

# JUDr. Marica Pirošíková, Agent of the Slovak Republic before the European Court for Human Rights

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

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention") does not include a specific provision regarding crime victims' rights (hereinafter referred to as the "victim"). Nevertheless, the European Court for Human Rights (hereinafter referred to as the "Court") drew guarantees in its case law from the Convention's single articles, which have a significant impact on the position of the victim in the proceedings held before domestic authorities. Should the above guarantees be violated by domestic authorities, the victims may lodge a petition with the Court.<sup>1</sup>

### 1. The Right to Life

#### 1.1 Duty to protect the right to life (substantive limb)

As regards the right to life, the Court noted that the first sentence of Art. 2, section 1 imposes an obligation on the State not only to refrain from intentional and unlawful deprivation of life, but also to adopt appropriate measures to protect life of individuals who are subjects to its authority (see the judgment *L.C.B. v. the United Kingdom* of 9 June 1998, par. 36). This commitment includes a State's primary obligation to ensure the right to life by implementing effective criminal law provisions deterring from commitment of crimes against individuals and by having in place a law enforcement system to ensure prevention, suppression and punishment for the violation of the above provisions. At the same time, this commitment may under certain circumstances arise into a positive obligation of state authorities to adopt preventative operational measures to protect the life of an individual where it is known, or ought to have been known to them in view of the circumstances, that he or she is at real and immediate risk from the criminal acts of a third party (see the judgment *Osman v. the United Kingdom* of 28 October 1998, par. 115). In the cases *Kontrová v. Slovakia* (see the judgment of 31 May 2007) and *Opuz v. Turkey* (judgment of 9 June 2009), a positive obligation shall arise based upon the finding that the state authorities knew or should have known at the time about the existence of an actual and immediate threat posed onto the life of a specific individual due to the crime activities of a third party and they failed to adopt measures within their authority that are deemed reasonable and appropriate to prevent the threat.

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<sup>1</sup> As regards the Slovak Republic, in case of delays during the investigation, a complaint with the Constitutional Court objecting a violation of the positive obligations under Articles 2, 3 and 8 of the Convention may be filed in the course of the proceedings (see e.g. the case I. ÚS 72/04, in which the Constitutional Court stated a violation of Article 3 of the Convention, ordered the relevant police body to act in the matter and awarded the applicant with SKK 100,000 as just satisfaction). Before a constitutional complaint, remedy may be sought by filing a petition and a repeated petition under the Prosecution Law (see the case *Zubal' v. Slovakia*). In some instances due to specific circumstances of the case, the Court rejected that filing of a constitutional complaint should be conditioned by a prior exhaustion of the above remedy (see *Kokey v. Slovakia* and *Puký v. Slovakia*). If a criminal proceeding is discontinued, in case of doubts concerning effective investigation, it may be requested with reference to the above Convention Articles that the Constitutional Court abolish such decision, whereas the law enforcement authorities shall be bound to proceed in line with the legal opinion of the Constitutional Court (see e.g. the case III. ÚS 86/05). If no remedy is achieved through the proceeding before the Constitutional Court, a petition with the Court may be lodged and priority review of the application in consideration of the severity of the case may be requested.

The applicants in the case *Branko Tomašić and Others v. Croatia* (judgment of 15 January 2009) were the relatives of the victims. On 15 August 2006 M.M. shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself just one month after his release from prison where he had served a sentence for repeatedly threatening M.T. that he would kill her, himself and their child. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence. The applicants complained, under Article 2 (right to life) and Article 13 (right to an effective remedy), that the State had failed to take adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths. The Court held that there had been a violation of Article 2 of the European Convention on Human Rights on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the mother and her child. The Court noted in particular that the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them. The Court furthermore noted several shortcomings in the actions of domestic authorities: although the psychiatric report drawn up for the purposes of the criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated; it resulted from the submitted documents that the treatment of M.M. in prison consisted of several sessions with the prison's staff members, none of whom was a psychiatrist; the relevant regulations nor the court's judgment specified what treatment should M.M. undergo; nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free. The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T., in violation of Article 2. The Court held that there was no need to examine separately the complaint under Article 2 regarding the failure of the State to carry out a thorough investigation into the possible responsibility of its agents for the deaths of M.T. and V.T. For the determined violation the Court awarded the applicants 40,000 EUR in respect of non-pecuniary damage and 1,300 EUR in respect of legal costs and expenses.

In the judgment *Kontrová v. Slovakia* (judgment of 31 May 2007) the Court noted that in the applicant's case the police had failed to meet its duties under the applicable criminal code provisions and service regulations, such as: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. The Court deemed proven that the shooting of the applicant's children by her husband had been a direct consequence of the police officers' failure to act. The above was de facto stated already by the Supreme Court upon abolishing the decision of the Regional Court of 21 January 2004 and the judgment of the District court of 20 October 2003. The District Court dismissed the summons. It found that the criminal offence of dereliction of duty presupposed a complete or enduring failure to discharge the duty. Merely impeding the discharge of the duty was not enough. It found that in the present case the officers' actions did not amount to such a failure to discharge their duty and that the connection between their actions and the tragedy was not sufficiently direct. The Regional Court dismissed an appeal against the judgment. The Supreme Court took action on the merits based on a complaint in the interest of the law lodged by the Prosecutor General. The Supreme Court found that the lower courts had assessed the evidence illogically, that they had failed to take account of all the relevant facts and that they had drawn

incorrect conclusions. The Supreme Court found that it was clear that the accused officers had acted in dereliction of their duties. It concluded that there was a direct causal link between their unlawful actions and the fatal consequence. The Supreme Court remitted the case to the District Court for reconsideration and pointed out that, pursuant to Article 270 Art. 4 of the CCP, the latter was bound by its above legal views. The District Court found officers B., P.Š. and M.Š. guilty as charged and sentenced them to, respectively, six, four and four months' imprisonment. The Court held that the applicant had no effective remedy available on the national level, through which it would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death, which was the direct consequence of the Government's failure to meet its positive obligations under Article 2 of the Convention. In the proceedings before the Court the Government argued that an action for protection of personal integrity was a remedy that the applicant should have used in respect of her complaints under Articles 2 and 8 of the Convention in order to comply with the requirement to exhaust domestic remedies pursuant to Article 35 Art. 1 of the Convention. In support of this argument, the Government relied on judicial decisions and maintained that these decisions showed that the action in question was available to the applicant both in theory and practice. The Government argued that in an action in the Nitra District Court (file no. 10C 142/2002) a mother claimed, among other things, financial compensation for non-pecuniary damage in connection with the death of her daughter. She relied on the previous conviction for manslaughter of her daughter. In a judgment of 15 May 2006 the District Court accepted that the plaintiff had suffered damage of a non-pecuniary nature and awarded her 200,000 SKK by way of compensation. In an action in the Žiar nad Hronom District Court (file no. 7 C 818/96) a mother claimed, among other things, financial compensation for non-pecuniary damage caused to her and her son in connection with the latter's violent death. She relied on the defendant's previous conviction for the extremely violent and racist murder of her son. The District Court concluded that the plaintiff and her son had suffered non-pecuniary damage and in a judgment of 9 September 2004 it awarded the plaintiff 100,000 SKK by way of compensation of the non-pecuniary damage she suffered and 200,000 SKK by way of compensation of the non-pecuniary damage her son suffered. On 19 January 2005 the Banská Bystrica Regional Court upheld the first-instance judgment. The Court dismissed the Government's objection on the failure to exhaust domestic remedies. It found that there was no sufficiently consistent case-law in cases similar to the applicant's to show that the possibility of obtaining redress in respect of non-pecuniary damage by making use of the remedy in question was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law. The Court observed at the admissibility stage that there had been some development in academic understanding and judicial practice in respect of the scope of actions for protection of personal integrity. The events which gave rise to the present case occurred in 2002. The decisions on which the Government recently relied date from 2006. Any relevance they might possibly have in respect of the present case is therefore reduced by the fact that they were taken after the relevant time.

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

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

In the case *Furdík v. Slovakia* (decision of 2 December 2008) the applicant *inter alia* objected violation of Article 2 of the Convention in that the state involved failed to adopt necessary measures to protect the life of his daughter who died as a result of injuries which she sustained while climbing the Široká veža peak in the High Tatras. He claimed that Slovak law did

not provide sufficient guarantees to ensure efficient organizing of medical rescue service in similar cases. Mainly, no specific time limit was set, during which the rescue service would be obliged to get to the injured person. In the applicant's opinion it should have been within 10 - 15 minutes from when an emergency call was placed, with the exception of vis major cases. The applicant claimed that he would have been able to successfully demand compensation before national authorities only if national law incorporated a similar guarantee. The Government argued that the applicant had not exhausted domestic remedies as required by Article 35 Art. 1 of the Convention. In particular, he could have sought redress by means of an action under Act 514/2003 as well as by means of an action for protection of personal integrity under Articles 11 et seq. of the Civil Code. As regards both the decisions of civil courts on such claims and the above conclusions reached by the prosecuting authorities, the applicant could have ultimately sought redress before the Constitutional Court pursuant to Article 127 of the Constitution. The Government maintained that, in any event, domestic law contained comprehensive and sufficient guarantees for ensuring effective and timely assistance to persons in emergency. It was not realistic to fix in the relevant regulations a specific time-limit for the air rescue team to reach a person whose life was in danger as suggested by the applicant.

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

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

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

and, if unsuccessful, lodge a complaint with the Constitutional Court relying on the guarantees of Article 2 of the Convention or its constitutional equivalent.

## **1.2 Duty to conduct an effective official investigation when individuals have been killed as a result of the use of force (procedural limb)**

The obligation to protect the right to life under Article 2 of the Convention also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. Whatever mode is employed, however, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

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

The facts of the case may be summarized as follows: At approximately 8.00 to 8:30 p.m. on 12 August 1999 police officers apprehended the applicant's husband and another person on suspicion of having stolen the bicycles they were riding. Police officers used force to apprehend

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

With its judgment of 14 December 2010, the Court stated on the merits of the case, that Article 2 of the Convention has been violated. In this respect the Court stated that even if the applicant's husband committed suicide in the manner described by national authorities, they violated their duty to take appropriate measures to protect his health and physical integrity during police custody. The Court also noted that the circumstances of the case did not provide any grounds for the police office on duty to have a weapon on him during the interrogation of the applicant's husband who had been arrested on suspicion of bicycle theft. Secondly, the Court noted that at the time of Mr Šarišský's death there were regulations in force which required police officers to secure their service weapons in order to avoid any "undesired consequences". Consequently, the Court found that there has accordingly been a violation of Article 2 of the Convention under its substantive limb.

As to the procedural part of Article 2 of the Convention, i.e. investigation into the circumstances surrounding the death of the applicant's husband, the Court concluded that it was not sufficiently independent. The criminal investigation was supervised by police officers from the Department of Supervision and Inspection at the Ministry of the Interior. The Court observes that these police officers were under the command of the Ministry of the Interior. Even if the Court were to assume that these officers were sufficiently independent for the purposes of Article 2 of the Convention, it is concerned that they did not commence their investigation until 13 August 1999, when an officer interviewed the wounded Mr Šarišský in hospital. The task-force that was formed immediately after the shooting was comprised of police officers from Poprad, which was the district in which Lt. F. was based. It was these officers who conducted the initial forensic examination of the scene. Moreover, after the Department of Supervision and Inspection took over, officers from Poprad continued to be involved in the investigation. In particular, it is clear from the record of the reconstruction conducted on 4 May 2000 that the technicians carrying out the experiments were from the Criminal Police Department in Poprad, which was Lt. F.'s department. Further investigations were also carried out by the Regional Investigation Office in Prešov. Whilst the Court acknowledges that the local police cannot remain passive until independent investigators arrive, in the absence of any special circumstances, immediate action by local police should not go beyond securing the area in question. In the present case, the task-force examined the crime scene, photo-documented it and recovered fingerprints and ballistic, biological and material evidence. They did not, however, have the necessary technical equipment to test Lt. F.'s hands for gunshot residue, and instead permitted

him to return home, although they submitted that he remained under the constant supervision of a police guard. No further details have been provided concerning the identity of this guard or the extent of the supervision. However, as police officers from the Department of Supervision and Inspection at the Ministry of the Interior did not arrive until the following day, it must be assumed that the guard was also from Lt. F.'s department in Poprad. The Court is also concerned about the continued involvement of technicians from Lt. F.'s department in Poprad in the investigation, most notably during the reconstruction carried out on 4 May 2000. Their involvement diminished the investigation's appearance of independence and this could not be remedied by the subsequent involvement of the Department of Supervision and Inspection. The Court therefore finds that the investigation was not sufficiently independent.

Moreover, the Court finds that the failure of the investigators to give serious consideration to Mr Šarišský's claim that he shot himself after Lt. F. handed him the gun amounted to a serious deficiency in the Šarišský's death. The allegation that Lt. F. voluntarily gave Mr Šarišský his gun amounts to a much more serious allegation against Lt. F. than that of causing injury to health by negligence, and yet the investigators do not appear to have considered it, preferring instead to rely on Lt. F.'s claim that Mr Šarišský forcibly took the weapon from him. The Court further observes that in a case such as the present, where there were no independent eyewitnesses to the incident, the taking of forensic samples was of critical importance in establishing who was responsible for Mr Šarišský's death. If the investigators had brought the necessary equipment to the police station, samples of gunpowder residue could have been taken from Lt. F.'s hands in the immediate aftermath of the shooting. If such samples had been taken, it might have been possible either to exclude or confirm that he pulled the trigger. Instead, samples were not taken until the following day. Although the Government submitted that Lt. F. remained under the supervision of a police guard until the samples were taken, the Court has concerns about the independence of the guard, who was most likely a police officer from Lt. F.'s department. Consequently, the result of the gunpowder residue test cannot be relied on. Although a ballistics test later confirmed that Mr Šarišský "most probably" shot himself, if conducted properly the gunpowder residue test could have been conclusive. Thus, there was a failure by the investigators to take reasonable steps to secure evidence concerning the incident which in turn undermined the ability of the investigation to determine beyond any doubt who was responsible for Mr Šarišský's death. Finally, the Court observes that very little attention appears to have been paid to the applicant's claim that her husband had injuries to his face, shoulder and ear, even after the autopsy confirmed the presence of these injuries. The Government have subsequently indicated that these injuries were ignored because they were not relevant to determining the cause of death. They were, however, relevant to determining whether Mr. Šarišský was ill-treated by police officers either during his arrest or in police custody, which in turn is relevant both to an investigation into a potential violation of Article 2 of the Convention and to a separate allegation under Article 3. The Court therefore finds that the failure to investigate the applicant's claim that her husband was ill-treated by police officers prior to the shooting amounted to a serious shortcoming in the criminal investigation and prevented the authorities from obtaining a clear and accurate picture of the events leading to Mr. Šarišský's death. In light of the above, the Court concludes that no meaningful investigation was conducted at the domestic level capable of establishing the true facts surrounding the death of Mr. Šarišský. It follows that there has also been a violation of the procedural limb of Article 2 of the Convention.

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

In the case *Puky v. Slovakia* (decision of 14 February 2012) the applicant complained under Article 2, both taken alone and in conjunction with Article 13 of the Convention, that the

Slovak authorities had failed to carry out a thorough and effective investigation into the death of his brother that allegedly occurred in the course of large-scale police operations in reaction to protests by people of Romany ethnic origin in Eastern Slovakia in February 2004. With reference to his and his brother's ethnic origin and the facts of the case, the applicant further alleged a breach of Article 14 in conjunction with Articles 2 and 13 of the Convention. The applicant argued that the authorities had failed to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events leading to the death of his brother. In that respect the Court notes that the authorities took a number of steps to establish the relevant circumstances of the case. In particular, they promptly examined and documented the scene where the body was found, arranged for an autopsy and a forensic examination of the body to be carried out and questioned eight witnesses, including the applicant and his brother's partner. The proceedings were discontinued after two forensic experts had found no signs of physical violence on the body and had determined suffocation by drowning as the direct cause of the death. In the Court's view, the domestic authorities took appropriate action with a view to establishing the relevant facts of the case in the circumstances. The participation of lawyers from the League of Human Rights at the reconstruction of the events at the place where the body had been found and the CPT's involvement indicate that there was a sufficient element of public scrutiny of the investigation. Finally, the Court concluded that the investigation lasted sixteen months. Considering the action taken and the decisions given during that period, it can be considered to be compatible with the requirement of promptness and reasonable expedition within the meaning of the case-law referred to above. The investigation into the death of the applicant's brother did not, therefore, fall short of the requirements of Article 2 of the Convention. The Court rejected the complaint under Article 2, both taken alone and in conjunction with Article 13 of the Convention as manifestly ill-founded. The Court notes that the case was given special attention by the highest prosecuting authorities. There is no indication of discriminatory treatment contrary to Article 14 of the Convention in the circumstances of the present case. It follows that the applicant's complaint under Article 14 of the Convention is also manifestly ill-founded and must be rejected.

## **2. Prohibition of torture and the right to respect for private and family life**

Similar to the Right to life, the Court has formulated positive obligations also in the case of Article 3 (Prohibition of torture) and Article 8 (Right to respect for private and family life) of the Convention.

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of the minimum level of severity is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. (See e.g. judgments *Raninen v. Finland* of 16 December 1997, par. 55, *Kudla v. Poland* of 26 October 2000, par. 91 and *Peers v. Greece* of 19 April 2001, par. 67)

Claims of ill-treatment must be supported by evidence before the Court. The standard which the Court adopts in assessing evidence of violations of Article 3 is "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. (See e.g. judgments *Selmouni v. France* of 28 July 1999, par. 88 and *Aydin v. Turkey* of 25 September 1997, par. 73)

The concept of private life includes a person's physical and mental integrity. Under Article 8, States have an obligation to protect an individual's physical and moral integrity from

other individuals. (See e.g. the decision on admissibility of the application of *M.T. and S.T. v. Slovakia* of 29 May 2012.)

## **2. 1 States' obligation to protect individuals from ill-treatment and violation of the right to respect for private and family life (substantive limb)**

The Court has drawn an obligation under Article 3 of the Convention, based on which States are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.

Similarly, States' positive obligations under Article 8 of the Convention inherent in effective "respect" for private and family life may involve the adoption of measures in the sphere of the relations of individuals between themselves. Albeit it is the government's discretion to choose the means to ensure compliance under Article 8 to provide protection against torture by private persons, an effective countering of serious criminal offences where basic values and private life elements are at stake, requires adequate criminal law provisions.

In this regard the Court noted that in certain situations (e.g. bodily injury, rape, domestic violence), effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect (see the judgment in *Sandra Janković v. Croatia* of 5 March 2009, par. 36). In the case *M.T. and S.T. v. Slovakia* (decision on admissibility of 29 May 2012) the Court emphasized that this attitude in principle is not limited to cases of physical violence, but to the contrary, especially in domestic violence cases it may apply also to psychological violence.

In the Court's view, States have an obligation to adopt such legislative and other measures ensuring efficient violation prevention or having a deterrent effect on potential perpetrators.

In the case *B. v. Moldova* (judgment of 16 July 2013) the applicant was regularly beaten by her husband. The violence was proven by 7 medical certificates. The courts had adopted 6 administrative decisions. The applicant's husband had been imposed fines ranging from EUR 9 to EUR 18 four times. Criminal proceedings for attempted rape had been instigated against him, but the proceedings had been discontinued as the applicant withdrew the criminal complaint. After reviewing the case, the Court held that there had been a violation of Article 3 and of Article 8 of the Convention. The Court stated that Moldovan law provides a legal framework enabling authorities to adopt measures aimed at protecting domestic violence victims and that Moldovan authorities had been aware of the violent behavior of the applicant's husband, since they had sanctioned him several times. The Court noted that although the authorities did not remain completely passive, the measures they had adopted did not prevent further assaults. In this regard the Court noted the very low fines that failed to have a deterrent effect on the perpetrator. As regards the withdrawal of the applicant's criminal complaint, the Court stated that in domestic violence cases authorities in their decisions on proceedings are obliged to establish a balance between the victim's rights under Articles 2, 3 and 8 of the Convention, and that the more serious the criminal offence or the higher the risk of its continuation, the more persistent should the authorities be in prosecuting such offence in the public interest even though the victim had withdrawn her criminal complaint. In the assessed case the authorities failed to analyze whether the severity of assaults on the applicant required to continue the investigation, even though the applicant had withdrawn her criminal complaint. Despite the reported attempted rape supported by a medical certificate that confirmed the allegation, the authorities did not initiate any investigation of their own motion and limited themselves to an administrative proceeding. The

Court further considered that Moldovan courts refused to order the applicant's husband's temporary eviction from the family apartment. Despite a restraining order had been issued against her husband, by allowing him to continue living in the family apartment with the applicant, the Moldovan courts made this measure ineffective. As regards Article 8 of the Convention, the Court stated that in deciding on the petition on the husband's eviction from the family apartment, the Moldovan courts failed to consider whether the applicant's husband executed his right to the use of the apartment in a manner infringing the applicant's rights under Article 8. The Court decided that domestic authorities failed to meet the State's positive obligation under Article 8 by not having established a balance between the affected rights, forcing the applicant to continue to bear the risk of violence or leave the family apartment. The Court awarded the applicant EUR 15,000 in respect of compensation of non-pecuniary damage and EUR 3,000 in respect of legal costs and expenses.

In the case *Bevacqua and S. v. Bulgaria* (judgment of 12 June 2008) the first applicant who claimed that she had been regularly beaten by her husband, left him and filed for divorce, taking their 3-year old son (second applicant) with her. Anyhow, her husband continued beating her. She spent 4 days in an asylum home for battered women with her son, but she was told that she might be prosecuted for child abduction, which might result in the court's decision to award joint custody. Filing a criminal complaint provoked further violence. Her application to have a preliminary injunction issued entrusting the son in her custody was not assessed with priority expedition and the son was entrusted in her custody only after the divorce more than a year later. The following year she was beaten by her ex-husband and her applications for criminal prosecution were turned down due to the reason that it was a "private matter" that required private criminal prosecution. In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life. The Court emphasized that the authorities' view that no assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights. The Court awarded the applicant EUR 4,000 in respect of compensation of non-pecuniary damage and EUR 3,000 in respect of legal costs and expenses.

In the case *A. v. Croatia* (judgment of 14 October 2010) the applicant's currently ex-husband (suffering from mental disorders such as anxiety, paranoia, epilepsy and post-traumatic stress disorder) physically assaulted the applicant repeatedly and threatened her with death for many years, and abused her in the presence of their young daughter. After the applicant went into hiding, she asked the court to issue a restraining order against her husband. The court turned down her request claiming that she failed to prove real and imminent risk posed to her life. The Court stated a violation of Article 8 of the Convention as the national authorities failed to implement measures ordered by the national courts, aimed on the one hand at addressing the offender's psychiatric condition, which appear to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by her former husband. They thus left the applicant for a prolonged period in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life. The Court awarded the applicant EUR 9,000 in respect of non-pecuniary damage and EUR 4,470 in respect of costs and expenses.

In the case *Kaluczka v. Hungary* (judgment of 24 April 2012) the applicant shared an apartment with her violent partner against her will over the course of several proceedings on

ownership of the disputed apartment. She claimed mainly that the Hungarian authorities failed to protect her from constant physical and mental abuse in her apartment. The Court concluded that Hungarian authorities failed to meet their positive obligation under Article 8 of the Convention. The Court specified that despite the applicant had filed a number of criminal complaints against her partner for bodily injury, requesting on several occasions a restraining order to be issued against him, and initiated civil proceedings seeking his eviction from the apartment, Hungarian authorities failed to implement sufficient measures to effectively protect her. The Court awarded the applicant EUR 5,150 in respect of non-pecuniary damage.

The case *Eremia and Others v. the Republic of Moldova* (judgment of 28 May 2013) concerned the applicants' complaint about the Moldovan authorities' failure to protect them from the violent and abusive behaviour of their husband and father, a police officer. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) in respect of Ms Lilia Eremia, and a violation of Article 8 (right to respect for private and family life) in respect of her two daughters. The Court held that, despite their knowledge of the abuse, the authorities had failed to take effective measures against Ms Eremia's husband and to protect his wife from further domestic violence. It also considered that, despite the detrimental psychological effects of her daughters witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. Finally, the Court found a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3 in respect of Ms Lilia Eremia since the actions of domestic authorities were not mere failure in investigating the violence she had sustained, but the authorities' attitude had amounted to condoning violence and had been discriminatory towards Ms Eremia as a woman. In this regard the Court noted that the conclusions of the United Nations Special Rapporteur on violence against women, its causes and consequences only further reinforced the impression that Moldovan authorities failed to fully appreciate the seriousness and scope of the problem of domestic violence in Moldova and its discriminatory effect on women. The court held that the Republic of Moldova was to pay the applicants jointly EUR 15,000 in respect of non-pecuniary damage and EUR 2,150 for costs and expenses.

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

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

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

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

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

## **2.2 Requirement to conduct an effective official investigation of ill-treatment and violation of the right to respect for private and family life (procedural limb)**

If a person has an arguable claim that he or she was subjected to treatment that is illegal and contradictory to Article 3 of the Convention, then this provision in conjunction with a general obligation imposed on Contracting States by Article 1 of the Convention "everyone in their jurisdiction shall be granted the rights and freedoms set out in (...) of this Convention" means by implication a requirement to conduct effective official investigation. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This obligation may not be limited to cases of ill-treatment on the hand of State agents.

Based on the Court's case law, a State's positive obligation under Article 8 to guarantee an individual's physical integrity may be extended on issues concerning effective investigation.

The case *M. C. v. Bulgaria* (judgment of 4 December 2003) concerned a disputed violation of the State's positive obligation to protect individuals' physical integrity and private life and secure effective remedy. The applicant alleged before the Court to have been raped twice (on 31 July 1995 and 1 August 1995), however Bulgarian law does not provide an effective protection from rape and sex assault because rape perpetrators are prosecuted only in the presence of evidence of significant physical resistance and that Bulgarian authorities failed to duly investigate the events of 31 July 1995 and 1 August 1995.

The Court observes that Article 152 Art. 1 of the Bulgarian Criminal Code<sup>2</sup> does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. What is decisive, however, is the meaning given to words such as “force” or “threats” or other terms used in legal definitions. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

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

Without making any statements concerning the issue of guilt of P. and A., the Court finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention. The Court awarded the applicant 8,000 EUR in respect of compensation of non-pecuniary damage and 4,110 EUR in respect of legal costs and expenses.

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

In the case *Valiulienė v. Lithuania* (judgment of 26 March 2013) a female victim of domestic violence objected before the Court that domestic authorities had failed to investigate her allegations of ill-treatment and prosecute her partner. The Court found violation of Article 3 of the Convention due to the fact that the practice and manner, in which the criminal law mechanism was applied in the applicant's case, failed to provide her with effective protection from domestic violence. Namely, there were delays in the investigation and the prosecutor decided to discontinue the investigation. As for just satisfaction, the Court awarded the applicant EUR 5,000 in respect of compensation of non-pecuniary damage.

In the case *E.M. v. Rumania* (judgment of 30 October 2012) the applicant objected that the investigation of her criminal complaint filed in the matter of domestic violence committed in the presence of her daughter (who was 18 months old at the time) was ineffective. Rumanian courts turned down the applicant's petition on the grounds that her claims about her husband's violent behavior against her were not supported with sufficient evidence. The Court found violation of Article 3 of the Convention in its procedural limb because the manner, in which the investigation was conducted, did not provide the applicant with effective protection as required by Article 3 of the Convention. The Court mainly noted that the applicant, upon filing the first criminal complaint, had requested assistance and protection for herself and her daughter from her husband's aggressive behavior. Despite the legal framework provided for cooperation between various authorities and implementation of out-of-court measures in relation to domestic violence, and despite the fact that the applicant supported her claims with medical certificates, it did not appear that Rumanian authorities had implemented any measures aimed at investigating her allegations. As for just satisfaction, the Court awarded the applicant EUR 7,500 in respect of compensation of non-pecuniary damage and EUR 178 in respect of costs and expenses.

### **3. Effective Remedy**

Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, par. 95, and *Aydın v. Turkey*, judgment of 25 September 1997, par. 103). The Court itself will in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. It has previously found that, in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies (see *Keenan v. the United Kingdom*, par. 130).

#### **3.1 Situation in the Slovak Republic**

Pursuant to Art. 11 of the Civil Code, a natural person has the right to protection of personal integrity, mainly protection of his or her life and health, civic honor and human dignity, as well as respect for private life, the person's name and expressions of personal nature.

Pursuant to Art. 13 par. 1 of the Civil Code, a natural person has mainly the right to request the court to order to refrain from violation of his or her right to protection of personal integrity, remove the consequences of violation, and to be awarded just satisfaction. Pursuant to par. 2 of this provision, a natural person has also the right to non-pecuniary damage compensation in money should just satisfaction under par. 1 appear insufficient mainly due to the reasons that the dignity or respect in society of a natural person has been significantly adversely affected. Pursuant to Art. 13 par. 3 of the Civil Code, the amount of the compensation under par. 2 shall be established by court with consideration to the severity of the damage and circumstances of the violation of the right.

If a person was deprived of his or her life as a result of a criminal offence or another violation, his or her next-of-kin indicated in Art. 15 of the Civil Code may claim compensation of non-pecuniary damage due to a violation of the right to life and the physical integrity or their next-of-kin. Such a violation of the right to life amounts at the same time to a violation of the right to protection of private life and/or family life of the next-of-kin, and hence they may request compensation for non-pecuniary damage sustained in relation to the violation of their personal integrity rights. The amount of non-pecuniary damage compensation is left to the court's discretion, taking due consideration of the statutory criteria regarding the severity of the damage and the circumstances of the violation of the personal integrity rights. The concrete amount of the compensation must take due regard of the circumstances of the case and must be established on equitable basis.

It should be noted that the payment of the court fee has been lifted for crime victims instigating proceedings for the compensation of damage or non-pecuniary damage sustained as a result of a criminal offence under Art. 4, section 2 (i) of the Act No. 71/1992 Coll. on Court Fees and Penal Register Excerpt Fees with effect from 1 January 2006.

In the judgment *Kontrová v. Slovakia* (judgment of 31 May 2007) the Court held in agreement with the applicant that the applicant had no effective remedy available on the national level, through which it would have been possible for her to make a claim in respect of non-pecuniary damage she had sustained in relation to her children's death and that an action for protection of personal integrity did not ensure to the applicant such remedy. The Court observed already at the admissibility stage under Article 35 of the Convention that there was no sufficiently consistent case-law in cases similar to the applicant's to show that the possibility of obtaining redress in respect of non-pecuniary damage by making use of the remedy in question was sufficiently certain in practice and offered reasonable prospects of success as required by the relevant Convention case-law.

In the case *Furdík v. Slovakia* (decision of 2 December 2008) the Court noted another case from domestic practice from 2006 that confirms the effectiveness of an action for the protection of personal integrity in the case of a death. The Court held in view of the above that the applicant who claimed violation under Article 2 (right to life) could arguably claim redress under Article 11 et seq. of the Civil Code and, if unsuccessful, lodge a complaint with the Constitutional Court relying on the guarantees of Article 2 of the Convention or its constitutional equivalent.

In the case *Baláž and Others v. Slovakia* (decision of 28 November 2006) the applicants complained about a violation of Article 8 of the Convention due to ill-treatment by the police. They also complained about the shortcomings in the ensuing investigation and telephone threats. The Government claimed that two of the applicants (Mr Baláž Jr. and Ms Konečnicková) failed to exhaust domestic remedies because they had not claimed compensation of damages under Act no. 58/1969 Coll. and relevant provisions of Act no. 171/1993 Coll. on Police Corps. In the

Government's view they also had the possibility to seek protection of their personal integrity and claim compensation of non-pecuniary damage under Art. 11 et seqq. of the Code of Civil Procedure. The Court found that the claims of Mr. Baláž Jr. and Ms. Konečnicková about ill-treatment by the police were investigated by the police, by the Inspection Service of the Ministry of the Interior and all levels of the Prosecution, which assessed them as manifestly ill-founded. If Mr. Baláž Jr. and Ms. Konečnicková did not agree with this conclusion, they had several remedies available to apply their rights under the Convention. Among others, they could have appealed against the decision to discontinue the case, as a result of which no accusation was raised against the police officers involved in the case, and they could have appealed against the conviction of Mr. Baláž Jr. Moreover, he and Ms. Konečnicková could have raised a claim to damage compensation before ordinary courts under the Act no. 171/1993 Coll. on the Police Corps or could have sought protection of their personal integrity under Art. 11 et seqq. of the Code of Civil Procedure.

Act no. 514/2003 Coll. became effective on 1 July 2004, pursuant to which aggrieved parties due to wrong official procedures or illegal decisions may claim compensation of non-pecuniary damage in money. Thanks to this provision, this remedy may be considered effective in respect of the Court's case law. Under this law, responsibility may be claimed for damage caused by decisions issued from the effectiveness date of this Act, i.e. starting from 1 July 2004. The same applies to damage caused by wrong official procedures. Aggrieved parties who sustained damage due to a wrong official procedure or an illegal decision after this date shall claim non-pecuniary damage compensation under this Act instead of under the provisions of Art. 11 et seqq. of the Civil Code.

As regards effective remedy, the Court noted that in certain situations effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms that would ensure adequate protection in that respect (see the judgment in *Sandra Janković v. Croatia* of 5 March 2009, par. 36). In the case *M.T. and S.T. v. Slovakia* (decision on admissibility of 29 May 2012) the Court emphasized that this attitude in principle is not limited to cases of physical violence, but to the contrary, especially in domestic violence cases it may apply also to psychological violence. Due to the above reasons, the Court refused the Slovak Government's argument that the applicants failed to file a personal integrity protection claim as an effective remedy, by means of which in the Government's view the applicants could have demanded that violation of their personal integrity would stop.<sup>3</sup>

Similarly, in the case *Hajduová v. Slovakia* (judgment of 30 November 2010, par. 36-38) the Court under Article 35 par. 1 of the Convention reviewed and refused the effectiveness of an action for the protection of the applicant's personal integrity under Art. 11 et seqq. of the Civil Code in a situation where State authorities failed to comply with their statutory obligation to order Ms. Hajduová's husband detention for psychiatric treatment following his conviction for abuse and making threats against her, which amounted to a breach of the State's positive obligations under Article 8 of the Convention.

In the case *M. C. v. Bulgaria* (judgment of 4 December 2003) the Court emphasized that effective protection against rape and sexual abuse requires measures of a criminal-law nature and

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<sup>3</sup> In its deposition the Government noted the judgment 1 Co 25/94 of 19 April 1994 of the Supreme Court of the Slovak Republic that ruled that the fact that a certain behavior of a physical person was subject to criminal proceedings or civil proceedings does not prevent a subsequent reaction of other persons to this behavior to become subject to personal integrity protection proceedings under § 11 et seqq. of the Code of Civil Procedure. The Government further noted the judgment of 20 June 2007 11 C 99/2006, in which the District Court in Čadca upheld the personal integrity protection claim filed by a divorced woman against her ex husband by issuing a restraining order banning violation of the applicant's personal integrity (making threats to her life and health and verbal assaults against her) and ordering her ex husband to stay at a minimum distance of 30 meters.

refused the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators.

Albeit in the Court's view in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies; this does not mean that States may withdraw from their responsibility for serious violations of the Convention with a mere reference to the possibility to seek damages in civil proceedings. States have to react to such violations adequately by means of an effective criminal-law mechanism. At the same time, such a mechanism must include a possibility to make a claim in respect of sustained non-pecuniary damages (see the judgment *Kontrová v. Slovakia*). Although it is not a condition that it should happen directly within the criminal proceedings, the situation in Slovakia has developed as follows.

Pursuant to Art. 287 of Act no. 301/2005 Coll., as amended, if a court has found guilty a person charged with a criminal offence, as a result of which damage had been sustained by a third party, the court's judgment shall as a rule impose damage compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory obstacle exists, the court shall always bind the perpetrator to compensate damage if the amount is included in the description of the merits of the judgment, by which the perpetrator has been found guilty or in case of compensation of moral damage sustained as a result of an intentional violent criminal offence under a special law in as far as the damage has not yet been paid. The statement on the perpetrator's obligation to compensate damages must specify the recipient and the adjudicated claim. In justified cases the court may state that the damages shall be paid in installments and the court shall specify the installment payment schedule, having regard to the victim's opinion. The original provision of Art. 287, section 1 read as follows: *"If a court has found guilty a person charged with a criminal offence, as a result of which pecuniary damage had been sustained by a third party, the court's judgment shall usually impose damage compensation to the victim, if the claim had been lodged in a due and timely manner. If no statutory obstacle exists, the court shall always bind the perpetrator to compensate the damages if the amount is included in the description of the merits of the judgment, by which the perpetrator has been found guilty, in as far as the damage has not yet been paid in the stated amount."* Although pursuant to Art. 46 of Act no. 301/2005 Coll. the injured party was defined as a person who had suffered an injury to health, pecuniary, moral or other damage as a result of a criminal offence, compensation of other than pecuniary damage in criminal proceedings was excluded by the above wording of the provision of Art. 287, section 1. This provision was amended by Act No. 650/2005 Coll., which removed the above legal obstacle. In this regard we note the commentary to the Rules of Criminal Procedure concerning the provision of Art. 287, section 1, which, *inter alia*, states the following: *"In consideration of the definition of the term damage (Art. 46, section 1), the obligation to decide on the damage in the convicting judgment, if the claim has been duly raised, shall apply to pecuniary, moral as well as other damage, and also to the violation or jeopardy of the victim's other statutory rights or freedoms, whereas the term "damage" in relation to the harmful effects of intentional violent criminal offences pursuant to special law shall be interpreted in the case of death, rape or sexual violence according to the interpretation of the term "non-pecuniary damage" used in civil proceedings."*

This legislative amendment has aligned the Slovak legal framework with the European standard that enables a crime victim to claim compensation of non-pecuniary damage (moral damage) in the criminal proceedings. In this regard we note that meanwhile the establishment of pecuniary damage incurred as a result of a criminal offence may significantly exceed the scope of the criminal proceedings, in most cases, the evidence collected in relation to the circumstances of the criminal offence and the manner, in which it was committed, shall suffice to establish non-pecuniary damage compensation. After all, the Court, which often awards compensation of non-

pecuniary damage, limits itself in the justification to the following wording: *“Ruling on an equitable basis, the Court decides to award the applicant...”* since the merits of the case have been sufficiently assessed in the justification of the Court’s opinion concerning the violation of the rights guaranteed by the Convention.

It needs to be noted in relation to a victim’s claim for non-pecuniary damage compensation in ancillary proceeding that the criminal court shall apply procedures under the provisions of the Rules of Criminal Procedure, but concerning the conditions of the claim itself, the court shall apply provisions of the civil substantive law, and namely provisions on personal integrity rights of natural persons that are enshrined in the Civil Code as protection of personal integrity provisions in Articles 11 through 16. Albeit financial compensation of the aggrieved party for moral damage, suffering (and/or for the death of the next-of-kin as a result of a violent criminal offence) may never sufficiently compensate the loss of the next-of-kin, it may however to a certain degree compensate the crime victim’s emotional distress due to the criminal offense. If financial compensation is combined with a just punishment of the perpetrator, it may happen that the crime victim leaves the courtroom with a good feeling and believe in justice in the broadest sense of the word. With regard to the above, it may be said that criminal courts in the Slovak Republic have sufficient statutory means available within the ancillary proceedings to decide in the convicting judgments also on non-pecuniary damage compensation.<sup>4</sup> It is probably just a matter of time when criminal courts will start to make use these means to a greater extent. Ancillary proceedings enable victims to seek just satisfaction already during the criminal proceeding without having to enforce their claims in separate civil proceedings.<sup>5</sup>

#### **4. Some rights of crime victims under Article 6 of the Convention (Right to a fair trial)**

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

Meanwhile the Court assesses complaints of applicants who had raised a claim for damage compensation in ancillary proceedings mainly in respect of undue delays in the criminal proceeding, the case law of the Constitutional Court in this regard is not always aligned with the Court’s approach.

In the case *Loveček and others vs. Slovak Republic* (judgment of 21 December 2010) the applicants were clients of a private non-banking investment company SUN, a.s. and sued the Slovak Republic for a violation under Article 6 section 1 of the Convention in respect of undue delays in the criminal proceeding, in which they claimed compensation of damages as aggrieved

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<sup>4</sup> See e.g. the judgment of the Regional Court in Žilina 1To/10/2011 of 22 February 2011, by which the Court with regard to § 287 par. 1 of the Rules of Criminal Procedure bound the perpetrator to compensate the two crime victims for non-pecuniary damage in the amount of EUR 10,000 each; or the judgment of the Regional Court in Prešov 8To/13/2013 of 25 March 2015, by which the Court with regard to § 287 par. 1 of the Rules of Criminal Procedure bound the perpetrator to compensate the two crime victims for pecuniary and for non-pecuniary damage in the amount of EUR 20,000 each.

<sup>5</sup>For more information see Bargel M.: The importance of just satisfaction for crime victims in criminal proceedings, s. 8 et seqq. ([http://www.ja-sr.sk/files/Bargel%20Martin\\_Zadost'ucinenie%20a%20jeho%20význam%20pre%20poškodeného%20v%20trestnom%20konaní.pdf](http://www.ja-sr.sk/files/Bargel%20Martin_Zadost'ucinenie%20a%20jeho%20význam%20pre%20poškodeného%20v%20trestnom%20konaní.pdf))

persons. The applicants' individual claims to damages were later excluded by the Supreme Court from the criminal proceeding and they were referred to civil proceedings. In terms of the incompatible length of the criminal proceedings with the "reasonable time" requirement, the applicants objected under Article 13 of the Convention that they did not have any effective remedy available on the national level. The applicants lodged a complaint with the Constitutional Court on a violation of their right to a hearing "without unjustified delay" and "within a reasonable time". In August 2002 the Constitutional Court declared the complaint inadmissible. It observed that the primary aim of criminal proceedings was to detect criminal offences and to punish perpetrators and not to determine aggrieved parties' claims for damages. Aggrieved parties' claims for damages were of a private-law nature and were predominantly to be asserted before the civil courts.

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

In the case *Javor and Javorová v. Slovakia* (judgment of 15 September 2015) the applicants alleged that their third-party claim for damages, which they had attached to criminal proceedings concerning an offence of which they were the victim, had not been determined within a reasonable time as provided for by Article 6 par. 1 of the Convention. The criminal proceedings had been discontinued based on the investigator's conclusion that there was no criminal case to answer. No charges had been brought against a specific person. Meanwhile, the applicants had lodged a constitutional complaint under Article 127 of the Constitution challenging the length of the proceedings on their third-party claim for damages attached to the above criminal proceedings, alleging a violation of the reasonable-time requirement under Article 6 par. 1 of the Convention and its constitutional equivalent. This complaint was declared inadmissible in March 2010; the Constitutional Court held that an aggrieved party claiming damages in criminal proceedings only benefited from the right to a hearing within a reasonable time under Article 6 after a charge had been brought against a specific person and, in the present case, the charges against A. had been quashed. The applicants lodged a petition with the Court who decided that their right under Article 6 par. 1 of the Convention had been violated.

The Government relied on the position taken by the Constitutional Court and raised an inadmissibility objection to the effect that, in any event, neither of the applicants could have benefited from the Article 6 guarantees because, under the domestic law, such guarantees only extended to compensation claims in criminal proceedings after a charge had been brought against a specific person, in combination with the fact that, in the present case, the charge against A. had been quashed and no new charge had been brought. In its judgment in relation to admissibility, the Court is of the view that, where a Contracting Party decides to provide for the possibility of

making third-party claims in the framework of criminal proceedings, and depending on its specific features, the guarantees of Article 6 must be provided and complied with. The Slovakian legal order undoubtedly provided for the possibility of attaching third-party claims to criminal proceedings. The Court notes that if such a claim is properly made and duly pursued, it constitutes an obstacle to the lodging of the same claim before the civil courts and has further legal consequences. The Court notes that for any such a claim to be considered as having been properly made, it has to specify its defendant, legal basis and amount. Under the domestic law and practice of the ordinary courts, a third-party claim for damages may be included into criminal proceedings with the above consequences as early as with the criminal complaint and without depending on whether charges have been raised against a concrete person. In view of the above, the Court has found no reasons for departing from its previous findings that the guarantees of the civil limb of Article 6 of the Convention apply to third-party claims for damages attached to criminal proceedings in Slovakia, and that, in so far as they are joined to a criminal complaint against a specific defendant or made subsequently to it, they enjoy the said guarantees from the moment they are made. The Court declared the application admissible. The Court concluded that the duration and the unfolding of the proceedings under review were at blatant variance with the “reasonable time” requirement bordering on denial of justice. There has accordingly been a violation of Article 6 of the Convention. The Court awarded the applicants EUR 5,200 jointly in respect of non-pecuniary damage and EUR 1,000 in respect of EUR in respect of costs and expenses.