article 2, whereas they cannot benefit from this right under Article 6.

2.3.1. Article 2

An effective investigation under Article 2 requires that the public and the next-of-kin be able to obtain information about the conduct and outcome of the proceedings, and that the relatives can take part in the proceedings to the extent necessary. An issue that raises questions is the degree of involvement of the next-of-kin in the investigation and trial.

According to the Court’s case law, under Article 2 the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests.⁸⁸ In practical terms this means that the relatives have to: be thoroughly and systematically informed about the progress and outcome of the investigation, including the procedural decisions taken in the course of the proceedings and the decisions concerning prosecution;⁸⁹ have access to the investiga-

⁸⁶ *Šilih v Slovenia* (71463/01) Grand Chamber, ECHR 9 April 2009, para. 194; *Hugh Jordan*, *supra* note 60, para. 105; *Al-Skeini and Others v UK* (55721/07), Grand Chamber, ECHR 7 July 2011, para. 165.

⁸⁷ See, Garlicki, et al, *supra* note 31, p. 137.

⁸⁸ *Hugh Jordan*, *supra* note 60, para. 109

⁸⁹ *Güleç*, *supra* note 29, para. 82; *Hugh Jordan*, *supra* note 60, para. 142.

tion and court documents, including statements of witnesses;⁹⁰ have full access to information used in the proceedings;⁹¹ be allowed to obtain legal representation;⁹² be able to participate in evidentiary proceedings, including the possibility to submit evidentiary motions;⁹³ and be interviewed by the investigating judge.⁹⁴ In the view of the Court, it is indeed contrary to the principles stemming from Article 2 for the national authorities to demand from the injured party (or next-of-kin of the deceased) the filing of a formal motion declaring their wish to be involved in the criminal proceedings. In the situation where the authorities receive information about a suspicious death, they should start an investigation on their own initiative, in which the deceased's next-of-kin should automatically be involved.⁹⁵

The Court has concluded that when the relatives are in practice hindered from participating in the proceedings, they are unable to have their legitimate interests upheld.⁹⁶ When this is the case, the Court may find that a violation of Article 2 of the Convention, under its procedural dimension, has taken place. The Court, however, does not make the efficiency of the proceedings conditional on the formal admission of relatives as victims to the criminal proceedings, and attaches immense importance to the practical aspects of participation.⁹⁷ Therefore, the refusal of the national authorities to grant an applicant the status of injured party (in the form provided by national law) – upon which the authorities make conditional the participation in the proceedings – may also constitute a violation of Article 2. In recent years the Court has indeed formulated the view that the inability of a victim's partner to take part in an investigation to establish the cause of death is sufficient to conclude that the investigation was not "effective".⁹⁸ Still, it is difficult to answer the question whether the refusal to admit the victim or relatives to the proceedings will have the same consequences under Article 6.

2.3.3. Article 6

It is not clear from the wording of the Convention whether the guarantees of Article 6 shall also apply to pre-trial proceedings, even though it is at that stage of the proceedings that the injured party may encounter particular difficulties in

⁹⁰ Öğür, *supra* note 29, para. 92.

⁹¹ *Yvon v France* (44962/98), ECHR 24 April 2003, Reports of Judgments and Decisions 2003-V, at para. 37.

⁹² *Hugh Jordan*, *supra* note 60, para. 142

⁹³ *Rajkowska v Poland* (37393/02), ECHR 27 November 2007.

⁹⁴ *Slimani v France* (57671/00), ECHR 27 July 2004, para. 44.

⁹⁵ *Ibidem*, para. 47.

⁹⁶ *Ahmadov*, *supra* note 61, para. 115.

⁹⁷ *Ibidem*.

⁹⁸ *Slimani*, *supra* note 94, para 49.

the realisation of his or her rights. It follows from the way in which Article 6 itself has been formulated – and in particular from the autonomous meaning given to the notions “case” and “accusation” within the meaning of the Convention – that this provision is at least partially applicable to pre-trial proceedings.⁹⁹ However, the application of the guarantees contained in the latter provision to pre-trial proceedings must take into consideration the special nature of those guarantees. The mere possibility of including pre-trial proceedings within the scope of protection of Article 6 does not mean that the same degree of protection shall be granted automatically as for the trial proceedings.¹⁰⁰ In its case law the Court has accepted the application of the guarantees of Article 6 to the legal situation of the relatives of victims at the pre-trial stage of the proceedings, provided that the relatives are claiming civil rights.¹⁰¹ As a result, both during the pre-trial and trial proceedings the injured party benefits from the fair trial guarantees laid down in Article 6 of the Convention, subject of course to the nature of the specific guarantees defined in that provision. The victim can benefit from the guarantees of this provision only when he or she pursues rights of a civil nature in the criminal proceedings. Therefore, in cases in which applicants do not have the possibility under national law to join the criminal proceedings as civil parties, but there is nothing that prevents them from bringing a civil action for compensation either before or in parallel with the criminal proceedings, there will be no violation of Article 6.¹⁰² So far the Court has not answered the question whether there is a violation of Article 6 in the situation where the applicant has neither the possibility to participate in criminal proceedings nor can initiate civil proceedings. In a group of cases the Court has considered this problem under Article 13, stating that where both the criminal investigation and any other remedy that may have existed were ineffective, the State has not met its obligations under Article 13 of the Convention.¹⁰³ However, it would be desirable to consider this situation with regard to the guarantees contained in Article 6. If the domestic legal system does not provide a separate possibility of initiating civil proceedings or putting forward civil claims, or the alternative domestic remedies foreseen in the national law for the participation in criminal proceedings as an injured party are completely ineffective,

⁹⁹ *Imbroschia v Switzerland* (13972/88), ECHR 24 November 1993, A 275, para. 36; *Rajkowska*, *supra* note 93.

¹⁰⁰ *See also*, Trechsel, *supra* note 2, p. 31.

¹⁰¹ *Perez*, *supra* note 26, para. 66.

¹⁰² *Giuliani and Gaggio*, *supra* note 65, paras. 335-337; *Sigalas*, *supra* note 22; *Assenov and Others v Bulgaria* (24760/94), ECHR 28 October 1998, Reports 1998-VIII, para. 111; *Tsalkitzi v Greece* (11801/04), ECHR 16 November 2006, paras. 29-32.

¹⁰³ *Isayeva v Russia* (57950/00), ECHR 24 February 2005, para. 229.

the refusal to allow the victim, or in case of the victim's death – his or her relative – to participate in the criminal proceedings in which he or she wishes to realise the procedural entitlements due the injured party under national law with the aim of pursuing his or her civil rights, should be treated as a violation of the right of access to court set forth in Article 6.

To what extent the victim or relatives may participate in the proceedings depends largely on the applicable domestic law and the stage of the proceedings. However, a victim/relative that enjoys the status of a party in the domestic proceedings may benefit from all the rights due to a party. With respect to the injured party, Article 6 guarantees, *inter alia*, the following: the right of access to the case-files and all the documents concerning the case,¹⁰⁴ the right to be heard, the right to receive reasoned decisions, and the right to fair evidentiary proceedings.¹⁰⁵ This is a non-exhaustive list, and is constantly being developed in the case law. Hence, it can be concluded that the guarantees are largely similar to those provided for under Article 2.

3. COMPARING THE SCOPE OF PROTECTION UNDER ARTICLES 2 AND 6

3.1. Dividing the scope of application between Articles 2 and 6

The Court has developed a consistent line of case law in accordance with which, where it has already ruled that there was a violation of Article 2 in its procedural aspect, it has refrained from finding a violation of Article 6.¹⁰⁶ In such cases the Court assumed that the complaints raised by the applicants under Article 6 concerned the same issues as those discussed under the procedural aspect of Article 2 and Article 13. Therefore, there was no need to examine the applications under Article 6. At the same time, the Court dispelled doubts as to the basis under which the complaints should be adjudicated by ruling that issues concerning the effectiveness of criminal investigations shall be considered under Articles 2 and 13 of the Convention.¹⁰⁷ Against that background the question arises: in which circumstances do complaints raised by the victims/relatives have to be considered not only under Article 2, but also under Article 6?

¹⁰⁴ E.g., Garlicki, et al, *supra* note 31, p. 347.

¹⁰⁵ E.g., *ibidem*, p. 329.

¹⁰⁶ *Varnava and Others v Turkey* (16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), ECHR 18 September 2009, Reports of Judgments and Decisions 2009, para. 211; *Bazorkina*, *supra* note 16, para. 153.

¹⁰⁷ *Hugh Jordan*, *supra* note 60, para. 149.

The first such situation would concern a case where the applicant participates in criminal proceedings, and at the same time in a different set of proceedings that are not subject to an assessment under Article 2. Proceedings not aimed at the identification and punishment of an alleged perpetrator cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.¹⁰⁸ Such conclusions were formulated in relation to the situation where the death was the result of the use of lethal force by a police officer. Therefore, at least in such types of cases the fairness of the investigation can be assessed only under Article 2, and the charges concerning other proceedings under Article 6.

Secondly, Article 6 seems to be suitable to serve as a basis for applications in cases where limits on the Court's temporal jurisdiction might prevent an assessment under Article 2. The Court has indicated that in many instances it treats the obligation of conducting an efficient investigation as an obligation that is autonomous in its character and scope, and is not limited only to cases where the State is responsible for a violation of the law in its substantive aspect. A procedural obligation may be treated as a completely separate obligation stemming from Article 2, binding on States even in situations where the death occurred before the entry into force for that State of the Convention.¹⁰⁹ However, the ascertainment of the existence of this separate, "detachable" obligation depends on the occurrence of certain premises. Only acts or omissions that took place after a given State had become bound by the Convention lie within the Court's jurisdiction, and provided that there "exists a genuine connection between the death and the entry into force of the Convention in respect of the respondent State", which means e.g. that the main part of the procedural actions that needed to be performed were, or were to be, carried out after that date.¹¹⁰ Therefore, in cases where the Court does not establish – due to the lack of its temporal jurisdiction – the existence on the part of the State of procedural obligations under Article 2, any proceedings, including criminal proceedings, conducted after the date of ratification by the national authorities might be subjected to an assessment under Article 6.

Thirdly, it is not excluded that the applicants may raise complaints concerning the fairness of criminal proceedings related to crimes that do not fall under Article 2, but can be adjudicated with reference to the guarantees of a fair trial under Article 6. The problem is that neither of these provisions clarify what exactly the notions of an efficient and fair trial encompass. In its case law the Court has elaborated certain entitlements that fall within the general substance

¹⁰⁸ *Ibidem*, para. 141.

¹⁰⁹ *Šilih*, *supra* note 86, para. 159.

¹¹⁰ *Ibidem*, paras. 161-163.

of such rights. It must be noted that the Court's case law is constantly evolving and the current interpretation of the above-mentioned provisions differs significantly from the interpretations applied in the 1970s and 1980s. One cannot exclude that in the future the Court will extend the protection offered by Article 6 § 1 to victims' claims of a non-pecuniary character not covered by the guarantees of Article 2. In this regard it is interesting to refer to the new challenges to the Court's case law, referred to earlier in this article, concerning the protection of certain personal rights related to access to information about the circumstances of the crime.

In concluding this part of article it is interesting to consider the potential consequences to a domestic legal system of the finding of a violation under Articles 2 and/or 6 of the Convention. Many applicants complain about the ineffectiveness of an investigation conducted by national authorities and request the Court to order the State to conduct a new investigation. These demands have in some situations been reflected in the position taken by the Committee of Ministers, according to which in many instances the reopening of the proceedings would be an effective way of redressing the consequences of a violation of the Convention caused by unfair or inefficient national proceedings. The Committee of Ministers, in its guidelines concerning the execution of the Court's judgments, has encouraged states to ensure that there exist adequate possibilities to reopen proceedings in those instances where the Court has found a violation of the Convention, and has specified situations in which the reopening of proceedings is particularly desirable.¹¹¹

As to the question whether the authorities should be compelled to initiate a new investigation after the Court has found a violation of procedural obligations under Article 2, there is no agreement among the scholars in legal literature, nor has the Court pronounced itself unambiguously on this matter.¹¹² The Court has not entirely rejected the idea of an obligation to reopen the proceedings, and the position taken by it in the case of *Finucane v UK* remains valid. In that case the Court stated that "it rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance in each case".¹¹³

¹¹¹ Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on January 19, 2000 at the 694th meeting of the Ministers' Deputies.

¹¹² See, J. Chevelier – Watts, *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or Onerous Burden on a State?*, 3 European Journal of International Law 21 (2010), p. 713.

¹¹³ *Finucane v UK* (29178/95), ECHR July 2003, Reports of Judgments and Decisions 2003-VIII, para. 89. It is important to note that in the case of *Akar v Turkey* the Court rejected the unilateral declaration of the Government, finding that apart from the acknowledgement

The issue of reopening proceedings is different when a violation of Article 6 is found. The recommendation of the Committee of Ministers encouraging States to create the possibility to reopen proceedings has been strengthened by the case law of the Court. In recent years one can observe a dynamic growth in the number of judgments in which the Court has found that “when an applicant has been convicted in breach of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested”.¹¹⁴ The Court’s practice of including in its judgments an order that States reopen proceedings is limited to criminal cases. It has been rightly pointed out in the legal literature that the Court is reluctant to urge states to reopen the proceedings in civil cases due to the consequences that such a remedy might have for third parties.¹¹⁵ Most national legal systems provide for the possibility to reopen proceedings following a judgment of the Court at least in criminal matters.¹¹⁶ In a few national legal systems the possibility to reopen proceedings also exists for civil cases. However, in criminal cases it is usually only the accused that benefits from such a possibility.¹¹⁷ The domestic systems do not allow other parties or persons that were involved in the criminal proceedings to request that they be reopened following the Court’s judgment. Therefore, the Court’s finding of a violation of the rights of the victim or relatives under Article 6 would not result in reopening the proceedings at the national level.

3.2. Supplementing role of Article 13

The guarantees concerning victims’ rights stemming from the substantive articles of the Convention are supplemented by the rights enshrined in Article 13. The scope of obligations under Article 13 varies depending on the nature of the

of a violation such a declaration should contain the obligation to instigate a fresh examination subject to supervision of the Committee of Ministers, see *Tahsin Akar v Turkey* (26307/95), ECHR 6 May 2003, Reports of Judgments and Decisions 2003-VI, para. 84. See also, Leach, *supra* note 31, p. 100.

¹¹⁴ *Laska and Lika v Albania* (12315/04 and 17605/04), ECHR 20 April 2010, para. 74. Earlier judgments in which the Court reached this conclusion: *Akkaş v Turkey* (52665/99), ECHR 23 October 2003; *Çavuş and Bulut v Turkey* (41580/98 and 42439/98), ECHR 23 October 2003; *Dalgıç v Turkey* (51416/99), ECHR 23 October 2003; *Samogyi v Italy* (67972/01), ECHR 18 May 2004; *Abbasov v Azerbaijan* (4271/05), ECHR 17 January 2008.

¹¹⁵ See also, Leach, *supra* note 31, p. 100.

¹¹⁶ Resolution (94) 84 of the Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹¹⁷ Cf., Art. 540 and 540a of the Polish Code of Criminal Procedure.

applicant's complaint under the Convention.¹¹⁸ The requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation.¹¹⁹ For the purposes of Article 13, in conjunction with Article 2, the applicants should be able firstly to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure (an obligation similar to that under Article 2), and secondly to an award of compensation.¹²⁰ As the Court has stated, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.¹²¹

The Court has developed a line of case law according to which, where the Court finds a violation of the procedural aspects of Article 2, and at the same time considers that the victims were not afforded the possibility of claiming compensation in either criminal or civil proceedings, it must be concluded that there has been a violation of Article 13 of the Convention.¹²² In the situation where the respondent government has not submitted examples of court practice confirming that the civil courts are capable of considering the civil claim of an injured party on the merits when the investigation has rendered absolutely no results, e.g. as regards the identification of the possible perpetrators, the Court has found that a violation of Article 2 in conjunction with Article 13 occurred.¹²³ However, in cases where the Court has found that an effective domestic investigation under Article 2 had been conducted into the circumstances surrounding a death and the applicant had not been prevented from bringing a civil action (even if only in civil and not in criminal proceedings), the Court has ruled that the applicants had effective remedies available to them in respect of their complaint under Article 2 of the Convention and that there was no violation of Article 13 of the Convention.¹²⁴

¹¹⁸ *McKerr v UK* (28883/95), ECHR 4 May 2001, Reports of Judgments and Decisions 2001-III, at para. 169.

¹¹⁹ *Orhan v Turkey* (25656/94), ECHR 18 June 2002, para. 384; *Ahmadov*, *supra* note 61, para. 137.

¹²⁰ *Kaya*, *supra* note 16, para. 107; *McKerr*, *supra* note 118, para. 171; *Ahmadov*, *supra* note 61, para. 138; *Assenov*, *supra* note 82, para. 117.

¹²¹ *Kaya*, *supra* note 16, para. 106; *Paul and Audrey Edwards v the United Kingdom* (46477/99), ECHR 14 March 2002, Reports of Judgments and Decisions 2002-II, para. 96; *Gül*, *supra* note 22, para. 100; *İlhan v Turkey* (22277/93), ECHR 27 June 2000; *McKerr*, *supra* note 118, para. 107.

¹²² *Assenov*, *supra* note 82, paras. 114-118.

¹²³ *Baysayeva*, *supra* note 64, para. 106.

¹²⁴ *Giuliani and Gaggio*, *supra* note 45, para. 337. However, one should also note the dissenting opinion signed by four judges – Tulkens, Zupancic, Ziemele and Kalaydjieva, who did not agree with the view that there had been no violation of Article 13. In their opinion,

CONCLUSION

The lack of a general definition of the notion of civil rights and obligations inhibits precisely defining the scope of protection due to an injured party pursuant to Article 6 of the ECHR. The general principles concerning the application of Article 6 that have been formulated by the Court allow the victims of crimes to benefit, to a certain extent, from the protection afforded by this article. However, this concerns only those injured parties who can prove that the proceedings conducted by the domestic authorities affected their civil rights. The ground-breaking judgment adopted in 2006 by the Court in the *Perez* case, in which it specified that it is no longer necessary for the injured party, to be entitled to protection on the basis of Article 6, to establish separately that the criminal proceedings are decisive for the civil action, did not dispel all doubts in this regard. In its previous practice the Court awarded protection under Article 6 mainly to those aggrieved persons who demanded pecuniary compensation for damage caused by an offence, or sought the protection of their reputation through a criminal procedure. Such situations have been assessed by the Court as circumstances in which civil rights are “determined”. On the whole, the Court has treated the concept of civil rights rather narrowly. Only in recent years has it drawn attention to the frequently disadvantageous position of injured parties in proceedings, particularly in criminal cases, where they seek to realise other interests that are important to them and are connected to the crime that has been committed. In this context one should assess positively the fact that the Court has taken up the challenge of assessing, on the basis of Article 6, those actions of States which, while creating a legal framework whereby injured parties can participate in criminal proceedings for the purpose of realising their legal interests connected with cultivating the memory of the deceased (obtaining reliable information about the circumstances of death and

“the applicants were unable to join the criminal proceedings as civil parties because the investigating judge discontinued the case. They were thereby deprived of the support of the prosecuting authorities in seeking to establish the facts and obtain the evidence. To contend in that regard, as the judgment does, that ‘there was nothing to prevent the applicants from bringing a civil action for compensation either before or in parallel with the criminal proceedings’ (see paragraph 337 of the judgment) strikes us as not merely theoretical but also illusory, since in any event the Grand Chamber considers the entire policing operation to have been perfectly lawful.” However, it is also worth noting that the Court’s case law on the issue of accessibility of effective remedies is not quite consistent, as in some cases the Court has decided that “in view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 2 in relation to its procedural aspect (...), the Court considers that no separate issue arises under Article 13 of the Convention”, *cf.*, *Makaratzis*, *supra* note 59, para. 86.

the burial site), do not put such provisions into practice. The Court's continuously evolving case law, which takes into consideration the fact that aggrieved persons may assert civil rights of a non-pecuniary nature in criminal proceedings, may be a partial response to the criticism raised in the legal literature that the Court seems to overestimate the importance of redressing material damage for injured parties.¹²⁵

The main provisions determining the scope of victims' guarantees stemming from the Convention will undoubtedly remain Articles 2 and 3 (the latter not having been discussed in this paper). The Court's case law has developed dynamically with respect to these provisions, and the concept of the procedural obligations of a State has undergone a significant evolution. From the point of view of the rights of victims, the aforementioned provisions play a crucial role. In this respect, the guarantees stemming from Article 6 may be of a complementary character to the procedural guarantees of Article 2, and together with this provision they may establish the framework for ensuring an ever more effective protection of victims' rights.

¹²⁵ Trechsel, *supra* note 2, p. 42.