



# **RIGHTS OF CRIME VICTIMS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: INVADING DEFENDANTS' RIGHTS?**

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LL.M. HUMAN RIGHTS THESIS

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## **EXECUTIVE SUMMARY**

For the purposes of this thesis a victim is defined as an individual complaining that he or she had suffered harm as a consequence of a criminal act of another. The views on the content of victims' rights vary depending on the differences between the common law and civil law systems and between the domestic and international standards, as well as depending on the theoretical models. However, a line of division between procedural and non-procedural rights can be drawn.

In the context of human rights protection system established with the European Convention on Human Rights, the position of the victim is addressed through the establishment of positive obligations of the state concerning the right to protection from becoming a victim of crime. The positive duties of the state in this regard include the duty to criminalize behavior that is contrary to the guarantees in the substantive provisions of the Convention, the duty to investigate and prosecute cases of such unlawful behavior and, in the context of the right to life, the duty to undertake operational measures to prevent incidents of crime. Furthermore, the right to protection from secondary victimization of vulnerable victims occurs in the context of cases concerning the fair trial guarantees.

Since the taking into account of the interests of the victims of crime needs to be counterbalanced to the other rights, including the due process rights, the abovementioned developments at the current stage do not present a threat to the already established rights of defendants in the criminal process.

## INTRODUCTION

In the last two decades, in the human rights discourse there has been a notably rising interest in the rights of crime victims in the systems of criminal justice. Doak notes that, in this period, “the interests of victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems”.<sup>1</sup> However, this was not the case in the past. Conor Hanly explains that “until recently,... there was little formal recognition of any rights applicable specifically to victims within the criminal justice system”<sup>2</sup>.

The developments in the past twenty years and the emerging interest in the rights of crime victims has led to the adoption of a number of international instruments tackling specifically the needs of this category of persons, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (on global level) or the Council of Europe Recommendation No. (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure (on regional level). As it can be seen just by looking at these two examples, some of the instruments deal with the general principles regarding the status of crime victims in the legal systems, whereas others address specific aspects of their position. Furthermore, on national levels many countries have gone through legislative reforms for repositioning the victims of crime within their criminal justice systems. Illustrative examples may be seen with the introduction of the Victims’ Charter in 1990 in the United Kingdom (as an example of the common law world), or the line of amendments of the

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<sup>1</sup> Jonathan Doak, “*Victim Rights in Criminal Trials: Prospects for Participation*”, *Journal of Law and Society*, Volume 32, Number 2, June 2005, pp. 294-316

<sup>2</sup> Hanly, Conor “*Finding Space for Human Rights in the Criminal Justice*”, Conference paper “Human Rights and Criminal Justice”, Law Society of Ireland (2007), page 1

legislative in Germany beginning with the Victim Protection Act as of 1986 (an example coming from continental Europe).

A question emerges how are these developments on both domestic and international level accommodated in the human rights protection system under the European Convention on Human Rights. The Convention system is often seen as the most sophisticated system of international human rights protection, due to its specificities, such as the permanent Court dealing with individual and inter-state applications alleging human rights violation and the binding power of its judgments and decisions. However, the Convention itself does not explicitly guarantee any specific rights of victims of crime. Does it mean that their interest remain unaddressed before the European Court of Human Rights? Certainly not, because the jurisprudence has shown that the Court is not mute on the issue of the interests of victims of crime. Therefore, another question emerges: how does the European Court of Human Rights accommodate the needs and the interests of victims' rights throughout its case-law?

Apart from this, it is often perceived that in the system of protection of human rights under the Convention, in the context of a bipolar relationship between the victims and the accused in criminal procedure, the focus of protection of human rights is at the rights of the defendants. As it is argued "Article 6 of the European Convention on Human Rights has been interpreted or drafted explicitly in a defendant-centered manner"<sup>3</sup>. On a more general level, in the recent developments in the national legal systems, victims' rights are often seen as a "counterbalance of defendants' rights"<sup>4</sup>, which puts them in the

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<sup>3</sup> Conor Hanly, "Finding Space for Human Rights in the Criminal Justice", Conference paper "Human Rights and Criminal Justice", Law Society of Ireland (2007), page 10

<sup>4</sup> See Michael, O'Hear, "Victims and Criminal Justice: What's next?" Editor's observations to "Federal Sentencing Reporter" Vol. 19, No. 2, pp.83-90, December 2006

context of what Michael O’Hear calls “equal rights rhetoric”<sup>5</sup> of the rights of the victims and the accused. In this regard, having in mind the very detailed jurisprudence of the European Court on the fair trial guarantees in Article 6 of the Convention, another issue arises: does the emerging recognition of the specificity of the position of crime victims negatively affect the already established rights of the defendants in the criminal procedure?

This thesis is going to address the abovementioned questions. The statement of the thesis is that although the needs of victims of crime are recognized on certain level in the jurisprudence of the European Court of Human Rights and although there are emerging implicit rights for victims of crime under the European Convention on Human Rights, they do not affect negatively the already established defendants’ rights.

For the elaboration of this statement, firstly, in Chapter I the problems of the definition of the notion of victims of crime and their rights will be addressed, together with some arising dilemmas on the scope of this category, deeply connected to the content of the rights. In this part a short overview will be given on the level of recognition of rights and interests of crime victims in the common law model, on one hand, and the continental law model of national criminal justice systems, on the other, as well as in the theoretical models of criminal justice. The specific methods through which the needs and interests of victims of crime are accommodated in the human rights protection system under the Convention will be looked at in Chapter II. The positive obligations of the state under the Convention, which are most often argued to be the ways of guaranteeing the protection of victims’ rights, will be addressed. Furthermore, other recent developments in the jurisprudence of the Court, through which the interests of

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<sup>5</sup> Ibid, page 88

crime victims are recognized, will be looked at in Chapter III. Finally, in Chapter IV attention will be paid to the ways in which the manners of the addressing the needs or interests of victims of crime affect the due process or fair trial rights of the defendants in the criminal process. I will argue that the developments in the jurisprudence of the Court regarding victims' needs do not impair the rights of defendants.

It is probable that some occurrences in the jurisprudence of the Court that will be left out of the scope of this thesis will potentially emerge in the future as significant for the issue at stake. Also, this thesis will not tackle the question of the rights of victims to compensation, since this is a wide topic that needs to be elaborated on its own and may be the topic of a different paper.



## CHAPTER I: DEFINING THE ISSUE – THE NOTION OF CRIME VICTIMS’ RIGHTS

### *1.1 Defining ‘Victims of crime’*

The necessarily first step before approaching in substance the subject matter of the content of victims’ rights in the Strasbourg human rights protection system and their relationship to the defendants’ rights would be to delineate the scope of the meaning of the notions *victim of crime* and *crime victims’ right* for the purposes of this thesis. This prerequisite stems from the fact that there is a greater difficulty in grasping the precise meaning of these notions than it might appear. What Doak<sup>6</sup> names as “the semantic difficulties inherent in the very concept of ‘victims’ rights”<sup>7</sup> is evident from the multiplicity of meanings and connotations in which the terms have been used, both in the legal and non-legal, academic and political discourse. Since the scope of the notion is inevitably connected to the understanding of the very content of the rights of this category of persons, I will look into some of the difficulties and dilemmas and the academic and theoretical approaches in defining these concepts, as well as the definitions provided in the relevant international instruments.

One of the difficulties in the process of demarcation of the exact scope of the notion, which specifically occurs in the human rights context, is the problem whether to recognize a conceptual difference between the notions of ‘victims of crime’ and ‘victims of human rights violations’, which is of critical importance for the present thesis. The

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<sup>6</sup> Jonathan Doak, “*Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*”, Hart Publishing, Oxford and Portland, Oregon (2008)

<sup>7</sup> *Ibid*, page 19

primary conceptual distinction is along the line of division between human rights violations by private individuals, on one hand, and by state officials, on the other. Human rights primarily focus on the State as a perpetrator, whereas victimology turns towards victims of crimes committed by individuals acting in contrary to the state's criminal laws.<sup>8</sup> It is observed that one of the reasons for the lack of a clear-cut distinction between victims of crime and victims of human rights violations is the development of international human rights law in the direction of increasing responsibility of the states for acts of human rights violations by private individuals.<sup>9</sup> Apart from this state-individual distinction, another possible cause, as noted by Garkawe, why these two concepts frequently tend to be disconnected is the perception that, in criminal justice terms, the discipline of human rights focuses mainly on the hardly-earned rights of the defendant.<sup>10</sup> This perception leads to the constant skepticism towards the emergent victims' rights discourse as a potential risk or threat towards the established set of rights for the accused in the criminal process. As Goody puts it, "the biggest challenge for victim-centered criminal justice initiatives is to convince the criminal justice

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<sup>8</sup> Sam Garkawe, "*Victims' Rights are Human Rights*", Presentation to the 20th anniversary celebration of the 1985 UN Victims Declaration, held in Canberra on 16 November 2005, available online at: <http://www.victimsupport.act.gov.au/res/File/garkawe%20speech.pdf>, last visited November 3<sup>rd</sup>, 2009

<sup>9</sup> "*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*", Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, Professional Training Series No. 9, United Nations, New York and Geneva, 2008, available online at: <http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducation.aspx>, last visited: November 3<sup>rd</sup>, 2009, pp. 751-752. Traditionally, acts of crime, on one hand, were understood as acts of the individual contrary to the penal laws of the state and acts of human rights violations, on the other hand, were defined as acts of the state authorities. With the evolving doctrine of 'positive obligations' of the states for the protection of human rights of the individuals, which will be discussed in Chapter III, this distinction becomes less and less clear and obvious.

<sup>10</sup> See: Sam Garkawe, "*Victims' Rights are Human Rights*", Presentation to the 20th anniversary celebration of the 1985 UN Victims Declaration, Canberra, November 2005

establishment that they do not erode defendants' rights".<sup>11</sup> Therefore, the hesitancy to bridge the potential disconnection between victims of crime and victims of human rights violations is partly due to this fear of invading the defendants' rights.

Despite the mentioned fears and caution, the common needs and interests of the two categories appear to be a sufficient reason why a number of authors approach the issue without making this distinction or even go further to plead for inclusion of the victims' rights movement in the international human rights agenda. For example, Klug<sup>12</sup> begins her analysis of victims' rights by using both definitions of victims of crime and victims of human rights violations in international human rights documents, without discussing the potential difference. Doak argues that the development of both the disciplines of victimology, on one hand, and of human rights, on the other, led to the formulation of a more integrated approach which is directed towards a more inclusive treatment of different stakeholders (including victims) in the system of criminal justice.<sup>13</sup> Some authors go even further to plead for adoption of a convention tackling specifically crime victims' rights.<sup>14</sup> Garkawe formulates a list of arguments "as to why victims' rights

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<sup>11</sup> Jo Goodey, *Victims and Victimology: Research, Policy and Practice*, Pearson Education Limited (2005), page 180

<sup>12</sup> Francesca Klug, "Human rights and victims", in: "Reconcilable rights? Analyzing the tensions between victims and defendants" Cape, Ed, (ed.) Legal Action Group, London, UK, (2004), pp. 111-124

<sup>13</sup> Jonathan Doak, "Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties", Hart Publishing, Oxford and Portland, Oregon (2008), page 30

<sup>14</sup> For a detailed analysis of the need and possible prospects of a convention on the rights of victims of crime see Willem van Genugten, Rob van Gestel, Marc Groenhijsen and Lianne Letschert, "Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victim's Rights", *Netherlands Yearbook of International Law*, Vol. 37, 2006, pp. 109-154

are human rights”<sup>15</sup>, pointing out to the need of a switch from a ‘welfare approach’, driven by the *needs* of the victims, towards a *rights*-based approach.<sup>16</sup>

In this context, it is reasonable to accept a concept of crime victims including, amongst other characteristics, the notion that they are a category of persons whose human rights have been infringed by the criminal act of an individual and not only by the state authorities. This line of argumentation is not only plausible, but also avoids the difficulty of differentiating these groups and the dilemma of whether one can argue on a set of rights of crime victims’ or the discussion is still on the level of taking into account the victims’ needs and/or interests.

However, there still remain difficulties in the process of delineating the term ‘victim’. An issue occurs from the width or the scope of the notion of the victim. A question arises whether this term encompasses only the direct victims of the criminal act, who have themselves directly suffered its consequences, or it also includes other categories of persons, such as the closest relatives of the direct victims, the potential and the indirect victims. For the purpose of an overview of the approaches taken on this issue in the existing definitions of victims, several of them will be discussed below.

It is appropriate to begin with the “magna charta of the international victims’ movement”<sup>17</sup>, the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>18</sup>, which defines victims as

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<sup>15</sup> See: Sam Garkawe, “*Victims’ Rights are Human Rights*”, Presentation to the 20th anniversary celebration of the 1985 UN Victims Declaration, Canberra, November 2005

<sup>16</sup> Garkawe also provides an elaboration of the two most commonly given counter arguments to treating victims’ rights as human rights, the first being the perception that there is not a necessity for victim rights, but the focus should be on victims *needs*, and the second one (also mentioned above): that victims rights are in conflict with the defendants rights and are therefore unacceptable.

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”<sup>19</sup>

Furthermore, Article 3 of the Declaration states that the term ‘victims’ includes also “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”, thus encompassing the ‘indirect victims’ and affording protection to them, where appropriate.

Reaffirming the principles expressed in the abovementioned Declaration, the UN General Assembly adopted the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>20</sup>. The definition of victims in Article 8 of the Basic Principles follows the line introduced with the Declaration and identifies victims as:

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

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<sup>17</sup> Van Dijk, Jan J.M. “Benchmarking legislation on crime victims: The UN Victims Declaration of 1985”, in Vetere, E. & David, P. (eds), *Victims of Crime and Abuse of Power: Festschrift in honor of Irene Melup*, 11th Congress on Crime Prevention and Criminal Justice, 2005

<sup>18</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, adopted by General Assembly resolution 40/34 of 29 November 1985, available online at: <http://www.un.org/documents/ga/res/40/a40r034.htm> , last visited November 3<sup>rd</sup>, 2009

<sup>19</sup> *Ibid*, Article 1

<sup>20</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

This definition, thus, as elaborated in detail by Bassiouni<sup>21</sup>, encompasses four categories of victims: 1) individuals who have suffered the harm directly; 2) members of the family or the household, as well as dependants, of the direct victims; 3) individuals who suffered harm while intervening to prevent violations and 4) collective victims (which may include members of an identifiable group whose victimization was based on their membership in the group, or different organizations or entities).<sup>22</sup>

Looking at the Rules of Procedures and Evidence of the International Criminal Court, a similar definition in respect of the persons included can be noticed. Namely, Rule 85 (a) defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”<sup>23</sup>. However, this is again broadened by Rule 85 (b) stating that “victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.<sup>24</sup>

On the other hand, when examining the relevant documents on regional level, there is a notable difference. The Council of Europe Recommendation to member states on assistance to crime victims<sup>25</sup> limits the notion of victim to only natural persons, thus

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<sup>21</sup> M. Cherif Bassiouni, “*International Recognition of Victims’ Rights*”, Human Rights Law Review, Vol. 6 No. 2, 2006

<sup>22</sup> *Ibid*, page 257

<sup>23</sup> Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, September 2002 (In Section III of the *Rules*, titled “Victims and Witnesses”)

<sup>24</sup> *Ibid*, Rule 85 (b)

<sup>25</sup> Recommendation Rec (2006)8 of the Committee of Ministers to member states on assistance to crime victims, Adopted by the Committee of Ministers on 14 June 2006, available online at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/fight\\_against\\_terrorism/2\\_Adopted\\_Texts/Rec%282006%298E%20Assistance%20to%20crime%20victims.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_Adopted_Texts/Rec%282006%298E%20Assistance%20to%20crime%20victims.pdf), last visited November 3<sup>rd</sup>, 2009

excluding collective victims.<sup>26</sup> This definition is similar to the one present in the EU Council Framework Decision on the standing of victims in criminal proceedings<sup>27</sup>, stating that for the purposes of the Decision, “victim shall mean a *natural person* who has suffered harm...”. Thus, the documents in European context obviously limit the width of the concept, allowing only for the inclusion of individuals in the concept.

Apart from these dilemmas, the academic approaches to the issue additionally focus on another range of problems in outlining the notion of victims of crime, mostly within the framework of the rapidly developing discipline of victimology. One of the authors who undertake the task of offering a definition is Doak, who, after analyzing several theoretical definitions and taking into account the provisions of some of the relevant international documents, uses the following meaning of the term ‘victim’:

an individual in recognition of his or her complaint that he or she has suffered harm as the result of the criminal action of another.<sup>28</sup>

Brennan<sup>29</sup>, on the other hand, approaches the question by examining some specific characteristics of the ‘ideal victim’. In her view, “‘victim’ suggests a non provoking individual hit with the violence of “street crime” by a stranger.”<sup>30</sup> She argues that the main attributes of the ‘ideal victims’ are vulnerability, passivity, individuality,

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<sup>26</sup> *Ibid*, Appendix, Article 1.1: Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.

<sup>27</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:EN:PDF> , last visited November 3<sup>rd</sup>, 2009

<sup>28</sup> Jonathan Doak, “*Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*”, Hart Publishing, Oxford and Portland, Oregon (2008), page 24.

<sup>29</sup> Carol Brennan, “*The Victim Personal Statement: Who Is the Victim?*”, [2001] 4 Web JCLI (Web Journal Of Current Legal Issues), available online at: <http://webjcli.ncl.ac.uk/2001/issue4/brennan4.html>, last visited: November 4, 2009

<sup>30</sup> *Ibid*, page 4

honesty, convincingness; but at the same time she acknowledges that there are victims of crime that fall out of this paradigm. These can be victims of crime that have previous relation to the offender (for example, in sexual offences or domestic violence), victims deemed of having potential effect on the criminal act in question or even contribution to it, etc. Brennan is aware of the necessity to include these category in the victims' paradigm and, therefore, to apply the necessary standards of treatment also to them.

Similarly, Christie<sup>31</sup> formulates the 'victim' notion through constructing the dichotomy 'ideal victim-ideal offender' and pointing out to the interdependence between these two categories. Finally, he identifies the victim as

a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim'<sup>32</sup>.

It can be argued that this definition does not provide much insight in the specific characteristics of the victims and appears to be somewhat tautological.

Finally, an atypical definition and, in the words of Goodey, a “dynamic understanding of the ‘victim’ identity”<sup>33</sup> is given by Rock:

“‘Victim’ in other words, is an identity, a social artefact dependent, at the outset, on an alleged transgression and transgressor, and then, directly or indirectly, on an array of witnesses, police, prosecutors, defence counsel, jurors, the mass-media and others who may not always deal with the individual case but who will nevertheless shape the larger interpretive environment in which it is lodged.”<sup>34</sup>

This characterization acknowledges the impact of the variety of agents in the criminal process, thus providing a more flexible concept that potentially includes several positions of an individual in the event of becoming a victim.

<sup>31</sup> Nils Christie, “*The Ideal Victim*” in E. Fattah (ed.) “From Crime Policy to Victim Policy”, Basingstoke, Macmillan (1986)

<sup>32</sup> *Ibid*, page 18

<sup>33</sup> Jo Goodey, “*Victims and Victimology: Research, Policy and Practice*”, Pearson Education Limited (2005)

<sup>34</sup> Paul Rock, “*On becoming a victim*”. In: Hoyle, Carolyn and Wilson, Richard, (eds.) New visions of crime victims. (2002) Hart Publishing, Oxford, page 14



Having in mind the discussion presented above, for the purpose of this paper, since it will explore the individual human rights of victims of crime and their interactions or potential conflict with the rights of the defendants in the criminal process, a definition similar to Doak's will be used. Namely, the term 'victim' will be used with the meaning of an individual (a natural person) complaining that he or she had suffered harm as a consequence of a criminal act of another. This definition, emphasizing that the individual is *complaining* of having suffered certain harm, avoids the potential problems that might occur in light of the right to 'presumption of innocence' of the defendant.<sup>35</sup> It has to be noted that for the purpose of giving an insight of the rights of victims of crime, a definition of victims that accommodates them as victims of human rights violations and, moreover, takes into account the violation of human rights not only by the state, but by an *individual* as well, would only be relevant.<sup>36</sup> Furthermore, in the paper the term victim is used to encompass the position of the victim in the various stages of the criminal process and also beyond its frames, a position which will be connected to the various aspects of the victims' rights as a subcategory of the general category of human rights: the potential victim, at the stage before the actual victimization takes place; the victim in the relation to the investigation of the crime in question and the victim as a participant in the criminal procedure (for an example, as a witness or through the possibility to influence the decisions in the criminal process).

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<sup>35</sup> Especially problematic when sexual offences (where the consent given by the alleged victim, and thus his or her status of victim, is disputable) are in question.

<sup>36</sup> For example, the UN Declaration on the Elimination of violence Against Women, adopted by General Assembly resolution 48/104 of 20 December 1993, in Article 4 (c) provides that: "States ... should exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, *whether those acts are perpetrated by the State or by private persons*" .

## *1.2 Crime Victims' Rights*

Before addressing the problem of the manner in which the victims of crime are addressed under the Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights, hereinafter: the Convention), it is necessary to examine the specific content of rights which fall under the notion of 'victims' rights' in general. Yet, determining the content and the categorization of rights of crime victims on a general level is an even more complex issue than the previous one. This problem stems from the significantly diverse position of the victim in the continental model of criminal justice in comparison to the Anglo – American, or the common law model, as discussed below.<sup>37</sup> There is, furthermore, an existing discrepancy of the victims' rights standards in the international mechanisms, on one hand, and on domestic level, in the other. These problems will inevitably occur as an obstacle in the process of demarcating the content of victims' rights.

### *1.1.1 Continental law models*

The position of the victim of crime within the frameworks of the criminal justice systems in continental Europe is much stronger in comparison to the common law world. Many of the European states provide for the possibility of a model of formal participation of the victim in the criminal justice process, not only in the trial stage, but also beyond it.

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<sup>37</sup> Although, in light of the recent jurisprudence of the ECtHR, it is argued that there is a movement of the standards regarding criminal process away from the traditional differentiation between 'adversarial' and 'inquisitorial' models towards a 'participative model' of criminal justice. See: John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, Modern Law Review, Vol. 68, No. 5, pp. 737-764, September 2005, for the developments in this movement on the basis of an analysis of the evidentiary systems in both civil law and common law systems of criminal process in Europe.

The participation aspect of the victims' place is strengthened by the possibility to join the criminal trial, by using the institutes of 'subsidiary prosecution' (for example in Germany), 'partie civile' (France is the typical example) or the 'adhesion procedure'. Regarding the right to participation in the criminal process, four models have been distinguished by Alan Young stemming from the European experiences: 1) right to prosecute privately for any offence (e.g., Finland and Cyprus); 2) right to prosecute privately for petty or minor offences (e.g., Austria, Denmark, Germany, Poland and others); 3) right to secondary prosecution in cases where the public prosecutor does not proceed with prosecution (e.g., Austria, Norway and Sweden) and 4) right to subsidiary prosecution through assisting the prosecutor (e.g., Austria, Germany, Poland, Sweden and others).<sup>38</sup> It is evident that, though varying in the particular forms, European systems do provide for a specific status of the victims in the criminal process.

An illustrative example can be seen in Germany, where victims of a certain category of crimes may act as 'subsidiary prosecutors', 'private prosecution' or 'private accessory prosecution'. As pointed out by Löffelmann, "participation of the victim in the criminal proceedings is rather the rule than the exception"<sup>39</sup> and in the past years the position of the victim has largely been a subject of legislative reforms. Löffelmann analyzes the changes in the position of the victim through the changes in the laws in Germany and discusses the rights of participation and protection of the victim from two aspects: 1) the functional role of the victim in criminal proceedings and 2) the position of the victim in criminal proceedings from a victimological perspective. The rights of the

<sup>38</sup> Alan Young "The Role of the Victim in the Criminal Process: A Literature Review - 1989 to 1999" Policy Centre for Victims Issues, Dept. of Justice [Ottawa], 2001, page 48

<sup>39</sup> Markus Löffelmann, "The Victim in Criminal Proceedings: A Systematic Portrayal of Victim Protection under German Criminal Procedure Law", available online at: [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no70/p031-40.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no70/p031-40.pdf), last visited November 28, 2008

victim in the stage of filing a report for a criminal complaint, as well as in the position of a prosecuting party, the increase of the protection of the personality of the victim and the right to participation in the criminal proceedings<sup>40</sup>, the possibility for a victim – offender mediation, the increase of the procedural and information rights of victims and the reduce of burdens for the victim stemming from the criminal process<sup>41</sup> point out to the significance of the victims position both as the initiator of the criminal proceedings and as an important source of evidence.<sup>42</sup>

For another example, the French criminal justice system (similarly to the Belgian) provides for the opportunity of the victim to become a party to the proceeding by undertaking the ‘adhesion procedure’ or ‘partie civile’, with the possibility to claim compensation before the criminal court. Where no prosecution has been brought, the victims may initiate proceedings directly before the court, or in certain cases, may bring the case to the *juge d'instruction*. The position of the victim is much strengthened in the pre-trial investigation stage, when the victims may have an access to the case file or request the judge to undertake certain actions in the investigation stage.<sup>43</sup>

Another example of a continental criminal justice system, illustrative for the position of the victim, can be seen in Poland, thus providing an example from the Eastern European experiences. As pointed out by Bienkowska<sup>44</sup>, the rights of victims of crime in the Polish criminal procedure include the right to become a subsidiary prosecutor, which

<sup>40</sup> Reached by the Victims’ Protection Act (*Opferschutzgesetz*) of 18 December 1986

<sup>41</sup> With the Victims Rights Reform Act as of 2004.

<sup>42</sup> See: Markus Löffelmann, “*The Victim in Criminal Proceedings: A Systematic Portrayal of Victim Protection under German Criminal Procedure Law*”,

<sup>43</sup> Jacqueline Hodgson, “*Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reforms*”, *The International and Comparative Law Quarterly*, Vol. 51, No. 4 (Oct., 2002), pp. 781-815

<sup>44</sup> Ewa Bienkowska, “*Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland*”, *Journal of Criminal Justice*, Vol. 21, (1993), pp. 47-60

enables them to propose evidence or witnesses or even to question witnesses.<sup>45</sup> When the public prosecutor has decided not to initiate the criminal proceedings, victims may proceed with the case having the status of a private prosecutor. Furthermore, the victims have the right to become civil plaintiffs within the criminal procedure by filing adhesive suits. The analysis of the victim participation in criminal cases conducted on a representative number of criminal cases in Poland showed that the participation of the victims in the criminal justice process “enhances satisfaction with justice”.<sup>46</sup>

All of the abovementioned experiences demonstrate that in the continental systems, the victims have a certain kind of a formally recognized status in the framework of the criminal process. This status in certain countries enables them to undertake actions for the protection of their interests in the criminal process. On the specific issue, there is a large discrepancy between the continental and the common law systems.

### *1.1.2 Common law experiences*

In light of these and other experiences from the continental law world, as well as the development of international and regional human rights standards, there is a big debate and movement for repositioning the victims in the criminal justice systems in the common law world, where, as pointed out by Bienkowska, “the role of the victim is a passive one; he/she is an observer or, at best, a witness”<sup>47</sup>. Also, there is a significant number of works written on the reforms in question. One of the classifications offered in the literature on this subject is the one between “service rights” and “procedural rights” of

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<sup>45</sup> Ibid, page 48

<sup>46</sup> Ibid, page 53

<sup>47</sup> Ewa Bienkowska, “*Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland*”, *Journal of Criminal Justice*, Vol. 21, (1993), page 47

the victims. Ashworth<sup>48</sup> makes this distinction, providing also for a list of specific rights falling under these two categories. Thus, in the group of ‘victims’ rights to service’, he enumerates the right to support in the period after the criminal act, the right to be kept informed and to be treated with respect and sympathy by the state authorities during the investigation process; a right to be treated with respect and understanding before and during court proceedings; and a right to compensation.<sup>49</sup> He enlists the rights “to be consulted on the decision whether or not to prosecute, on the bail-custody decision, on the acceptance of a plea, on sentence, and on parole release”<sup>50</sup> in the group of ‘procedural rights’, emphasizing their different nature, but at the same time questioning the extent to which these rights of the victims should influence the outcome of the decision making in the criminal process.

A similar categorization of victims’ rights to can be seen at Fenwick’s<sup>51</sup> study, when she examines the victims’ position in the legal system of the United Kingdom. Although recognizing that the criminal justice system of the United Kingdom, in comparison to other jurisdictions, does not provide victims with participative or consultative rights, she notes the signs of movement towards a more participatory system. In her view, the main difference between “service” and “procedural” rights is the possibility for eventual impact and influence of the victim to the criminal process. Procedural rights have the potential for the change of the victims’ position in this direction, whereas the service rights do not have this effect, but nevertheless improve the

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<sup>48</sup> Andrew Ashworth, “*Victim Impact Statements and Sentencing*”, *Criminal Law Review* (July 1993), pp. 498 - 509

<sup>49</sup> *Ibid*, page 499

<sup>50</sup> *Ibid*.

<sup>51</sup> Helen Fenwick, “Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process” *The Modern Law Review*, Volume 60, Number 3 (May 1997), pp. 317-333

situation of the victims after the harm suffered. As one of the service rights, in light of the provisions of the United Kingdom's Victim Charter<sup>52</sup>, she examines the victims' emerging<sup>53</sup> *right to information*, both concerning important developments in the case, as well as the right to post-trial information. In the group of procedural rights, she elaborates the 'pre-trial right' to participation in the bargaining decision, the 'procedural right at trial' to participation in sentencing decisions and the 'post-trial procedural rights'.<sup>54</sup>

Alternatively, Doak<sup>55</sup> in his detailed analysis of the position of victims of crime in the United Kingdom, but also taking into account the international human rights standards, differentiates other several categories of victims' rights. He names the first category of rights as the '**right to protection**', which he subdivides into two groups: on one hand, 'right to protection from *becoming* victims of crime', and on the other hand, protection from 'secondary victimization', mostly examined in the context of victims' appearance in the course of the criminal proceedings as witnesses and especially taking into account the victims of sexual offences and domestic violence. The second group of rights is connected to the '**right to participation**', where he also accommodates the potential involvement of the victim of the crime in the different stages of the criminal proceedings. The third category that he elaborates on is the so-called '**right to justice**' or more precisely the 'right to remedy' and the fourth category is the '**right to reparation**'.

Interestingly, all of the abovementioned classifications bring up the right *participation* of victims of crime to and its relevance from the aspect of the position of

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<sup>52</sup> *Victim's Charter*, Home Office, London (1990)

<sup>53</sup> "The right to information... is still in its infancy". Fenwick, page 325

<sup>54</sup> Helen Fenwick, "Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process" *The Modern Law Review*, Volume 60, Number 3 (May 1997), pp. 326-332

<sup>55</sup> Jonathan Doak, "*Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*", Hart Publishing, Oxford and Portland, Oregon (2008), pp. 37-240

the victim in the criminal process and the relation to the rights of the accused. Nevertheless, they do not establish a clear and precisely determined content of this right, which points out that the issue of the extent of victim participation is somewhat more contentious than the other aspects of the protection of victims' rights.<sup>56</sup> Victim participation appears particularly problematic in view of the traditionally perceived character of the criminal trial, as a two-party process between the state and the defendant with its main focus being the final decision on the guilt of the accused. Sorochinsky<sup>57</sup> argues that despite the efforts to include the victim of the crime into the criminal justice process, it is nevertheless seen as "a process of confrontation between the criminal and the state".<sup>58</sup> Furthermore, there are authors that claim that the participation in the criminal process actually burdens the victims and may even subject them to secondary victimization.<sup>59</sup> Thus, the need to accommodate the victims' interests in the process would appear as the most controversial from the point of view of the already strongly affirmed procedural rights of the defendant.

### *1.1.3 Victims in the theoretical models of criminal justice*

The need of inclusion of the victim as a relevant stakeholder in the criminal justice process has been the subject of meticulous theoretical examination, particularly in

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<sup>56</sup> See Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation", *Journal of Law and Society*, Vol. 32 No. 2, June 2005, pp.294-316

<sup>57</sup> Mykola Sorochinsky, "Prosecuting Torturers, Protecting 'Pedophiles': Towards a Power Balance Model of Criminal Process in International Human Rights Law" (January 19, 2009). Available at SSRN: <http://ssrn.com/abstract=1330104>

<sup>58</sup> *Ibid*, page 21

<sup>59</sup> Raquel Aldana-Pindell, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State Sponsored Crimes", *Human Rights Quarterly*, Vol. 26, No. 3 August 2004, pp.605-686



the context of the recently more and more developing ‘restorative justice movement’<sup>60</sup>. As Ashworth explains, “one of the aims of the restorative justice movement is ... changing the focus of the term ‘criminal justice’ itself, away from the assumption that it is a matter concerning only the state and the defendant/offender, and towards a conception that includes as stake holders the victim and the community, too”<sup>61</sup>. In this context, he distinguishes three points of principle in the criminal justice systems that have the leading impact on the substance and extent of victims’ rights: *the principle of compensation* for wrongs (where he elaborates on the legitimate interest of the victim to compensation), *the principle of proportionality* of the gravity of the offence and the punishment to the offender (which, in his view, goes in opposite line with the victims’ influence or impact on the sentencing stage of the procedure) and *the principle of independence and impartiality* (or the right to the defendant of a fair hearing before an independent and impartial tribunal). The latter is particularly interesting with regard to the conflict which may occur with the potential participation of the victims in the criminal trial.

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<sup>60</sup> Tony Marshall defines ‘restorative justice’ as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’ (As cited by Andrew Ashworth in “*Responsibilities, Rights and Restorative Justice*”, British Journal of Criminology [2002], Vol. 42, no. 3, page 578). A useful insight of the debate on repositioning the victims in the criminal justice system as part of the restorative justice movement is given in the articles in “*Crime, Victims and Justice: Essays on Principles and Practice*”, Ed. by Hendrik Kaptein and Marijke Malsch, Ashgate Publishing Limited, Hampshire, England, 2004

<sup>61</sup> Andrew Ashworth in “*Responsibilities, Rights and Restorative Justice*”, British Journal of Criminology [2002], Vol. 42, no. 3, page 578. Nevertheless, some authors make a differentiation between the notions of ‘victim oriented criminal law’ and ‘restorative justice’. For example, Ybo Buruma explains ‘restorative justice’ in the following manner: “the perpetrator is still in the middle of the procedure, although the victim can have his say as well”. Ybo Buruma, “*Doubts on the Upsurge of the Victim Role in Criminal Law*”, in “*Crime, Victims and Justice: Essays on Principles and Practice*”, Ed. by Hendrik Kaptein and Marijke Malsch, Ashgate Publishing Limited, Hampshire, England, 2004, page 3

Another interesting analysis determining the scope and content of the rights of victims of crime can be seen in Sorochinsky's<sup>62</sup> study of the models of criminal process in international human rights law. Namely, he examines the emerging victims' rights in the different international courts' jurisprudences in light of Herbert Packer's two models of criminal process, the one being the 'due process model', on which he argues that is mostly focused on the individual rights of the accused, and the other being the 'crime control model', focusing on the efficiency and speed of the criminal process itself. In this context, Sorochinsky makes the distinction between 'purely procedural rights' of the victims of crime (such as the right to participation, the right to information), on one hand, and 'substantive' rights of victims of crime, where he interestingly includes the right to have the offenders punished, claiming that the first group "is not, at least at this stage, in such direct conflict with the established notions of due process for criminal defendants as to question the viability of the due process model in human rights law"<sup>63</sup>.

Examining the weaknesses of Packer's two criminal process models from the aspect of victims' participation in the criminal process, some authors have formulated and proposed new normative models of criminal procedure, addressing the need of recognition of crime victims' rights. One of those new proposed models is Beloof's 'victim participation model'<sup>64</sup>, that is supposed to "complement, but not replace, Packer's two models"<sup>65</sup>. Having in mind that both of the Packer's models are built upon (and illustrative of) the values underlying the components of the criminal process, Beloof

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<sup>62</sup> Mykola Sorochinsky, "Prosecuting Torturers, Protecting 'Pedophiles': Towards a Power Balance Model of Criminal Process in International Human Rights Law" (January 19, 2009). Available at SSRN: <http://ssrn.com/abstract=1330104>

<sup>63</sup> *Ibid*, page 7

<sup>64</sup> Douglas Evan Beloof, "The Third Model of Criminal Process: The Victim Participation Model" Utah Law Review, No. 2 (1999), pp. 289–330

<sup>65</sup> *Idem*, page 292

formulates the ‘victim participation model’ in accordance with its principal value - the priority of the position of the victim of the criminal act.<sup>66</sup> Parting from this value based position of the victim, he differentiates between “due-process-like” rights (including the right to participation) and other types of rights,<sup>67</sup> a classification in substance similar to the abovementioned differentiations between “procedural” and “substantive”.

#### *1.1.4 Conclusion*

What follows from the examination of the different context for looking at the position of the victim is that although there is a lack of consensus on the concrete substance and the scope and extent of the rights of victims’ of crime, the emerging rights of victims of crime on international level or already guaranteed in the criminal justice systems of certain countries are both of *procedural* and *non-procedural* nature. This means that the treatment of the victims of crime is the subject of the interests not only throughout the course of the criminal process itself, but also before it begins and after it ends. This is the only position that can be taken having in mind the aim of ameliorating the situation and suffered harm of the victims of crime. This conclusion is also very relevant for the examination of the rights of victims of crime in light of the jurisprudence of the European Court of Human Rights, especially in the context of the relationship between these two categories of rights of victims and the rights of the defendants, as these rights also appear as procedural rights under Article 6 of the Convention, on one

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<sup>66</sup> He builds his model mainly parting from the common law concept of the criminal process and the jurisprudences of the courts in the United States and explains that there are three basic concept related to the victims of crime implied in the language of the federal and state statutes or constitutions: the principles of fairness to the victim, respect fro the victim and dignity of the victim.

<sup>67</sup> Douglas Evan Beloof, “*The Third Model of Criminal Process: The Victim Participation Model*” Utah Law Review, No. 2 (1999), page 295

hand, but as other non process related human rights guaranteed as substantive rights throughout the text of the Convention.

The following Chapters II and III will deal with the concrete manners in which the position of crime victims is addressed in the human rights protection system under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>68</sup>, known as the European Convention on Human Rights (hereinafter: the Convention), adopted by the Member States of the Council of Europe and opened for signature in Rome on November 4, 1950. On one hand, the doctrine of positive obligations of the states will be looked at in Chapter II from the aspect of its significance to the protection from becoming a crime victim. This will be followed by an exploration of other relevant developments in the context of the ‘fair trial’ guarantees in the Convention, where the European Court of Human Rights (hereinafter: the Court) pays specific attention to the position of victims in the criminal process.

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<sup>68</sup> The Convention entered into force on September 3, 1953. The complete text of the Convention and its Protocols is available online at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>, last visited November 4, 2009

## CHAPTER II: POSITIVE OBLIGATIONS AND VICTIMS' RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

### *II.1. General observations on victims' rights under the Convention*

Before entering the specific field of positive obligations, it is necessary to give a general note on the Convention and victims' rights. Although the Convention includes a detailed catalog of guaranteed human rights and fundamental freedoms, it does not explicitly provide for any specific rights of the victims of crime.<sup>69</sup> In contrast to this, Article 6 of the Convention, titled "Right to a fair trial", as a whole focuses on the fair trial right. In addition to the aspects of the fair trial rights of a persons in the determination of their civil rights and obligations, it enlists a number of rights of the persons being tried in criminal cases before the courts, including the right to be tried by and independent and impartial tribunal established by law, the right to be tried within a reasonable time, the presumption of innocence, the right to be informed of the accusation against him/her, the right to defence, the right to examine witnesses and the right to an interpreter.

However, the fact that there is not an explicit guarantee of the rights of victims of crime in the Convention does not mean that the victims of crime are left out of the scope of protection of the Convention. On the contrary, the Court throughout its jurisprudence has developed ways and mechanisms to (although often not explicitly) address and give the appropriate attention to the human rights of this category of persons. For example in

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<sup>69</sup> Emmerson, Ashworth and Macdonald, in the beginning of their analysis of victims' rights under the Convention, point out that "the principle purpose of the Convention is the protection of the right of individuals from infringement by states". (See. Emmerson, Ben; Ashworth, Andrew and Macdonald, Alison "*Human Rights and Criminal Justice*", Second Edition, Sweet & Maxwell, London (2007), page 741) However, as mentioned above, the definition of the victim of crime includes harm suffered not only by acts of the state authorities, but by actions of individual private persons, as well.

the context of the fair trial rights, Klug argues that “a range of additional rights have effectively been 'read into' the right to a fair trial by the ECtHR including, ..., protection of witnesses or victims”<sup>70</sup>.

Examining the jurisprudence of the Court from the aspect of the different methods in which it has been addressing victims of crime and with regard to the categorizations of victim's rights previously mentioned, some authors have formulated different categories of the obligations and duties of the states and, correspondingly, rights of victims of crime under the Convention. When approaching this issue, Emmerson, Asworth and Macdonald differentiate the following categories of state obligations corresponding to victims' rights: obligations to prevent infringements of rights under Articles 2 and 3, obligations to have in place laws which penalize infringements of basic rights, duty to investigate alleged breaches of Articles 2 and 3, obligations to prosecute and give reasons, rights of victims and witnesses in criminal trials and victims' rights in the sentencing process.<sup>71</sup> Correspondingly, Soroichinsky provides for a similar classification of the state duties and refers to two groups of such duties related to the protection of rights of victims. Firstly, he addresses the '*duty to criminalize*' in light of the obligations of the state to enact criminal legislation providing punishments for criminal acts that constitute violations of a number of the rights guaranteed by the Convention. The second category that he mentions is '*the duty to investigate and the duty to prosecute*', related to violations of the right to life and the prohibition of torture. In his view, recent developments of the jurisprudence of the Court demonstrate that this category of duties for the states is closer

<sup>70</sup> Francesca Klug, “*Human rights and victims*”, in: “Reconcilable rights? Analyzing the tensions between victims and defendants” Cape, Ed, (ed.), Legal Action Group, London, UK, (2004), page 8

<sup>71</sup> Emmerson, Ben; Ashworth, Andrew and Macdonald, Alison “*Human Rights and Criminal Justice*”, Second Edition, Sweet & Maxwell, London (2007), pp. 741- 784

and closer to encompassing a ‘substantial’ right of the victim of the crime to punishment of the offender.<sup>72</sup>

A question that emerges from the abovementioned is: what are the specific approaches of the Court in dealing with violations of the human rights that are part of the Convention through which the protection of the rights of victims is addressed and developed? There are several directions in which the jurisprudence of the Court has been developing which are relevant for the rights of victims of crime. One of those is the ‘doctrine of positive obligations’ of the states, which has emerged firstly as a general obligation, then to develop towards several specific duties of the state connected to ensuring the protection of the rights guaranteed by the Convention. These are going to be discussed in more details below.

## ***II.2 Positive Obligations – Definition, Characteristics and Emerging***

The importance of the doctrine of positive obligations of the state under the articles of the Convention for the place of the crime victims under the Convention is in the duty of the state to protect the individuals from criminal acts of others. As it is justly argued by Doak, initially, the obligations of the state to protect victims of crime “have largely unfolded through the doctrine of positive obligations”<sup>73</sup>. The main characteristics of this doctrine and its connection to the protection from criminal acts will be elaborated in the following part of this section.

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<sup>72</sup> Mykola Sorochinsky, “Prosecuting Torturers, Protecting ‘Pedophiles’: Towards a Power Balance Model of Criminal Process in International Human Rights Law” (January 19, 2009). Available at SSRN: <http://ssrn.com/abstract=1330104>, page 17

<sup>73</sup> Doak, Jonathan “Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties”, Hart Publishing, Oxford and Portland, Oregon (2008), page 39

The doctrine of positive obligations<sup>74</sup> provides that the states do not only have the duty to refrain from violating the human rights of individuals within their jurisdiction by the actions of the state authorities, but in addition have the positive duty to ensure the respect and prevent violations of some of the human rights enshrined in the Convention, even when these violations occur as the result of the actions of non-state parties. As Londono defines it, this doctrine indicates “the positive duties owed by states under the Convention to take proactive measures to secure rights in their activities, including the manner in which the actions of private individuals are governed”<sup>75</sup>. This means that under a positive obligation the responsibilities of the state party to the Convention go beyond those explicitly mentioned in its articles. The logic behind the positive obligations doctrine stems from Article 1 (“Obligation to respect human rights”) of the Convention itself, which obliges the state parties “to *secure* to everyone within their jurisdiction the rights and freedoms” guaranteed by the Convention. It is the term “*secure*” of Article 1 that points out to a deeper content of the provisions of the Convention than the mere obligation to refrain from acts of violations conducted by state authorities.

It is argued that the positive obligations only require undertaking of certain measures to ensure the protection of a certain right and do not necessarily go to the results accomplished: “a state need only show that it has tried, not necessarily that it has

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<sup>74</sup> An insight in the development of the doctrine of positive obligation by the European Court of Human Rights is given by Alastair R. Moowbray, in *“The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights”* Hart Publishing, (2004)

<sup>75</sup> Londono, Patricia *“Positive Obligations, Criminal Procedure and Rape Cases”*, European Human Rights Law Review (2007), Vol. 12, page 159



succeeded”.<sup>76</sup> However, there is a certain quality, linked to their potential to achieve the needed results, of the measures that need to be undertaken by the government, in order for the duty to be fulfilled for the purpose of the Convention.

The first steps towards accepting the positive obligations by the Court were marked by what McBride names “a tentative quality”<sup>77</sup>; namely, in the *Marckx* case<sup>78</sup>, where the positive obligations were firstly mentioned by the Court, it stated that they *may* be inherent in an effective respect for a family life. However, as it will be seen below, the development of the doctrine through the jurisprudence of the Court led to the now established position that there *are* positive obligations inbuilt in the articles of the Convention.

Although it is sometimes argued that the concept of positive obligation first had its significance in the context of economic and social rights, it did not take long until it was transferred to the field of criminal justice,<sup>79</sup> establishing the states’ obligations to protect the individuals from serious forms of crime. The landmark case in the Strasbourg jurisprudence on the development of the doctrine in the direction of protection for victims of crime was the case of *X and Y v. Netherlands*<sup>80</sup>. The case concerned the right to respect of the private and family life under Article 8 of the Convention. The circumstances of the case were the following: there was a gap in the legal system of the

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<sup>76</sup> Claire de Than, “Positive Obligations Under The European Convention On Human Rights: Towards The Human Rights Of Victims And Vulnerable Witnesses?”, *Journal of Criminal Law*, Vol. 67. No. 2, April 2003,

<sup>77</sup> Jeremy McBride, ‘Protecting Life: A Positive Obligation to Help’, 24 *European Law Review, Supplement Human Rights Survey* 43 (1999), page 43

<sup>78</sup> *Marckx v. Belgium*, Application number 6833/74, judgment as of June 13, 1979

<sup>79</sup> Mykola Sorochinsky, “Prosecuting Torturers, Protecting ‘Pedophiles’: Towards a Power Balance Model of Criminal Process in International Human Rights Law” (January 19, 2009). Available at SSRN: <http://ssrn.com/abstract=1330104>, page 36

<sup>80</sup> *X and Y v. Netherlands*, application no.8978/80, judgment as of March 26, 1985

Netherlands, which prevented the parents of a 16-year old mentally handicapped person to file a complaint for sexual abuse of their child, in the situation when due to her state she was not able to file the complaint herself. When examining this problem, the Court firstly reiterated that the object of Article 8 is protecting the private sphere of individuals from arbitrary interference *by the state authorities*. However, it made a significant step forward by stipulating that positive obligations for securing effective respect for private and family life of the individuals may occur from Article 8 and that, furthermore,

“these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”<sup>81</sup>.

The content of the positive obligation in this case was to *adopt measures* to secure the respect for the private life. As to the kind of measures sufficient for the protection of the right in question, the Court pointed out that the possibilities under the Dutch civil law were insufficient to afford the necessary protection in a case where, in the words of the Court, “fundamental values and essential aspects of private life are at stake”.<sup>82</sup> Hence, there was a need for employing the criminal law in the protection of those values; the goal of deterrence of criminal acts leading to their violation could only be achieved through criminal law provisions. The importance of this position of the Court for the position of the victims of crime is evident, since it speaks of the need to adopt criminal law measures for the prevention of the breaches of rights by criminal acts, when the aim cannot be achieved with other available means.

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<sup>81</sup> *Ibid*, paragraph 23 of the judgment. Here the Court recalls its position held in Airey judgment (Airey v. Ireland, application No. 6289/73, judgment as of October 9, 1979) where the court held that a woman had been a victim of violation of Article 8 – right to respect for her private and family life, since she was not able to request a legal recognition of the factual situation of separation from her husband. The Court held that: “Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto.” (paragraph 33 of the judgment).

<sup>82</sup> *Ibid*, paragraph 27 of the judgment

Although the first occurrence of the positive obligations regarding the prevention from crime took place within the framework of the right to respect for the private and family life and consisted of the duty to adopt legislation, it did not take long until the Court, in its judgments and decisions, extended the range, scope and content of positive obligations. Positive duties for the states were established in the context of right to life, prohibition of torture and, recently, prohibition of slavery and forced labor. A further step forward was the expansion of the substance of the positive duties to other necessary measures beyond the adoption of legislation. These developments are going to be discussed separately in the following sections of Chapter II.

### ***II.3 Positive obligations under article 2: Right to life***

The accommodation of the positive obligation doctrine in the context of the right to life under Article 2<sup>83</sup> of the Convention is particularly relevant for the protection of individuals from threats to their life that occur as the result of criminal acts of other individuals. A landmark case concerning the protection of individuals from such crime was the case of *Osman v. the United Kingdom*<sup>84</sup>. The issue that occurred before the Court in this case was whether the failure of the police to protect the lives of the second

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#### <sup>83</sup> **ARTICLE 2**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>84</sup> *Osman v. the United Kingdom* (87/1997/871/1083), [1998]

applicant and of his father, in a case of manslaughter, led to a violation of the right to life under Article 2. Although the manslaughter did not occur as a result of actions of state authorities, the applicant contended that their failure to undertake protective and preventive measures amounted to a violation of Article 2 of the Convention, since the police had supposedly been notified on a number of occasions on the risk and had warning signals that the manslaughter was going to occur.

In the Courts' judgment, it was firstly noted that the first sentence of Article 2 paragraph 1 obliged the states authorities not only to refrain from killing in an illegal and deliberate manner, but also "to take appropriate steps to safeguard the lives of those within its jurisdiction".<sup>85</sup> In examining the concrete measures to be undertaken for the efficient protection of the right to life, the Court pointed out to the following:

"It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."<sup>86</sup>

In the cited reasoning of the Court, there are three distinctive positive obligations recognized. The first is the duty to enact the necessary legislation, or in the Court's words "effective criminal-law provisions"<sup>87</sup>, to protect the right to life guaranteed by Article 2<sup>88</sup>. The second one is the duty to put into place efficient law-enforcement machinery for

<sup>85</sup> *Ibid*, paragraph 115 of the judgment. The Court cited this formulation from the case of *L.C.B. v. the United Kingdom* (judgment of 9 June 1998) where it first occurred, concerning the possible effect of the applicant's father exposure to radiation to the applicant's subsequent leukemia and the potential duty of the state to protect the applicant.

<sup>86</sup> *Ibid*, paragraph 115 of the judgment

<sup>87</sup> *Ibid*.

<sup>88</sup> The positive duty to enact legislation for criminalizing acts of individuals that lead to violations of the rights of other individuals was introduced in *X and Y v. the Netherlands*, in respect to Article 8

the deterrence, repression and punishment of breeches of the established criminal law provisions. However, thirdly and very significantly, the Court went further to stipulate that the states have also the duty “to take preventive operational measures” for the protection of a person from the danger to his life occurring from criminalized behavior of another person. Having in mind that in the context of *X and Y v. the Netherlands*, the only positive obligation recognized was the duty to *adopt measures*, introducing an obligation to undertake *preventive operational measures* is a big step forward in the direction of affording protection to everyone within the state’s jurisdiction from becoming a victim of unlawful attacks to their life.

Certainly, this lastly mentioned obligation (to take preventive operational measures) was not absolute or unconditioned, since the Court itself posed its limitations and conditions in the judgment. In the *Osman case*, the Court clarified that States can be in violation of this duty when the state authorities know or have the possibility to know of the existing “real and immediate risk to the life”<sup>89</sup> of an individual and they do not undertake any measures to protect his/her life. Thus, there is a double threshold for triggering this positive duty of the state: on one hand a requirement for the level of foreseeability of the risk (knowledge or possibility of knowledge of the authorities); on the other hand, the quality of the threat (real and immediate risk). The Court took into account the unpredictability of human behavior and limited resources of the states, to conclude that this positive duty should be understood in a manner which does not impose “an impossible or disproportionate burden on the authorities”<sup>90</sup>. This was reaffirmed in other occasions where the duties to undertake measures occurred before the Court. In the

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<sup>89</sup> Ibid, paragraph 116 of the judgment

<sup>90</sup> Ibid

*Mastromatteo case*<sup>91</sup>, where the applicant contended that granting the prison leave to habitual offenders led to a breach of the positive obligation of the state to protect the life of his son, who was killed by those persons, it was clearly pointed out that the positive obligations under Article 2 did not mean that the state is under the duty “to prevent every possibility of violence”<sup>92</sup>.

Although under the circumstances of the *Osman case* no violation of Article 2 was found, the effects of what was established with this judgment have shown to be far-reaching. The circumstances under which the Court has found a violation of the positive obligations under Article 2 include, for example, the failure of the authorities to protect the life of a person in custody sharing a cell with another dangerous person (*Paul and Audrey Edwards v. United Kingdom*<sup>93</sup>) or the situation where authorities had not undertaken measures of protection of the life of a journalist who had been receiving life threats, nor had they investigated the extent of the risk to his life after the threats (*Kılıç v. Turkey*<sup>94</sup>). It is to be expected that the position of the Court will be reaffirmed in other cases where the prevention of threat to life by criminal acts of individuals will be the issue at stake.

It can be argued that the positive duties of the state related to the protection of the right to life from criminal acts of other individuals correspond to several aspects of the position of individuals subjected to criminal acts threatening the life of the person. It is plausible that a *right to protection* from such criminal act emerges for the persons under the jurisdiction of the member states, although the Court does not explicitly mention such

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<sup>91</sup> *Mastromatteo v. Italy* (application No. 37703/97, judgment as of October 24, 2002)

<sup>92</sup> *Ibid*, paragraph 68 of the judgment

<sup>93</sup> Application No. 46477, judgment as of March 14, 2002

<sup>94</sup> Application No. 22492/93, judgment as of March 28, 2000

a right. However, the right to require protection from the state authorities when put in such circumstances is at present limited to situations where the police and the other authorities can possibly react, without this putting a disproportionate burden on them. It is reasonable to believe that the Court will not go beyond this reasonable limitation of the duties to establish a more comprehensive right to protection from crime.

#### ***II.4 Positive obligations under Article 3: Prohibition of torture***

Following the establishment of positive duties to undertake measures in specific circumstances under the guarantee for right to life, the notion of positive obligations was broadened to the obligations of states in respect to the guarantees for prohibition of torture in Article 3<sup>95</sup> of the Convention. The Court has in the recent case – law started to recognize in the wording of Article 3 positive obligations for the state – parties relevant for the improvement of the position of the potential victims of torture, by transferring the obligation of the state to the context of acts of non-state actors amounting to the behavior prohibited by Article 3 of the Convention.

The landmark case in this regard was the case of *A v. the United Kingdom*<sup>96</sup>, when a nine-year old boy was on more than one occasion severely beaten with a garden cane by his stepfather. In the domestic criminal proceedings, the stepfather was acquitted by the jury, after the defense had claimed that the beating was in the frame of reasonable correction of the child. However, the proceedings before the European Court on Human Rights had a very different outcome. In the judgment, after establishing that the beating amounted to the degree of severity prohibited by Article 3, the Court undertook the

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<sup>95</sup> “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>96</sup> *A v. the United Kingdom* (100/1997/884/1096) [1998]

analysis whether the state was responsible for this treatment. In approaching this problem, the Court leaned on the previously elaborated reasoning related to the duty of the states to secure to everyone within their jurisdictions the respect of the rights guaranteed by the Convention, as of Article 1 of the Convention. It was argued that Article 1, taken together with Article 3, imposed a duty on member-states

“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.”<sup>97</sup>

This was the first time in the jurisprudence of the Court that the protection against torture and ill-treatment was broadened beyond the acts of the public authorities, towards the protection of the victims of unlawful acts amounting to a behavior prohibited by Article 3 when conducted by private persons, although, as discussed below, in a much more limited content in comparison to what was previously elaborated in regard to protection of the right to life.

What was the content of the positive obligation recognized in this case? In the very short reasoning of the Court (mostly due to the Government’s acknowledgment that it had failed to protect adequately the children from such actions), it was stated that ‘the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.’<sup>98</sup> In other words, although there was legislation in place to criminalize acts that constitute violation of Article 3, that legislation did not provide the adequate and necessary protection from such acts. The Government recognized the need for the amendment of the domestic law existing at the time and the Court held that there was a violation of Article 3 in the abovementioned circumstances. Thus, the obligation of

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<sup>97</sup> *Ibid*, paragraph 22 of the judgment

<sup>98</sup> *Ibid*, paragraph 24 of the judgment



the state in this specific case did not go beyond the similar duty recognized in *X and Y v. the Netherlands* in respect to the right to respect for the private life, which was to adopt legislation that would enable an efficient protection of the right in question.

Very significant further developments occurred recently in the Strasbourg jurisprudence, in the context of victims of rape and their rights, in the landmark case of *M.C. v. Bulgaria*<sup>99</sup>. These changes occurred in the context of the prohibition of torture and inhuman and degrading treatment and punishment under Article 3, together with the right to respect of the private and family life as guaranteed by Article 8 of the Convention. The issue that arose before the Court in this case was whether in rape cases the domestic laws and practice which require a proof of physical resistance are adequate to the standards of protection guaranteed by Articles 3, 8 and 13 of the Convention.

In the judgment, the Court reiterated the existing examples in its jurisprudence of the positive obligations in relation to both Article 3 and Article 8 in general. Then it referred to the duty to conduct an official investigation in cases concerning Article 3, establishing that this duty was not limited only to Article 3 violations committed by state authorities. As a result, the Court tied these two sets of obligations to conclude the following:

“States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”<sup>100</sup>

There is a threefold obligation of the state established in these words: 1) to enact legislation that criminalizes rape; 2) to conduct effective investigation, also in the cases

<sup>99</sup> *M.C. v. Bulgaria*, Application no. 39272/98, judgment as of December 4, 2003

<sup>100</sup> *Ibid*, paragraph 153 of the judgment

of rape committed by non-state subjects and 3) to conduct effective prosecution of rape cases.

Furthermore, although reaffirming the wide margin of appreciation that states have in respect of the means to achieve the abovementioned, the Court provided a rather detailed analysis of the international and comparative practices, to conclude that requiring a proof of physical resistance of the victim would leave space for leaving certain incidents of rape unsanctioned. In the Court's view, the positive obligation of the states under Articles 3 and 8 of the Convention require the "penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."<sup>101</sup>

The important change in this case is that the Court did not stop at only establishing a duty of the state to introduce a positive obligation of the states to enact legislation or to 'adopt measures', as it was seen in *A. v. the United Kingdom* in the context of Article 3 or *X and Y v. the Netherlands* in the context of the right to respect for the private and family life. In its judgment in *M.C. v. Bulgaria*, a step forward was taken in the direction of prescribing the content of the legislation that needed to be enacted and the manner of its application.<sup>102</sup>

After examining the circumstances of the concrete case, the Court concluded that the investigation, as well as the approach taken by the investigative authorities, fell short of the requirements of the positive obligation to set up and to effectively implement a legal system that would enable sanctioning of all forms of rape and sexual abuse.

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<sup>101</sup> *Ibid*, paragraph 166 of the judgment

<sup>102</sup> For an analysis of the case and its impact on the position of victims of sexual offences, see: Joanne Conaghan, "Extending the Reach of Human Rights to Encompass Victims of Rape: *M.C.v. Bulgaria*", *Feminist Legal Studies*, Vol. 13, 2005, pp. 145 – 157

Furthermore, it was once again stressed that the legal response to these group of offences has to be through criminal – law provisions and sanctions. Such an approach of the Court enables the victims of these crimes to gain efficient recourse to justice.

On the basis of the explained developments under Article 3, on one hand, but also under Article 3 and 8 in the specific conditions of rape cases, on the other, it can be argued that the right to protection from becoming a victim of criminal acts of individuals violating the prohibition of torture emerges in the jurisprudence of the European Court of Human Rights. However, when compared to the positive obligations in Article 2, under which the states may have the duty to undertake preventive operational measures, it may be argued that the reached level is lesser in the context of Article 3. Since the Court has often expressed that Articles 2 and 3 of the Convention enshrine “core values of the democratic societies”<sup>103</sup> and, therefore, are the most fundamental provisions of the Convention, it is plausible that the Court in the future decisions may take the further step towards the establishment of the obligation to undertake operational measures to prevent cases under the scope of Article 3. Certainly, in case such obligations are found, it is logical that they will also be placed in the limitations explained above under the section on Article 2.

However, it is important to look at the other aspects of positive obligations of the state relevant for crime victims’ rights to be able to look at the future prospects. The Court’s jurisprudence on positive obligations has recently evolved, not remaining limited to the obligations under the guarantees for the right to life, prohibition of torture and the right to respect for the private and family life. The latest developments interestingly

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<sup>103</sup> See, for example, *Pretty v. the United Kingdom*, application no. 2346/02, judgment of April 29, 2002, paragraph 49

spread the application of the ‘positive obligation doctrine’ on the obligations of the state under the prohibition of slavery and forced labour in Article 4 of the Convention, which will be examined in the following section.

### ***II.5 Positive obligations under Article 4: Prohibition of slavery and forced labour***

The landmark case introducing the positive obligation doctrine in the context of Article 4<sup>104</sup> of the Convention was the case of *Siliadin v. France*<sup>105</sup>. The case concerned a minor Togolese national, brought to France and kept to work as a housemaid for a family, where she had to assist to caring for the four children in the family, without any remuneration for the work she did. The applicant lived in the children’s room and slept on a mattress on the floor in the period of several years. Furthermore, she was kept in a situation of dependence and vulnerability, because of the fact that her passport was taken from her by the family which she lived with, as well as due to the constant fear of arrest and deportation, in which the family held her in order to be able to control her conduct.

In the described circumstances, the Court in the judgment began its reasoning on the applicability of Article 4 to the case by reiterating the already established jurisprudence that simply refraining from directly violating the Convention rights by their own actions was not sufficient for complying with the state’s obligations under the

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<sup>104</sup> **Article 4 . Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term .forced or compulsory labour shall not include:
  - a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - d) any work or service which forms part of normal civic obligations.

<sup>105</sup> Application No. 73316/01, judgment as of July, 26, 2005

Convention. This was followed by an overview of the jurisprudence of the Court regarding the positive obligations of the state established in the context of Articles 8 and 3 of the Convention. This line of reasoning, taken together with the Court's position that "together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe"<sup>106</sup> and after the provisions of other relevant international documents<sup>107</sup> were taken into account, led to the conclusion that there are positive obligations for the states under Article 4 of the Convention. Namely, the Court stated that it:

"... considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice"<sup>108</sup>

Furthermore, similarly to the reasoning in *M.C. v Bulgaria* regarding Article 3 and Article 8 in rape cases, the Court specifically pointed out<sup>109</sup> to the obligation of the states for the penalization and prosecution of *any* act that would put an individual in the position prohibited by Article 4 of the Convention. Hence, the Court gave a direction for the normative content of the criminal provisions to be adopted by the member states for securing efficient protection of the potential victims of conduct which is contrary to Article 4.<sup>110</sup>

<sup>106</sup> *Ibid*, paragraph 82 of the judgment

<sup>107</sup> The Forced Labour Convention, adopted by the International Labour Organisation (ILO) on 28 June 1930; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956 and the International Convention on the Rights of the Child of 20 November 1989

<sup>108</sup> *Siliadin v. France*, Application No. 73316/01, judgment as of July, 26, 2005, paragraph 89 of the judgment

<sup>109</sup> In paragraph 112 of the judgment

<sup>110</sup> In the specific circumstances of the case, after the Court had established that the applicant was subjected to forced labour and was held in servitude in the meaning of Article 4 of the Convention, concluded that the

The *Siliadin* judgment, therefore, introducing the positive obligations under Article 4 for criminalizing certain practices<sup>111</sup> broadens the position of the Court on the level of protection from specific forms of criminality to the guarantees for human rights protection in the Convention not addressed before in this context and enhances the right to protection of potential victims of serious crimes in the context of the Article (such as human trafficking, maintaining in position of servitude etc.). Furthermore, this development potentially opens the door towards transferring the positive obligations of specific contents (such as the undertaking of operative measures) already established in other spheres of human rights guaranteed by the Convention to the area of prohibition of slavery and forced labor.

### ***II.6 Other positive obligations***

In light of the expansion of the content of positive obligations, as well as their application to further guarantees in the Convention, it is also argued<sup>112</sup> that there are development relevant for the position of the victim, consisting of positive obligations of the state rising in the contexts of the right to freedom of expression and the right to freedom of assembly, as guaranteed by the Convention. Certainly, these first steps are made in very particular circumstances only. From the relevant part of the jurisprudence regarding Articles 10 and 11, De Than infers that at this point of the development, the

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relevant criminal provisions did not provide effective penalization of the conduct to which the applicant was subjected

<sup>111</sup> This trend has been, however, criticized by some authors as putting too much accent on the criminal law as the primary response to human rights violation (see Holly Cullen, “*Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights*”, Human Rights Law Review, Vol. 6 No.3, pp. 585-592)

<sup>112</sup> See, Claire de Than, “*Positive Obligations Under The European Convention On Human Rights: Towards The Human Rights Of Victims And Vulnerable Witnesses?*”, Journal of Criminal Law, Vol. 67. No. 2, April 2003,

positive obligations occur only in the situation of extreme factual circumstances.<sup>113</sup> These emerging positive obligations, amongst which there may be a space for the potential appearance of new fields for attention to the interests of the victims, possibly in the future will be of great significance for the position of the victims in the criminal justice system.

In the context of the right to freedom of expression<sup>114</sup>, an exciting case occurred in Turkey, concerning the protection from attacks, harassment and intimidation of the journalists employed in a newspaper, where such incidents affected the freedom of expression.<sup>115</sup> Namely, the journalists, distributors and other persons connected with the *Ozgur Gundem* newspaper in Turkey were repeatedly subjected to incidents of violence, including assaults and arson attacks, killings and forced disappearances. The Turkish authorities were duly informed of those incidents and failed to take any appropriate measures to investigate them or to prevent their future occurring. In the judgment, the Court reiterated what was already firmly established in other fields: that there might be positive obligations inherent in the rights guaranteed by the Convention and directed towards the effective respect of the right in question. It recalled that the right to freedom of expression is a precondition of key significance for a functioning democracy, thus to express the following in regard to the freedom of expression:

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<sup>113</sup> *Ibid*, page 15

<sup>114</sup> **Article 10**

**1.** Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

**2.** The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>115</sup> *Ozgur Gundem v. Turkey*, application No. 23144/93, judgment as of March 16, 2000

“Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.”<sup>116</sup>

Since the Government had failed to comply with the positive obligations, the Court found a violation of Article 10 of the Convention under the specific circumstances of the case.

The transfer of the doctrine of positive obligations on the terrain of Article 10 is of crucial importance for the further development of the doctrine itself, giving a sign that in future the Court may find positive obligations in other Articles of the Convention which construction would logically allow for that. Furthermore, the significance is even higher in light of the prospects for further strengthening of the emerging right to protection from becoming a victim of crime. There may be some counter argument to this prediction. Namely, in the circumstances of the case the efficient protection of the freedom of expression was connected to the occurrence of incidents including the killings and other forms of dangers to the life of people, which were already covered with the positive obligations under Article 2. Furthermore, the substance of the positive obligations under Article 10 does not add up to the already established in the other Articles of the Convention discussed above. However, in answer to this it can be argued that the fact that, in the circumstances of the case, there were serious attacks on the property (the arson attacks) may leave space for the developments in the direction of comprehending the protection of victims of diverse types of crime and not only the criminality as a threat to the physical safety, as protected by Articles 2 and 3. Of course, this is possible only to occur in the situation where such threats to the possessions of the victims lead to the violation of a right guaranteed by the Convention.

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<sup>116</sup> *Ibid*, paragraph 43 of the judgment



The prospect for the abovementioned developments appears even more plausible in the context of the progress of positive obligations under Article 11<sup>117</sup> of the Convention. In the case of *Plattform "Ärzte für das Leben" v Austria*<sup>118</sup>, the Court considered whether the failure of the measures undertaken by the police to protect the conducting of demonstrations from counter-demonstrators were sufficient to fulfill the obligations of the state under Article 11. The Court did not find a violation of the right to freedom of assembly; however, it noted that "a purely negative conception would not be compatible with the object and purpose of Article 11"<sup>119</sup>. Formulating the general principles, it also stated that the duty to undertake reasonable and appropriate measures to enable peaceful demonstrations was connected to a wide margin of discretion in regard to the used means and that the obligations in this context were connected not to the result achieved, but to the measures employed.

Applying the set general principles in further cases, the Court has found violations of Article 11 in cases of failure of the authorities to protect the peaceful manifestation of the right to freedom of assembly and freedom of association. For an example, the Court found a violation of the right to association in the case of *Ouranio Toxo and Others v. Greece*<sup>120</sup>, concerning an attack over the headquarters of a political party, whose declared goals included protection of the Macedonian minority in Greece. One of the reasons for

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<sup>117</sup> **Article 11**

**1.** Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

**2.** No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

<sup>118</sup> Application No. 10126/82, judgment of June 21, 1988

<sup>119</sup> Ibid, paragraph 32 of the judgment

<sup>120</sup> Application No. 74989/01, judgment of October 20, 2005

the found violation was the authorities' omission to act and protect the headquarters of the party which were ransacked by citizens opposing the party's political ideas. In the reasoning, the Court expressed the following: "There may ... be positive obligations to secure the effective enjoyment of the right to freedom of association ... even in the sphere of relations between individuals".<sup>121</sup> A similar conclusion to the abovementioned can be drawn; namely, that where a substantive right is potentially violated, positive obligations for the state occur, thus leading to need for protection from criminal acts of others influencing the peaceful enjoyment of those rights.

## ***II.7 Conclusion***

In light of the discussion presented in the sections of Chapter II, the conclusion is that, under the jurisprudence of the Court, states have several categories of positive obligations which are relevant for the position of the victims of crime and the efficient protection of their rights. One of those categories is *the duty to enact criminal laws* that to criminalize certain behaviors. The second category is *the duty to undertake preventive operative measures* to protect individuals. And the third category deals with *the duty to investigate* cases of a potential violation, connected to the obligation for effective prosecution. These obligations on the side of the state correspond to a certain right on the side of the individuals. Although these obligations are directed to an effective protection of the rights explicitly guaranteed by the Convention, it may be argued that implicitly they bear a specific significance related to the relationship between criminal acts, on one hand, and human rights violations, on the other. Namely, the positive duties of the nature

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<sup>121</sup> *Ibid*, paragraph 37 of the judgment

explained above may lead to a potential affirmation of an implicit right to protection from crime for the individuals within the jurisdiction of a member state.

However, the impact of the ‘positive obligations’ doctrine to the protection of victims of crime, with the exception of the duty to conduct an efficient investigation and prosecution, is limited mainly to the position of individuals *before* becoming victims. Therefore, in light of the theoretical framework set in Chapter I, it can be argued that it is mostly relevant to the *non-procedural* aspect of interests of crime victims. For the developments in the jurisprudence of the European Court of Human Rights of the *procedural* aspect, a further examination of a number of cases dealing with the interests of crime victims within the framework of the ‘fair trial’ standards will follow in Chapter III of the thesis.

## **CHAPTER III: OTHER DEVELOPMENTS IN ECtHR JURISPRUDENCE RELEVANT FOR CRIME VICTIMS**

This Chapter will discuss the issue on the emerging recognition of the needs of victims of crime related to the criminal proceedings, the level of protection afforded at this stage with the jurisprudence of the Court and its limitations. These topics will be looked at through the cases that came before the Court, concerning, on one hand, the issue of the recognition of the interests of vulnerable victims and, on the other, the established position of the Court that there is ‘no right to revenge’ in the Convention. This aspect of the victims’ status emerged throughout the jurisprudence of the Court under Article 6 of the Convention. Therefore, it is evidently relevant for the question of the effect of the emerging recognition of victims’ interests to the already established set of fair trial rights of the defendants in the criminal process.

### ***III.1 Recognition of the crime victims’ position***

Building the very comprehensive jurisprudence on the specific aspects of the fair trial guarantees, the Court was faced with cases where it addressed the need for protection of victims of crime. The landmark case in this regard was the case of *Doorson v. the Netherlands*<sup>122</sup>, where the Court explicitly mentioned the interests of the victims and the witnesses in relation to their testimonies in the criminal proceedings. Since the findings in this case are of a crucial significance to the position of the victim in the criminal trial process, the case is going to be looked at in detail below.

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<sup>122</sup> Application No. 20524/92, judgment as of March 26, 1996

The case concerned an action of the Netherlands authorities to combat the drug trafficking in Amsterdam. During the action, photographs of suspects of drug-dealing were being shown to drug-addicts and statements were taken. In one such case, eight statements recognizing the applicant as a drug-dealer were taken from drug-addicts, out of which two had their identity revealed in the further proceedings, whereas six remained anonymous. The applicant was subsequently arrested as a suspect for drug-dealing offences and a detention on remand was imposed on him. In the first instance of the domestic procedure, the defense council of the applicant on several occasions requested a hearing of the persons who gave the statement and remained anonymous. These requests were all refused. In that stage, only one of the witnesses who had their identity revealed was questioned and gave a statement in which he reiterated from what he had stated before, stating that he was not that certain that the person whose photograph he was shown was the one who had sold him the drugs. However, the applicant was convicted of drug-trafficking and sentenced to imprisonment in duration of fifteen months.

In the appeal stage of the proceedings, two of the anonymous witnesses were questioned by both the investigative judge and the defense lawyer of the applicant. The defense lawyer was not aware of their identity, since the investigative judge had found that their wish to remain anonymous was grounded. The Appeal Court quashed the first instance verdict, but nevertheless convicted the applicant and sentenced him to fifteen months of imprisonment. On the further appeal on points of law, the Supreme Court, *inter alia*, pointed out that the mere fact that the defendant could not question an anonymous witness did not lead to a violation of the fair trial guarantees in Article 6 of the Convention. Finally, in the application before the European Court of Human Rights, the

applicant contended that the reliance in the bringing of the decision on the statements by two anonymous witnesses, drug-addicts, who could not be questioned by the defense lawyer, was incompatible with the fair trial standards. The ground for their remaining anonymous was also contested. Under such circumstances, it was left to the Court to determine whether the use of statements of anonymous witnesses in the case was contrary to Article 6 of the Convention.

The Court commenced the reasoning by stressing what was already established in numerous occasions, namely that the matter of admissibility of evidence is by rule a matter to be regulated by the domestic law and that primarily national courts are to examine the evidence brought before them. Furthermore, building up on the already established principles in previous cases,<sup>123</sup> it reiterated that the use of anonymous witnesses is not *per se* contrary to the Convention standards, stating that what may appear as an issue before the Court is the subsequent use at the trial stage of the statements collected in such manner. The Court then examined whether the reasons for the witnesses' wish to remain anonymous were relevant and sufficient. In light of the data pointing out that the drug-dealers often used threats and violence against the persons testifying against them and that one of the witnesses in question had actually suffered violence by a drug-dealer against whom he had testified, it was held that in the particular case there were sufficient reasons for the witnesses to remain anonymous. In regard to the difficulties to the defense caused by the anonymity of the witnesses, the Court held that they were compensated by the procedures conducted by the domestic authorities. It was

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<sup>123</sup> The Court referred to the judgment in the case of *Kostovski v. the Netherlands*, application No. 11454/85, judgment as of November 20<sup>th</sup>, 1989

stated that the domestic court rightfully, in a “counterbalancing procedure”<sup>124</sup>, gave more significance to the necessity to insure the safety of the witnesses, balancing it to the obvious interest of the applicant to have had the witnesses examined. It should be noted that although the Court did not itself enter into balancing the rights of the accused with those of the defendants, a balancing procedure undertaken by the domestic authorities led to the prevalence of the need for the protection of the victim.

Nevertheless, what is of greatest importance for the position of the victims in the criminal justice system is a part of the reasoning in the judgment, where the Court made the major step forward towards a position that necessarily takes into account the needs and interests of victims and witnesses. It stated:

“It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”<sup>125</sup>

Thus, the Court in the reasoning gave several very important statements. One of them is the explicit determination that although the Convention itself does not mention the victims and witnesses, their interests are still protected by the Convention. Another important point in this reasoning is that the Court explicitly mentions several specific rights of victims which may be at stake (life, liberty, security of the person, and interests within the scope of the right to respect for the private and family life), thereafter to

<sup>124</sup> *Doorson v. the Netherlands*, Application No. 20524/92, judgment as of March 26, 1996, paragraph 75 of the judgment

<sup>125</sup> *Ibid*, paragraph 70 of the judgment

position them in the substantive provisions of the Convention. It can be argued that by this last statement the list offered by the Court remains non-exhaustive, but open a bigger number of the rights contained in the substantive provisions of the Convention which may be at stake (for example, the prohibition of torture). Thirdly, the Court pointed out to the need for the states to organize their criminal justice systems in such a manner that would not leave space for an unjustified endangerment of those rights. This way of indicating the obligations of the states very much resembles the previously explained approach of the Court in establishing the need of the states to set a legal framework for compliance with their positive obligations. Thus, it can be argued that the Court here poses a sort of an obligation on the states to introduce or to amend their criminal justice legal frameworks, in a manner compatible with the *interests* of the victims. And finally, what also can be drawn from this is that there is a need to balance the interests of the defendant, on one hand, with those of the victim, on the other, which was, as mentioned, done by the domestic court in the present case.

However, in the perspective of the counterbalancing procedure as a way to compensate the differences in the process with a view towards the victims' rights, the Court did not leave the prospect for balancing entirely open. It pointed out that "a conviction should not be based either solely or to a decisive extent on anonymous statements"<sup>126</sup>. It also added a warning for precaution that "the evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care"<sup>127</sup>. Hence, a line preserving the necessary fair trial standards is necessary and kept, meaning

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<sup>126</sup> *Ibid*, paragraph 76 of the judgment

<sup>127</sup> *Ibid*



that the balancing exercise cannot go beyond a minimum of standards for the protection of the accused.

This last conclusion appears even truer in light of the judgment of the Court in the case of *P.S. v. Germany*.<sup>128</sup> The case concerned a trial for sexual abuse of a child, where the child, being the victim, was not questioned before the domestic authorities and the domestic court decision was based mainly on the statements of the child's mother, the police officer and the opinion of the expert on psychology. The Court held that the use of evidence in the circumstances of the case imposed limitations on the rights of the defense, which led to the failure of the state to attain the necessary 'fair trial' standards and constituted a violation of Article 6 of the Convention. In the reasoning of the judgment, the Court pointed out to the difference between the circumstances in this case and the cases concerning trials for sexual offences, where the decisions of domestic courts either relied in whole on evidence other than the statements of the victim or were not based exclusively on the statement of the victim.

The position of the Court regarding victims, introduced in the *Doorson* case and then subsequently reaffirmed by the Court, is undeniably very significant for the position of the victims within the context of the 'fair trial' notion. However, its application may appear to be somewhat limited. Firstly, one limitation may be perceived in the very approach taken by the Court to point out to several specific rights, thus limiting the scope of interests that may be at stake for the victims. The answer to this can be found in the previously said in regard to the Court mentioning the substantive provisions of the Convention. Secondly, a logical limitation is the need for balancing the interests of the victims, on one hand, and the interest of the defense, as it was seen in *P.S. v. Germany*,

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<sup>128</sup> Application no. 33900/96, judgment as of December 20, 2001

where the Court gave prevalence to the interest of the defense. This is very relevant for the relationship between the interest of the victims and of the accused, and will be further addressed in Chapter IV.

### ***III.2 ‘Right to revenge’***

While the need to take into consideration the interests of victims of crime was explicitly pointed out by the European Court of Human Rights, the issue on whether there is a right of the victims of crime to have the perpetrator punished also appeared before the Court. In addressing this issue, the Court firmly established the Convention does not guarantee the ‘right to revenge’ for the victims. The circumstances under which this was established will be looked at in this section.

The position of the Court that there is no right to revenge for the victim of crime can be seen in the case of *Perez v. France*<sup>129</sup>, concerning civil party proceedings under the French law. The issue that appeared before the Court was the question of applicability of Article 6 guarantees to civil party proceedings, as proceedings concerning disputes over ‘civil rights and obligations’ as provided in Article 6 paragraph 1 of the Convention. The Court took the view that the proceedings were decisive for a person’s civil rights and obligations, and thus, came within the scope of Article 6, but only once the person is joined to the proceedings as a civil party. However, this was where the limits of applicability of Article 6 guarantees were marked. In the view of the Court, the period before the joining of the proceedings was not covered by Article 6 guarantees.

What is of biggest interest in the judgment of the Court is the firm position that “the Convention does not confer any right, as demanded by the applicant, to “private

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<sup>129</sup> Application No.47287, judgment of February 12, 2004

revenge” or to an *actio popularis*”.<sup>130</sup> Furthermore, it was pointed out that the right to have someone prosecuted or punished for a criminal act was not *per se* a right guaranteed by the Convention:

“the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it 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’.”<sup>131</sup>

As a result, the Court held that on this point the application was incompatible with the Convention.

This new approach of the Court was confirmed by judgments in other cases. For example, the same reasoning led to a different outcome in the case of *Gorou v. Greece*<sup>132</sup>. In this case the applicant, being an alleged victim of insult and defamation, sought an appeal by the prosecutor in the criminal proceedings, but was refused. What was taken into account by the Court in this case was that the applicant had asked for a symbolic compensation in the approximate amount of three euros and additionally claimed to be a victim of defamation. These circumstances were sufficient for the Court to hold that the case fell in the scope of Article 6 of the Convention, because a (however symbolic) reparation was sought and the case concerned the ‘right to a good reputation’.

In the light of the circumstances of the case and the rather narrow requirements for the victims’ right to bring civil proceedings, this judgment of the Court is leaving sufficient space for the conclusion that in future the scope of Article 6 in the part of the “determining the civil rights and obligations” will be construed in a broad fashion to

<sup>130</sup> *Ibid*, paragraph 70 of the judgment

<sup>131</sup> *Ibid*

<sup>132</sup> Application No 12686/03, judgment of March 20<sup>th</sup> 2009

encompass the right of the victim to approach the courts. The future developments in the jurisprudence of the court may lead towards a bigger number of cases where the victims' request to bring proceedings would not be practically strictly limited by the additional requirements of an associated right. Thus, it is probable that the very strict position of the court that there is no for crime victims to have the perpetrator punished may potentially be softened in practice by the very wide approach of the Court in determining the threshold for entering the ambit of civil rights and obligations.

### *III.3 Conclusion*

From the examples from the jurisprudence of the Court, it is evident that it has moved towards the recognition of the needs and interests of victims of crime on several levels. One of those is the acknowledged need for prevention of the primary victimization, or in other words, the need for protection of the individuals within the jurisprudence of the state from criminal acts that would represent infringements of rights guaranteed by the Convention. This was elaborated in Chapter II under the positive obligations of the states. However, in the previously explained distinction of emerging rights of victims of crime given by Doak<sup>133</sup>, the right to protection, apart from the element of protection from primary victimization or protection from becoming a victim, includes another element. This is the emerging right to protection from secondary victimization. It can be argued that the examples of the jurisprudence of the Court confirm this emerging rights in light of the taking into account the interests of vulnerable victims and witnesses. This other level of the inclusion of the victim is more directly connected to the position of the victim in the criminal process. Namely, the Doorson

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<sup>133</sup> See Chapter I, section 1.

judgment showed that the interests of the victims (and their rights protected by the substantive provisions of the convention) are a factor that necessarily has to be considered in the framework of the criminal process itself.

However, what the case – law of the Court has not to this point established is the concrete contents of the status of the victims of crime in the criminal proceedings and their specific rights in that context. This may be looked at from several points of view. The recent cases regarding the non-existent ‘right to revenge’ where only seeking a symbolic reparation or a claim of the right to good reputation is sufficient for the case to enter the scope of Article 6 in terms of the ‘determination of the civil rights and obligations’, may appear as softening the stand of the Court towards bringing a closer possibility for the victims to approach the courts with their claims. However, from the point of view of the status of the victim in the course of the criminal proceedings, the Court’s jurisprudence does not recognize a right to participation in the trial. It is left to the member states to organize their criminal justice systems in regard to this issue. Due to the differences in the legal orders of the member states it can be argued that the specific content of the victim participation in the criminal proceedings are not very likely to be detailed or ‘prescribed’ by the future judgments of the Court. At this point of the developments of the standards on the protection of the interests of the victims of crime, a future establishing of firm rules on the form of participation of the victims appears to be of small probability.

## **CHAPTER IV: HOW THE EMERGING VICTIMS' RIGHTS AFFECT DEFENDANTS' RIGHTS UNDER THE ECHR**

As opposed to the elaborated situation of the development of the recognition of the interests of crime victims under the European Convention on Human Rights, where they were evolving throughout the jurisprudence of the Court through diverse Articles, as it was already mentioned, the Convention contains an explicit guarantee of the fair trial rights of the accused in the criminal procedure. Namely, Article 6<sup>134</sup> is entirely dedicated to the rights and standards composing the 'fair trial' notion. While its first paragraph is concerned with both "the determination of ... civil rights and obligations or of any criminal charge", the second and third paragraph are dedicated exclusively to persons charged with criminal offences. The fair trial guarantees encompass a wide range of rights of the defendants or accused in the criminal justice process explicitly mentioned in the wording of Article 6. For instance, only the wording of Article 6 (1) explicitly

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<sup>134</sup> **Article 6**

**1.** In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**2.** Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

**3.** Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

provides for the following rights: right to a fair hearing, right to a public hearing, right to a trial within a reasonable time, right to be tried by an independent and impartial tribunal established by law and right to a publicly pronounced judgment. Paragraphs 2 and 3 of the Article guarantee the following rights: the presumption of innocence, the right to be informed of the accusation against him/her, several aspects of the right to defence, the right to examine witnesses and the right to an interpreter. Furthermore, in light of the evolutive interpretation of the Convention and its character of a living instrument, the Court in its jurisprudence has interpreted the general right to a fair hearing as providing for a number of *implied rights*, not explicitly mentioned in text of the provision, amongst which the right of access to the courts, the right to be present at an adversarial hearing, the right to equality of arms, the right to fair presentation of the evidence, the right to cross examine and the right to a reasoned judgment<sup>135</sup>. Nevertheless, however detailed the aspects of fair trial may be, the Court often stresses that the fairness of the procedure is looked at as a whole, in its completeness,<sup>136</sup> which leads to the conclusion that some deficiencies of the procedure may be compensated by firm procedural guarantees in other aspects of the proceedings.

Having in mind the highly developed standards for the protection of the defendants' rights<sup>137</sup> in the jurisprudence of the Court, it can be understood why Sorochinsky argues that "although the fair trial guarantee under Article 6 of the European Convention on Human Rights protects both parties, in criminal cases protections have been reserved by international conventions exclusively for those charged with a criminal

<sup>135</sup> R. Clayton, H. Tomlinson, "The Law of Human Rights", Oxford University Press, 2000, page 637

<sup>136</sup> See, for one of the numerous examples, the case of *Khan v. United Kingdom*, application no. 35394/97, judgment as of May 20, 2000, paragraph 34 of the judgement

<sup>137</sup> A very good overview of the Court's approach to Article 6 is given, amongst others, by Emmerson, Ashworth and Macdonald, see note 70

offense”<sup>138</sup>. Hanly is on the same position when he says that Article 6 “has been interpreted or drafted explicitly in a defendant-centered manner”<sup>139</sup>. It is argued that this situation is due to the fact that the defendants’ rights are explicit and prominent in the Convention and that they have been the subject of deep analysis in the jurisprudence.<sup>140</sup>

In light of the recent cases introducing the acknowledged position of the victim of crime in the system for human rights protection under the Convention, the issue of the effect of the emergence of victims’ rights under the Convention on the already existing defendants’ rights necessarily arises. It may be addressed from several points of view, which are inevitably corresponding to lines of development explained above. Thus, on one hand, the effect of the positive obligations in the context of protection from victimization has to be looked at and, on the other, the impact on the other developments regarding victims rights in the criminal procedure has to be seen.

#### *IV. 1 Effect of positive obligations*

Even when addressing the positive obligations of the state related to the protection from crime, the Court itself has been precautionous towards the possible effect that these developments will have on the rights of the defendants. In the *Osman* case, elaborated in Chapter II of the thesis, where the Court has held that there are positive obligations of the states implicit in Article 2 of the Convention to undertake measures for the protection of the life of persons within their jurisdiction, there was a very important consideration of

<sup>138</sup> Mykola Sorochinsky, “*Prosecuting Torturers, Protecting ‘Pedophiles’: Towards a Power Balance Model of Criminal Process in International Human Rights Law*” (January 19, 2009). Available at SSRN: <http://ssrn.com/abstract=1330104>, page 17

<sup>139</sup> Conor Hanly, “*Finding Space for Victims’ Human Rights in the Criminal Justice*”, Conference paper for the “Human Rights and Criminal Justice” Conference, Law Society of Ireland (2007), page 10

<sup>140</sup> Claire de Than, “*Positive Obligations Under The European Convention On Human Rights: Towards The Human Rights Of Victims And Vulnerable Witnesses?*”, *Journal of Criminal Law*, Vol. 67. No. 2, April 2003, pp. 165



the guarantees entrenched in the Convention, amongst which the procedural guarantees.

In the words of the Court:

“...(a) relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.”<sup>141</sup>

The wording in this part of the judgment contains a warning on the potential risk of threatening a range of rights of the other citizens. The precaution towards respecting the due process rights is a very significant direction pointing out to the guarantees of a fair trial contained in Article 6 of the Convention. Furthermore, there is another very important consideration made by the Court, which is the awareness of the danger for the respect of another range of rights of the person suspected of committing a crime, except for their due process rights. The rights explicitly mentioned by the Court in this occasion are the right to liberty (in the sense of protection against unlawful deprivation of liberty) as well as the right to respect for the private and family life of the person. The formulation used by the Court leads to the conclusion that is not limited to the rights guaranteed by the Articles 5 and 8 explicitly mentioned, but it points out to the possibility of endangering a wider range of rights, or even, potentially, all of the rights of the individual (in this case, the suspect) guaranteed by the Convention that may in practice come into play. In light of this position, the Court in the *Osman case*<sup>142</sup>, on the claim of the applicant that the criminal act could be prevented by searching the premises of the suspect before it had happened, accepted the government’s claim of the need for protecting the rights to presumption of innocence of the teacher who later committed the

<sup>141</sup> *Osman v. the United Kingdom*, paragraph 116 of the judgment

<sup>142</sup> *Osman v. the United Kingdom* (87/1997/871/1083), [1998], paragraph 115 of the judgment

shooting, since there were no sufficient grounds for suspicion before the criminal act took place.

The abovementioned position may be seen as logical continuation of what was already established by the Court in regard to the positive obligations in other decisions; namely, that there are other interests that have to be taken into account when assessing the positive obligations of the state. This implies that the duty of the states to undertake positive measures to protect one right is logically limited by the duty not to infringe another right. A recognition of this limitation occurred in a case concerning positive obligations under the guarantee for respect of private and family life in Article 8 of the Convention. Discussing the positive obligations of the states under Article 8 of the Convention, guaranteeing the right to respect for the private and family life of the individual, the Court stressed the following:

“In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual, or individuals, concerned”<sup>143</sup>.

By this, the need to apply the balancing test, which was already being applied regularly by the Court in assessing potentially conflicting rights of the Convention, entered in the context of the positive obligations of the state. In light of the previously elaborated relationship between the positive obligation of the state and the interests of the potential victims of crime, this approach clearly points out that the rights corresponding to the positive duties of the state are not absolute, but are necessarily limited on two levels: firstly, by the community interests and, secondly, by the concerned individuals. In a situation where the circumstances of the case will point out to potential conflict of the

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<sup>143</sup> *McGinley and Egan v. United Kingdom*, application Nos. 21825/93 and 23414/94, judgment of June 9, 1998, paragraph 98

positive obligations with the rights of the suspect or the defendant, they would not only have to be taken into account but also balanced against.

In regard to the positive obligations of the state to enact criminal provisions in the domestic legal system, corresponding to the potential ‘right to protection’ of the victims of crime, it can be argued that they in fact do not impose any additional burden on the side of the defendant in the particular cases. The existence of domestic laws criminalizing certain behavior does not *per se* alter the position of the victims regarding the already firmly established guarantees to due process rights. A more sensitive issue is, in particular, the position of the victim and, correspondingly, of the accused in cases of sexual offences. An argument may occur that in the rape cases, best illustrated by *M.C. v. Bulgaria*, the positive obligation of the state to amend the laws in the direction of not requiring a proof of physical resistance has an effect towards a slight repositioning the burden of proof to the defendant. I believe that there is no such danger: namely, the burden of proof still rests on the prosecution to establish the necessary elements of the crime of sexual assault, but in order to provide efficient safeguards against the guarantees of Article 3 and Article 8 of the Convention, the physical resistance should not be one of those elements, notwithstanding the fair trial rights of the suspect or the accused.

Thus, the introduction of the positive obligation of the states under the articles of the Convention does not affect the firmly established status of the fair trials standards in the Convention system. On the opposite, it may be argued that there is a line of precaution on the jurisprudence of the Court on the position of the victim, which points out to the need for taking into account the fair trial and other rights and the need to

balance the emerging standards (positive obligations) against the already recognized standards.

#### *IV. 2 Effects of other developments*

Apart from the possible effect of the emerging positive obligation of the states as a manner for addressing the interests of the victims of crime, a question remains on the effects of the development of the jurisprudence of the European Court towards the recognition of the needs and interests of the victims of crime directly connected to the course of the criminal proceedings. In this context, the point of interest is how the Court accommodates the newly occurring considerations in the already existing standards related to the criminal proceedings.

Having in mind the cases where the issue of participation and questioning of vulnerable victims in the trials, it is evident that the Court itself approaches this issue with paying due attention to the fairness of the procedure. A very relevant and illustrative example can be seen in the *Doorson case*. As explained above, in this particular case the Court held that the use of the statements of anonymous victims and witnesses is not *per se* contrary to the fair trial guarantees of the Convention, but only after taking into account all of the other aspects relevant for the fair trial guarantee.

The approach which is usually taken by the Court in many cases concerning the fairness of the criminal proceedings is that what has to be looked at to determine whether the accused had a fair trial is the fairness of the whole procedure, the proceedings in their completeness. In other words, if the interests of the victim require for a different position in the criminal justice process, this would not lead to an unfair procedure if the other

elements of a fair trial are accordingly respected and fulfilled. This point is more plausible in light of the judgment of the Gorou case, where the fact that the decision of the national court was mainly based on the statement of the child-victim, who was not afterwards questioned during the trial, led to a violation of the fair trial guarantees for the defendant.

On the basis of the abovementioned, it is evident that the developments in the case-law of the Court that lead to a recognition of the position of the victim of crime do not negatively affect the already established rights of the defendants. Namely, as mentioned above, there are a large number of very detailed aspects of the criminal justice system tending to correspond to the fair trial standards established by Article 6 of the Convention. With the acknowledgment of the very specific status of the victim of the criminal act (in the presented examples, the vulnerability of the victims of sexual offences), the specific fair trial guarantees do not lose their power and significance.

## CONCLUSION

The status of the victims of crime in the criminal justice system is emerging as a human rights issue in the discourses on diverse levels. The position of the victims is diverse in the different national legal contexts. The international documents dealing with the issue are this far limited to the influence of the soft-law instruments. There are claims that on the international level, there is the need of a hard-law document that would on one hand, surpass the dilemma on whether there the status of the victims of crime should be formulated through a specific set of established rights for the victims perceived as a separate category of persons, and, on the other hand, would establish firm obligations of the states directly concerning the rights of the victims.

The issue is even more interesting and complex in the context of, as perceived by many, the most developed human rights protection system- the regional system established in the Council of Europe with the European Convention on the Protection of Human Rights and Fundamental Freedoms. Although the Convention does not explicitly provide for the rights of crime victims, their needs and interests are still recognized by the Court through its jurisprudence in several manners.

This thesis explores the emerging recognition of the need for protection of rights and interests of the victim of crime under the European Human Rights Convention. The thesis tries to answer the question: which are the ways in which the interests of victims of crime are addressed by the European Court on Human Rights, in the state of lack of an explicit provision in the Convention guaranteeing specific rights of victims of crime. The second question which this thesis seeks to answer to is whether the thus recognized rights or interests of crime victims negatively affect the rights of the defendants in the criminal

process, already firmly established by the Convention in Article 6 and by the extensive and detailed jurisprudence of the Court under this provision.

One of the developments in the jurisdiction of the Court relevant for the protection of victims' rights is the establishment of positive obligations of the states to criminalize and efficiently investigate the violations of the human rights guaranteed by the Convention, not only when they are infringed with an action of the state authorities, but also with actions of the individuals within their jurisdiction. This duty of the state can be seen as corresponding to a 'right to protection from becoming a victim'. In the recent developments of the jurisprudence of the Court, this emerging right encompasses the protection from violations of the right to life, the prohibition of torture, the right to respect for the private and family life, the prohibition of slavery and forced labor, thus protecting from a wide range of criminal acts that lead towards breaches of the listed rights. Amongst them are acts consisting of attacks to the life and physical safety of the person, very commonly the sexual offences and other forms of crime. There are reasons to believe that the developments of the doctrine of positive obligations, through the protection of the substantive rights, will lead to covering a wider scope of criminal acts threatening also other protected values.

However, one of the positive obligations recognized under Article 2 is the obligation to undertake positive operational measures directed towards protection from occurring of crime. Since the undertaking of those measures by the domestic authorities was set together with the need to balance them against the rights of other individuals that may be at stake, a future prospect for the development of this specific positive obligation under the other Articles of the Convention seems plausible, since it was seen that it will

not hamper the rights of the suspects. This is a potentially interesting topic for a further research which would look at the possibilities of introducing the obligation for operational measures under the Articles of the Convention and their impact to the already existing structure of rights.

Apart from the positive obligations, the necessity to recognize the needs of victims of crime was explicitly mentioned by the Court in a number of cases under Article 6 of the Convention and concerning in particular the questioning of the vulnerable victims. In this context the approach of the Court is that when the criminal procedure as whole provides sufficient safeguards for the due process rights of the defense, the vulnerable victims need not necessarily give a statement at the trial stage. This is a protection from a secondary victimization, which is especially relevant for victims of sexual offences or children – victims.

On the other hand, the Court never established a firm positive right for participation. One of the reasons for this is the difference in the status of the victims in the different criminal justice systems of the member states. With this in mind, it is not a likely prospect for the future that a right for participation will be established, since it would first require bridging the dissimilarities in the national criminal justice processes.

The fear behind the reluctantness for the emerging victims' rights that this development would invade the hardly earned rights of the defendant in the context of the Convention has shown to be ungrounded. This is largely due to the fact that the Court has always stressed the need to balance the interests at stake in the specific cases and always takes into account the potential dangers to the invasion of other rights. This approach of



the Court leads to the conclusion that in future the Court will apply a balancing test when required in a situation of a conflict of the interests of the defendant and the victim.

The prospects for the future developments are that there may be positive obligations found in other Articles of the Convention to spread the protection from criminality on all sorts of crime. However, it does not seem likely that there will be positive obligations for victim participation found implicit in the Article 6 of the Convention, containing the fair trial guarantees. The further step-by-step introduction of the victims' needs in the context of victims' rights under the human rights protection of the convention is more likely to occur under the substantive articles of the Convention.

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