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THE PROTECTION OF HUMAN RIGHTS THROUGH CRIMINAL
JUSTICE: THE RIGHT TO EFFECTIVE CRIMINAL
INVESTIGATIONS IN EUROPE

An integrate analysis between the ECHR and EU law

Presentata da: dott.ssa Sofia Mirandola

Coordinatore Dottorato

Relatore

Prof.ssa Marcella Gola

Prof. Michele Caianiello

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CHAPTER I

INTRODUCTION

1. Subject of the research

The subject matter of this research are the States' obligations under the European Convention on Human Rights (the ECHR) to protect human rights through criminal law, with a focus on the procedural limb of such protection, namely the States' duty to carry out effective criminal investigations into the most serious human rights offences. While the European Court of Human Rights (the Court) has developed a large body of case law in the field of the positive obligations to investigate, the concept and its application have not received sufficient scholarly attention in order to define their precise scope and implications on national criminal procedures.

Furthermore, this study will adopt also an integrated approach and discuss the interplay between the duty to conduct effective criminal investigations under the ECHR and the EU legal framework, by analysing the most relevant EU instruments of judicial cooperation in criminal matters in view of assessing whether it actually implements the instances of effectiveness of criminal proceedings into human rights offences flowing from the ECHR and whether it offers a stronger protection of such rights.

This introductory chapter will first give a general introduction on the development of the doctrine of the procedural obligations to investigate into serious human rights violations by the Court. Secondly, a working definition of certain concepts used in the study will be proposed. Finally, after giving an overview of the state of the art of the literature in this field and explaining how the scope of this study relates to this broader literature, the research questions will be discussed, as well as the methodology and structure adopted.

2. The procedural obligation to investigate into serious human rights offences in the ECHR: origins and rationale

The duty to carry out effective criminal investigations into human rights violations constitutes a form of positive obligation weighing on States. Positive obligations can be defined as ones «whereby a State must take action to secure human rights», as opposed

to negative obligations which are those «by which a State is required to abstain from interference with, and thereby respect, human rights»¹.

Admittedly, despite the traditional conception of human rights as limits to the powers of an intrusive State, imposing primarily negative obligations on States to refrain from directly interfering with those rights and freedoms, it has long been accepted that such rights may at the same time give rise to positive obligations, requiring States to take active steps and adopt all the reasonable measures to secure individuals the effective enjoyment of their human rights². Behind this doctrine of positive obligations, indeed, stands the acknowledgment that a human right can be harmed not only by an action by the State, but also by its failure to act, for which the State should also be held responsible.

Since the 1979 *Marckx v. Belgium* case³, when for the first time the door was opened to a more positive reading of ECHR rights, the Court has found positive obligations to arise under basically every Convention right, thanks to the general obligation of Article 1 ECHR, which requires the States to «secure» the enjoyment of Convention rights to everyone within their jurisdiction⁴.

The primary rationale cited by the Court to justify the development of such positive obligations is the principle of effectiveness, according to which the Convention is intended to guarantee rights that are practical and effective, not merely theoretical and illusory⁵. Such a dynamic and creative interpretation has clearly brought about an extension and redefinition of the obligations imposed on States by the ECHR, that go far beyond what was originally foreseen. One very significant implication of positive obligations, in this connection, is that they also lead to a “horizontal effect” of Convention rights, inasmuch as the State is expected to adopt measures to secure the enjoyment of those rights even in the sphere of the relationships among individuals, in order to prevent and protect from infringements of those rights by other private individuals⁶.

¹ HARRIS, O’BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. ??.

² See, L. LAVRYSEN, *Human Rights in a Positive State. Rethinking the relationship between positive and negative obligations under the European Convention on Human Rights*, Intersentia, 2016, p. 3.

³ *Marckx v. Belgium*, no. 6833/74, 13 June 1979, § 31, concerning the discrimination of “illegitimate” children in affiliation and inheritance rights, the Court found that «the object of [Article 8] is ‘essentially’ that of protecting the individual against arbitrary interference by the public authorities (...). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life».

⁴ In this sense, F. SUDRE, *Droit Européen et International de droits de l’homme*, Presses Universitaires de France, 2012, p. ??; R. CHENAL, *Obblighi di criminalizzazione tra sistema penale italiano e Corte europea dei diritti dell’uomo*, in *Legislazione Penale*, 2006, 1, p. 178.

⁵ See, *Airey v. Ireland*, no. 6289/73, 9 October 1979, § 24. In this sense see, A. MOWBRAY, *The creativity of the European Court of Human Rights*, in *Human Rights Law Review*, 2005, 5, p. 57.

⁶ In these cases the infringement of a human right by a private individual is linked to a failure of the State to comply with a positive obligation, see L. LAVRYSEN, *Human Rights in a Positive State.*, cit., p. 79.

Among the wide range of positive obligations existing under the various Convention's provisions, having the most diverse content and nature⁷, the first and most basic one, which represents the prerequisite for discharging any of the other types of positive obligations and is defined by the Court itself as a «primary duty⁸», is the State's duty to put into place an adequate legal framework which provides effective protection for the rights at stake⁹. In other words, under this obligation States are required to adopt legal rules to ensure that individuals may effectively enjoy their rights. As a consequence, a State could be held internationally responsible if its legislation is not appropriate as it allows for the infringement of a protected right by other private individuals.

It is precisely in this connection that the role of criminal law as instrument for the protection of human rights comes into play, as the most effective tool available for the State to guarantee an effective enjoyment of the rights.

While normally States dispose of a margin of appreciation in choosing how to discharge the obligation to provide for an adequate legal framework, the importance of the right at issue and the severity of the threat to it, however, influence the strength of the required legislative response and thus may restrict the appropriate options¹⁰. In certain cases, in relation to the most important Convention rights and to the most serious infringements thereof, the Court has indeed found that only criminal law is able to ensure effective protection of those rights. Therefore the provision of a criminal law remedy is mandated in order to fulfil this positive obligation¹¹.

The case *M.C. v. Bulgaria* can be taken as a very significant example in order to understand this reasoning of the Court, for in that occasion it has been made clear that «while the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective

⁷ For an extensive analysis of positive obligations under the ECHR see L. LAVRYSEN, *Human Rights in a Positive State*, cit., who distinguishes positive obligations between substantive or procedural, preventive or remedial, and as requiring to put into place a legal framework or to take ad hoc measures. Such categories are not mutually exclusive, but have rather a cross-cutting nature. See also, F. SUDRE, *Obligations positives dans la jurisprudence européenne des droits de l'homme*, in *Revue Trimestrielle des Droits de l'Homme*, 1995, p. ...

⁸ See, *Osman v. the United Kingdom* [GC], no. 23452/94, 28 October 1998, § 115.

⁹ In this sense, A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004, p. 225; D. XENOS, *The Positive Obligations of the State under the European Convention on Human Rights*, Routledge, 2012, p. 107; L. LAVRYSEN, *Human Rights in a Positive State*, cit., p. 113.

¹⁰ See, *X and Y v. the Netherlands*, no. 8978/80, 26 March 1985, § 24. See also, R. CHENAL, *Obblighi di criminalizzazione tra sistema penale italiano e Corte europea dei diritti dell'uomo*, cit., p. 180.

¹¹ See *infra* ... for an overview of the scope of the positive obligations of criminal law protection under the different ECHR rights.

deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions¹²».

With respect to certain fundamental human rights, therefore, a positive obligation of protection of human rights through criminal law arises, which is based on the assumption that only criminal law provisions are able to ensure a sufficient deterrent effect against infringements of those rights, thanks also to its prominent expressive and symbolic value¹³. In the first case in which an obligation of criminal law protection was found, indeed, the Court stressed that «effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions¹⁴».

The development of these obligations of criminal law protection discloses the «paradoxical» nature of the relationship between human rights and criminal law: the formers, at once, represent a limit on the punitive power of the States but also, on the other hand, require its intervention in order to guarantee their effective enjoyment¹⁵. In this sense, it has been said that human rights have both a «defensive and offensive role, a role of both neutralizing and triggering the criminal law¹⁶», in that they are indeed a source of positive obligations to criminalise.

The obligation to protect certain human rights through criminal law, however, is not confined to requiring the mere criminalisation of particular offences, but embraces also the effective enforcement of those criminal law provisions and covers therefore the whole criminal justice system and all its actors. In relation to Article 2, for instance, the Court stated 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

¹² M.C. v. Bulgaria, no. 39272/98, 4 December 2003, § 150.

¹³ See, S. MANACORDA, «Dovere di punire»? Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto, in *Riv. ita. dir. proc. pen.*, 2012, 4, p. 1364. The symbolic and expressive value of criminal law relates its ability to reaffirm the importance society attaches to the infringed rights and, more generally, the authority of law, see J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, Martinus Nijhoff Publishers, 2013, p. 60. Such value is also related to its element of public censure, which is a central feature of criminal liability, see A. ASHWORTH, *Positive obligations in criminal law*, Hart Publishing, 2013, p. 11.

¹⁴ X and Y v. the Netherlands, cit., § 27.

¹⁵ According to F. VIGANÒ, *L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali*, in *Studi in onore di Mario Romano*, Jovene, vol. IV, 2011, p. 2654, this represents a reversal of the traditional relationship between human rights and criminal law.

¹⁶ F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, in *Journal of International Criminal Law*, 2011, 9, p. 579. On such double role of human rights see also, A.M. MAUGERI, *Fundamental rights in the European legal order, both as limit on punitive power and as a source of positive obligations to criminalise*, in *New Journal of European Criminal Law*, 2013, 4, p. 374; R. BARTOLI, «Chiaro e oscuro» dei diritti umani alla luce del processo di internazionalizzazione del diritto, in *Riv. ita. dir. proc. pen.*, 2012, p. 794.

of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions¹⁷».

Accordingly, on top of the substantive positive obligation to criminalise, which is an aspect of the general positive obligation of adopting an effective regulatory framework¹⁸ and has a preventive nature, the Court has introduced also a procedural obligation of remedial nature that comes into play *ex post facto* once the infringement of the right has allegedly taken place: the duty to carry out effective criminal investigation into that offence¹⁹.

Such procedural obligation was established for the first time in *McCann and others v. the United Kingdom [GC]*, where the Court concluded that:

«The obligation to protect the right to life (...), read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State²⁰».

The criminal investigation, in particular, must be able to establish the facts and to identify and, where warranted, also prosecute and effectively punish those responsible. In other words, it is an obligation that touches upon the whole life of a criminal proceedings. As a consequence, distinguishing between which aspects of criminal law enforcement fall under the substantive obligation to criminalize and which, to the contrary, should be assessed under the procedural duty to investigate and punish, is not always so straightforward. To the contrary, since the two obligations are clearly interlinked, they also tend to overlap and

¹⁷ *Osman v. the United Kingdom [GC]*, cit., § 115.

¹⁸ See A. ASHWORTH, *Positive obligations in criminal law*, cit., p. 196-211.

¹⁹ According to E. DUBOUT, *La procéduralisation des obligations relatives au droits fondamentaux substantiels par la Cour Européenne des droits de l'homme*, in *Revue Trimestrelle des Droits de l'Homme*, 2007, n. 70, p. 472, the Court has in this way has operated a «redoublement» of the protected right, where now a substantive limb can be distinguished from a procedural one.

²⁰ *McCann and others v. the United Kingdom [GC]*, no. 18984/91, 27 September 1995, § 161. Such judgement which has been felicitously described as the equivalent of an additional Protocol to the Convention by J. LARKIN, *Dialogue at cross purposes: the Northern Ireland inquest and Art. 2 of the European Convention on Human Rights*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life under Article 2 of the European Convention on Human Rights, Twenty Years of Legal Developments since McCann v. the United Kingdom. In Honour of Michael O'Boyle*, Wolf Legal Publisher, 2016, p. 161. The procedural obligation to investigate, indeed, is not an unambiguous and explicit requirement of the Convention, but rather an implied duty, as reminded by R. ARIAV, *National Investigations of Human Rights Between National and International Law*, in *Goettingen Journal of International Law*, 2012, 4, p. 860; and, J. CHEVALIER-WATTS, *Effective Investigations under Art. 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, in *European Journal of International Law*, 2010, 3, p. 701.

it seems that the procedural one encompasses much more than one would initially think²¹. This seems to be rooted in the fact that the scope of a criminal investigation and proceedings is inevitably determined by the existence of substantive criminal law provisions criminalizing specific conducts. In the words of the Court, «an indispensable prerequisite for the discharge of this [procedural] obligation in individual cases is the concomitant obligation (...) for States to have criminal law provisions appropriately penalising acts contrary to that Article²²». As a consequence, a too narrow definition of a criminal offence could lead to certain acts being left outside the scope of the proceedings and therefore unpunished. It is thus apparent that defects in substantive criminal law might inevitably determine an impossibility to fulfil the procedural obligation to investigate and punish. In many cases, admittedly, the Court has found a violation of the procedural obligation on account of such kind of substantive problems²³.

Whilst the scope, definition and requirements inherent in such procedural obligation will be discussed in detail subsequently as the object of the first part of this study, it suffices here to highlight that the rationale justifying the existence of this procedural obligation is, once again, the need to ensure an effective protection of the human right at issue through the proper enforcement of the national criminal provisions protecting such right²⁴. Without an effective enforcement, indeed, the deterrent effect of criminal law provision would remain only illusory. But why are criminal proceedings regarded as the best and only possible means of enforcement to ensure such effective protection of human rights?

The first reason relates to the deterrent effect of criminal sanctions that has just been discussed. However, it appears that another rationale underpinning such assumption lies in the specific peculiarities of criminal proceedings, and in particular in their ability to establish the facts. In certain cases, indeed, it is only through the coercive investigative measures available in criminal proceedings and thanks to the independence of the authorities in charge of criminal justice that it is possible to come to the ascertainment of the facts, lacking which no other form of redress would be possible.

²¹ In this sense also, L. LAVRYSEN, *Human Rights in a Positive State*, cit., p. 53.

²² *Cestaro v. Italy*, no. 6884/11, 7 April 2015, § 209; *Gafgen v. Germany [GC]*, no. 22978/05, 1 June 2010, § 117; *Myumyum v. Bulgaria*, no. 67258/13, 3 November 2015, § 68; *Siliadin v. France*, no. 73316/01, 26 July 2005, § 142; *C.N. v. the United Kingdom*, no. 4239/08, 13 November 2012, § 73. On this issue see also, V. STOYANOVA, *Art. 4 of the ECHR and the obligation of criminalizing slavery, servitude, forced labour and human trafficking*, in *Cambridge Journal of International and Comparative Law*, 2014, 3, p. 407, who argues that thereby also quality requirements on the definition of criminal offences are imposed.

²³ See, *M.C. v. Bulgaria*, cit., § 166; *Myumyun v. Bulgaria*, cit., § 73-74 and 77; *Cestaro v. Italy*, cit., § 225.

²⁴ See, *Kelly and others v. the United Kingdom*, no. 30054/96, 4 May 2001, § 94, where it is stated that «the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life».

Finally, it should be noted that the State's duty to investigate into serious human right offences, although meant primarily to ensure the effectiveness of the underlying right, brings about at the same time a significant strengthening of the position of victims of crime within criminal proceedings in terms of their becoming thereby entitled to many rights, even of participatory nature.

If looked at from the other side of the coin, indeed, this procedural obligation can be regarded as the individual right of victims of serious human rights violations to an effective criminal investigation, who may indeed bring a complaint before Strasbourg for a failure of the State to adequately investigate into the offence they have suffered. In this sense, the positive obligation of effective enforcement of criminal law acknowledges a new dimension of criminal justice: criminal proceedings are conceived not anymore just as a guarantee for the rights of the accused, but also and at the same time as an instrument of *redress latu sensu* to safeguard the rights of victims of crime²⁵. Indeed, without the establishment of the facts to which criminal investigations and proceedings aim, any other judicial remedy offered to the victims would remain ineffective.

3. Conceptual framework

While concepts such as “investigation”, “prosecution”, “victim”, and “serious human right violation” have been for a long time part of the human right vocabulary, they refer at the same time to very specific and technical notions of a criminal procedure and their meaning therefore is strictly dependent on the national criminal justice system taken into consideration with its specificities. In view of this inevitable lack of uniformity on the precise meaning of such notions, which varies significantly from one State to another, it is important to provide a working definition thereof that is universally applicable, irrespective of the specific national system concerned. Such a uniform definition, though being inevitably approximate from a purely national perspective, is needed when having to assess different national criminal justice systems in the light of the same principles, just like it is done at the ECHR and EU level. The definitions adopted in this work, therefore, are in essence those that can be found in the case-law of the Court or in the EU legal order, which they often share.

Firstly, the notion of “serious human rights violation or offence”, which recurs throughout this work, refers to those infringements of certain rights that are considered by the Court

²⁵ In this sense also, F. VIGANÒ, *L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali*, cit., p. 2659.

as being so essential to the human person and dignity that they have a higher rank in the hierarchy of rights and deserve a criminal law protection²⁶. Accordingly, such concept refers to the violation of a certain category of human rights and not, by contrast, as it sometimes is the case in international law, to the massive scale or nature of the violation, resulting for instance from a systematic practice. Indeed, also an individual violation of those preeminent rights amounts to a serious human right offence. A list of what, according to the ECHR case-law, constitutes as serious human right offence is provided hereinafter when discussing the scope of the duty to effectively investigate and punish²⁷.

Secondly, for the notion of “victim of crime” this work relies on the definition given by Directive 2012/29/EU on the rights of victims of crime²⁸, which encompasses both the direct victim of a crime, defined as «a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence», as well as indirect victims, that is «family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death²⁹». Accordingly, in order for a person to become a victim it is sufficient that an alleged criminal offence is identified, but the identification of an alleged offender is not necessary³⁰.

Such definition may indeed be used also for the purposes of the ECHR because in the Court's case-law on the procedural obligations to investigate and punish serious human rights offences, in the same way as in the abovementioned Directive, both the direct victims of the crime and the relatives of the deceased victim are placed on the same level as far as their participatory rights in criminal proceedings are concerned³¹, and the existence of a causal link between the offence committed against the victim and an accused is not required before involving the victim in the criminal proceedings³².

As to the notion of «investigations» in the case-law of the Court, and therefore also for the purposes of this study, such term refers specifically to the preliminary investigations,

²⁶ See, J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, cit., p. 23.

²⁷ See *infra*...

²⁸ Directive 29/2012/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

²⁹ See Article 2 (1)(a) of Directive 29/2012/EU. Family members are also defined as «the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim».

³⁰ In this sense, A. KLIP, *European Criminal Law*, 3rd edition, Intersentia, 2016, p. 332.

³¹ See, *inter alia*, *Mocanu and others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, § 324, where it is expressly stated that the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. Equally, with regard to Article 3 of the Convention, the victim should be able to participate effectively in the investigation».

³² See *Anusca v. Moldova*, no. 24034/07, § 44, 18 May 2010.

namely that first stage of criminal proceedings which takes place before a case is sent to trial and is normally designed to collect evidentiary elements in order to decide whether to prosecute or not, irrespective of whether it is carried out under the supervision of a public prosecutor or of an investigating judge or whether such elements are admissible at trial or not. The investigation phase, thus, normally starts from the moment when the authorities become aware of the facts allegedly constituting a criminal offence and ends when a decision to commit for trial or, in the opposite case, a decision not to prosecute is taken. In this connection, it is therefore necessary to define also the notion of «prosecution», which is intended in the case-law of the Court as the power to approve the indictment and refer the case to a court for trial following the preliminary investigation stage, regardless of whether it is exercised by a public prosecutor or an investigating judge. Correspondingly, a «decision not to prosecute» is any decision ending criminal proceedings before the case is sent to trial or, in other words, concluding the preliminary investigation stage by not bringing any charges before the courts, as for instance a decision to withdraw the charges, to drop the case, to dismiss a complaint, or to discontinue the proceedings and stop investigating. The same notion is adopted by Directive 2012/29/EU, which refers to a decision taken either by a prosecutor, investigating judge or other law enforcement authorities such as police officers, but not by a court, which ends the criminal proceedings and includes decision to withdraw the charges or to dismiss the case³³. Finally, there is one last *caveat* to keep in mind when discussing the notion of «investigations». The definition just provided, limited to the preliminary investigation stage, could actually be misleading for one may therefore tend to understand the procedural obligation of States to investigate serious human rights violations under the ECHR as being limited to that particular stage and capable of being exhaustively discharged at the moment the preliminary investigations are concluded. This is however not the case since, as it will be discussed hereinafter, it is undisputed that where the case is sent to trial, such procedural obligation extends also to the following stages, and the criminal proceedings as a whole, from their initiation until the execution of the sentence, are taken into consideration by the Court in order to assess compliance with such duty³⁴. Therefore, although the procedural obligation object of this study is called by the Court itself duty to investigate, it is in fact confined to the strict investigation phase only where a decision not to prosecute is taken and proceedings are ended at that preliminary stage and should be better defined as “duty to effectively investigate and punish”.

A last concept which should also be defined is that of «judicial review» which is relevant in this study in relation to the possibility of submitting a decision not to prosecute to some

³³ See Recitals 43 and 44 of Directive 2012/29/EU.

³⁴ See *infra*...

form of control. Such term is intended here, in line with the interpretation given by the Court³⁵, as a synonym of judicial remedy. It thus refers to an intervention by a judicial authority, being it a judge or a court, which enjoys the guarantees of an independent tribunal for the purposes of Article 6 ECHR. It does not, conversely, concern the specific standards of review used by that authority, in the sense of judicial review as opposed to an appeal, being limited to the mere legality of the decision and not to its merits.

A similar definition is consistent also with the one provided in Directive 2012/29/EU on the rights of victims of crime under Article 11 which lays down the «right to a review» of a decision not to prosecute. Such provision, indeed, does not use the term «judicial» precisely because it allows also for a possibility of hierarchical review of the decision dismissing the proceedings within the prosecution service, which would to the contrary not fall within the notion of «judicial review» used by the Court³⁶.

4. Structure and methodology

The present work intends to assess how effective protection against gross violations of human rights should be ensured through the enforcement of criminal law at European level in accordance with standards set by the European Court of Human Rights (the Court). Given that the issue of the substantive duties of criminalisation of human rights has been already extensively discussed in literature³⁷, this work will not discuss their legitimacy, but it will rather take their existence as a starting point and focus instead on the procedural aspect of the duties of criminal law protection and on the possible reflections of such requirements on the EU legal framework, in the view of achieving a more effective implementation of such State obligations.

To that end, the study will be divided into two sections. Chapter II discusses the procedural obligation to investigate and punish human rights violations under the ECHR. Through an

³⁵ See, *Armani da Silva v. the United Kingdom* [GC], no. 5878/08, § 278; *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], no. 24014/05, 14 April 2015, § 232; *Gürtekin and others and two other applications v. Cyprus* (dec.), 11 March 2014, § 28.

³⁶ See *infra*...

³⁷ See, *inter alia*, R. CHENAL, *Obblighi di criminalizzazione tra sistema penale italiano e Corte europea dei diritti dell'uomo*, cit., p. 178; F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, in *Journal of International Criminal Law*, cit., p. 577; S. MANACORDA, «Dovere di punire»? *Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto*, cit., p. 1364; J. ALIX, *Les obligations positives de pénalisation et de punition des atteintes à la vie imposées par la Cour européenne des droits de l'homme au titre de l'article 2 de la Convention*, in S. MANACORDA, J. TRICOT (eds.) «Devoir de punir»? *Le système penal et a protection internationale du droit à la vie*, Société des législation comparé, 2013, p. 223; F. VIGANÒ, *Obblighi convenzionali di tutela penale*, in V. MANES, V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Giuffrè, 2011, p. 243; F. VIGANÒ, *L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali*, cit., p. 2645; F. BESTAGNO, *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale*, Vita e Pensiero, 2003; C. PAONESSA, *Gli obblighi di tutela penale. La discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari*, Edizioni ETS, 2009.

analysis of the large body of case-law, it will establish in detail its scope and what characteristics should criminal investigations, and more generally criminal proceedings, have to be regarded as effective and in compliance with such obligation. It will also assess how these requirements of effectiveness relate to the defence's fair trial rights ensured by Article 6 ECHR. Indeed, although from the two different perspectives of the defendant and of the victim, there is a certain degree of interplay between the criminal fair trial guarantees of Article 6 and the procedural requirements of the obligation to investigate and punish, on account of the fact that, as it will be mentioned hereinafter, they both apply both to the criminal investigations stage and trial. Some issues on which, indeed, both provisions have a bearing are, just to mention a few, the independence of the authorities, the examination of witnesses, the right of access to the case file, the reasoning of judicial decisions and the reasonable length of the proceedings. Finally, the impact that compliance, or rather non-compliance, with the duty to investigate has on other rights of the defence, such as the right not to be tried or punished twice under Article 4 of Protocol No. 7, will also be addressed. The perspective adopted in this work, therefore, is to assess whether a fair balance has been achieved between the sought for efficiency and the guarantees of the defence.

Building upon such *acquis*, Chapter III shifts the look to the EU legal framework, in order to discuss the extent to which to date the EU normative body in criminal matters reflects and contributes to implement such requirements of effectiveness of the investigations and criminal proceedings, in certain cases also offering higher standards of protection. In particular, the existence of positive duties to investigate and effectively punish human rights offences flowing directly from the EU legislation and how the effectiveness of criminal proceedings is thereby ensured will firstly be discussed. Secondly, attention will be paid to specific procedural aspects relating to the effectiveness of criminal proceedings, such as the rights of involvement of victims of crime on account of the fact that such profile represents one of the key requirements of effectiveness of criminal investigations under the ECHR. The argument, finally, is that the EU instruments of judicial cooperation in criminal matters are a valuable tool to implement in a more efficient way the duties of effective investigations implied in the ECHR.

The methodology of this work is mainly analytical. Through an interpretation of the ECHR and the judgments and decisions delivered by the Court in the field of the procedural obligations to investigate and punish serious human rights offences, the study seeks indeed to answer analytical questions such as «how legal concepts are defined and fit

together and the extent to which any general principles can be extracted by legal reasoning that can guide future decisions³⁸».

To that end, the study adopts however an integrated approach, focusing on the same issues of the effectiveness of criminal proceedings into serious human rights violations and discussing how these are developed both at the ECHR and EU level. Such perspective is actually lacking in the existing literature discussing the ECtHR procedural obligations³⁹. Academic research to date, indeed, has not analysed what influence can the Court's case-law concerning effective investigations have on the development of EU standards for criminal proceedings. Neither has research focused on, on the other hand, whether the EU instruments of judicial cooperation could be a valuable tool to implement in a more efficient way the duties of effective investigations imposed by the Court.

³⁸ J. BELL, *Legal Research and the Distinctiveness of Comparative Law*, in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Hart Publishing, 2011, p. 155.

³⁹ A. MOWBRAY, *Duties of investigation under the European Convention on Human rights*, in *International Criminal Law Quarterly*, 2002, 51, p. 437; O. CAHN, *Obligations positives procédurales et droit à la vie*, in S. MANACORDA, J. TRICOT (eds.) «*Devoir de punir*»?», cit., p. 235; J. CHEVALIER-WATTS, *Effective Investigations under Art. 2 of the European Convention in Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, cit., p. 701; B. BELDA, *Les droits de l'homme des personnes privées de liberté*, Bruylant, 2010, p. 586; K. ALTERMANN, *Ermittlungspflichten der Staaten aus der Europäischen Menschenrechtskonvention*, Nomos, 2006; L. LAVRYSEN, *Human Rights in a Positive State*, cit., p. 61-66; M. MONTAGNA, *Necessità della completezza delle indagini*, in A. GAITO (ed.), *I principi europei del processo penale*, Dike, 2016, p. 345.

CHAPTER II

THE RIGHT TO EFFECTIVE CRIMINAL INVESTIGATIONS INTO SERIOUS HUMAN RIGHTS OFFENCES UNDER THE ECHR

SECTION I: DEFINITION AND SCOPE OF THE RIGHT TO EFFECTIVE INVESTIGATIONS

3. The notion of “effective investigations”

B) Definition

Originally, the procedural obligation to carry out an effective investigation, firstly created in *McCann v. the United Kingdom*⁴⁰ under Article 2 of the Convention and then extended also to several other rights⁴¹, was not precisely defined and the Court refrained from deciding on the form and conditions that should be involved. It merely stated that «the obligation to protect the right to life (...) requires by implication that there should be some form of effective official investigation», without providing any indication on what form such an investigation should take⁴².

A more exact definition of the notion of effective investigation is now to be found in the case-law. In the judgment *Janowiec v. Russia*, the Court has specified that «the procedural obligation under Article 2 covers acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party» and that «this definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing historical truth»⁴³.

It is thus clearer now that the procedural obligation discovered in Article 2 and other Convention rights relates to an investigation with a view to prosecution and punishment, or (in cases where recourse to criminal law is not mandated, *infra* §...) to an award of compensation⁴⁴.

⁴⁰ *McCann v. the United Kingdom*, cit., § 161.

⁴¹ See *infra*, §...

⁴² *McCann v. the United Kingdom*, cit., §161-162; *Yasa v. Turkey*, no. 22495/93, 2 September 1998, § 98, see also J. LARKIN, *Dialogue at cross purposes*, cit., p. 161.

⁴³ *Janowiec and others v. Russia* [GC], nos. 55508/07, 29520/09, 21 October 2013, § 143. See also, *Kavaklioglu and others v. Turkey*, no. 15397/02, 30 May 2017, where parliamentary inquiries are excluded from the investigations capable of discharging the procedural obligations under Articles 2 and 3.

⁴⁴ See also J. LARKIN, *Dialogue at cross purposes*, cit., p. x, who therefore excludes that the peculiar structure of inquests existing in Northern Ireland have the necessary features to satisfy this procedural obligation.

Therefore, in situations where the substantive obligations of protection of Convention rights impose the recourse to criminal law, the nature of the investigation required to satisfy the procedural obligations is also, in principle, criminal⁴⁵. In these cases, indeed, States have the duty to «put 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 punishment of breaches of such provisions»⁴⁶. The essential purpose of the investigation thus is to secure the effective implementation of domestic laws which protect the right to life or the other relevant Convention rights and to ensure the accountability of the perpetrators⁴⁷.

Accordingly, inasmuch as a criminal law is mandated by the substantive facet of the Convention right, civil proceedings undertaken on the initiative of the victims, not of the authorities, and which do not involve the identification and punishment of those responsible, but merely an award of damages, cannot discharge this procedural obligation⁴⁸. As indicated by the Court itself, this is so because if authorities could confine their reaction to an infringement of those Convention rights to the mere payment of compensation, while not doing enough in the prosecution and punishment of those responsible, it would be possible in some cases for agents of the State (but not only) to abuse the rights of those within their control with virtual impunity, and the general legal prohibitions of killing and torture or inhuman or degrading treatment, despite their fundamental importance, would remain ineffective in practice⁴⁹.

Nonetheless, the obligation to carry out an effective criminal investigation does not go as far as to impose one single model of investigation. The States' freedom in organizing their prosecutorial and criminal justice system is not put into question, as the Court made it clear that «a variety of State prosecution systems and divergent procedural rules for conducting criminal investigations may be compatible with the Convention, which does not contemplate any particular model in this respect»⁵⁰. The same holds true for the parallel

⁴⁵ See also, F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 577, who states that «criminal proceedings would appear to constitute par excellence the most appropriate remedy for satisfying the procedural requirements of Art. 2»; HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 215.

⁴⁶ *Mutafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 171. See *infra*, §... for the situations in which this duty to resort to criminal law arises.

⁴⁷ *Margus v. Croatia* [GC], no. 4455/10, 27 May 2014, § 125.

⁴⁸ *Al-Skeini and others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, § 165; *Petrovic v. Serbia*, no. 40485/08, 15 July 2014, § 80.

⁴⁹ *Petrovic v. Serbia*, cit., § 80.

⁵⁰ *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009, § 208. Also, *Armani da Silva v. the United Kingdom* [GC], cit., § 259; *Al-Skeini and others v. the United Kingdom* [GC], cit., § 145. On this issue see A. MOWBRAY, *Duties of investigation under the European Convention on Human rights*,

procedural obligation under Article 3, as «the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim»⁵¹.

The essence and the essential purpose of the procedural obligation, which is in any case to be attained, is that «the investigation must be capable of establishing the facts and, where appropriate, identifying and punishing those responsible»⁵². In this sense, «in the normal course of events a criminal trial with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of fact and the attribution of criminal responsibility»⁵³.

Accordingly, notwithstanding the States' discretion in organizing their own criminal justice system, there could be situations of institutional deficiencies which may breach the procedural obligation in so far as the national rules for the investigations preclude the attainment of their essential purpose, but these remain rather exceptional. This is the case, for example, for the «pre-investigation inquiries» in Russia and Ukraine, when not followed by the opening of a criminal case and of full-scale preliminary investigations. Such legal framework has not been considered capable of establishing the facts of the case and of leading to the punishment of those responsible on the ground that the investigative measures normally available in criminal investigations in order to secure the evidence cannot be resorted to by the authorities in these «pre-investigation inquiries»⁵⁴.

cit., p. 437; E. BREMS, *Procedural protection. An examination of procedural safeguards read into substantive Convention rights*, in E. BREMS, J. GERARDS (eds.) *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*, Cambridge University Press, 2014, p. 137, who specifies that the investigation does not need to be judicial.

⁵¹ *Valiulienė v. Lithuania*, no. 33234/07, 26 March 2013, § 85. This demonstrates that the margin of appreciation doctrine is not unknown in respect of Article 2, although this provision protects a non-derogable right, and this is to be explained by the very nature of positive obligations as opposed to the negative ones. See, L.A. SICILIANOS, *Out of harm's way, positive obligations under Article 2 of the European Convention on Human Rights*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life*, cit., p. 35; and, L. LAVRYSEN, *The scope of rights and the scope of obligations. Positive obligations*, in E. BREMS, J. GERARDS (eds.) *Shaping rights in the ECHR*, cit., p. 172.

⁵² *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 172; *McKerr v. the United Kingdom*, no. 28883/95, 4 May 2001, § 121.

⁵³ *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007, § 66.

⁵⁴ *Lyapin v. Russia*, no. 46956/09, 24 July 2014, § 133-136; *Kulik v. Ukraine*, no. 10397/10, 19 March 2015, § 51; *Savridin Dzhurayev v. Russia*, no. 71386/10, 25 April 2013, § 193. The limit concerns primarily the impossibility to question persons as witness, in the same way and with the same safeguards of criminal proceedings, as for example criminal liability for perjury or refusal to testify. In the «pre-investigation inquiries» the authorities can only collect «explanations» which do not commit their authors in the same way. Furthermore, victims are prevented from effectively participate.

i. Criminal nature: in a strict sense or according to the notion of «criminal charge»?

Having clarified that the investigations required are necessarily criminal, it should be pointed out that so far the Court has never directly addressed the issue of whether only criminal proceedings *strictu sensu* or also administrative punitive proceedings, which are criminal in nature according to the *Engel* criteria⁵⁵, may satisfy the procedural obligation to investigate and punish.

It could be argued that, having the Court refrained from imposing a single model of investigations, even a formally administrative proceeding which is capable of establishing the facts and of leading to the punishment of those responsible could discharge the procedural obligation under Article 2. However, when taking a closer look at the rationales underpinning the States' duty to provide for criminal law remedies, the opposite conclusion could be reached that the procedural obligation may be discharged only by the institution of formal criminal proceedings in strict sense. Indeed, when imposing the positive obligation to enact criminal law provisions against an infringement of a Convention's right, the Court relies strongly on the symbolic and expressive value of criminal law in order to ensure effective deterrence, as only criminal law is able to express public disapproval of a serious offence⁵⁶. This result could not, on the other hand, be achieved by punitive proceedings that are not formally criminal, which, as acknowledged by the Court itself, normally carry a «lower degree of stigma⁵⁷». This is, admittedly, the argument underpinning the conclusion of the Court in a very recent case, the first one in which the issue in question has been addressed, concerning repeated episodes of domestic violence that national authorities did not consider sufficiently serious to warrant criminal sanctions and therefore punished them by a mere administrative fine. The Court indeed observed that such

⁵⁵ *Engel and others v. the Netherlands*, 8 June 1976, § 82, which refers to three criteria: the classification of the offence in national law, the nature of the offence and the nature and severity of the sanction provided by the law. For more on this topic see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 373.

⁵⁶ *Supra* §... For these considerations see also, F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit.; S. MANACORDA, «*Dovere di punire*»? *Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto*, cit., p. 1364; J. ALIX, *Les obligations positives de pénalisation et de punition des atteintes à la vie imposées par la Cour européenne des droits de l'homme au titre de l'article 2 de la Convention*, cit., p. 223; C. LACROIX, *L'influence de la jurisprudence de la Cour Européenne des droits de l'homme. Le droit au procès pénal en cas de catastrophe*, in *Risques études et observations*, 2011, 3, p. 173; F. VIGANÒ, *Obblighi convenzionali di tutela penale*, cit., p. 243; J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, cit., p. 60.

⁵⁷ See *Jussila v. Finland* [GC], no. 73053/01, 21 November 2006, § 43, in which it is accepted that the autonomous interpretation of the notion of «criminal charge» under Article 6 has underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of criminal law which differ from the hard core of criminal law, as for instance tax surcharges.

measure «did not have the deterrent effect necessary to be considered as a sufficient safeguard against further ill-treatment⁵⁸».

The issue of whether only formal criminal sanctions or also administrative punitive ones are able to discharge the States' obligation to effectively punish human rights violations, nevertheless, appears to be mostly theoretical, as the breaches of Convention rights for which a criminal law remedy is required usually reflect those very fundamental values of societies that are normally protected by hard-core criminal law also in domestic systems.

ii. Beyond the mere stage of investigations

The second consideration that can be drawn from the above mentioned definition of the duty to carry out effective criminal investigations, is that this procedural obligation is not confined to the strict investigation phase, but it extends also to the proceedings as a whole and to each stage of the criminal process. This is the reason why a more appropriate denomination would be that of “duty to effectively investigate and punish”.

Indeed, where the investigations have led to the institution of criminal proceedings, it is also the trial stage that will fall under the scrutiny of the Court and which must satisfy the procedural requirements of the Convention⁵⁹. In these cases, the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic courts, in reaching their conclusions, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined⁶⁰.

The Court will carefully assess, therefore, many aspects that go beyond the pure investigative measures available, starting from the legal classification given by the courts of the facts at issue and their interpretation of the criminal offence, the decisions adopted, their motivation and whether it is coherent with the results of the investigations. Finally, it will also scrutinize the sentencing and the effective execution of the sentence⁶¹. The procedural obligation under Article 2, indeed, requires also, where warranted, an effective

⁵⁸ See, *Balsan v. Romania*, no. 49645/09, 23 May 2017, § 66.

⁵⁹ *Oneryildiz v. Turkey* [GC], no. 48939/99, 30 November 2004, § 96; see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 218; F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit.

⁶⁰ *Oneryildiz v. Turkey* [GC], cit., § 95-96; *Armani da Silva v. the United Kingdom* [GC], cit., § 239. For the same argument under Article 3, see *Cestaro v. Italy*, cit., § 206.

⁶¹ See, F. TULKENS, S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l'homme. Réflexions à marge de la jurisprudence récente de la Cour Européenne des droits de l'homme*, in F. TULKENS, Y. CARTUYVELS, C. GUILLAIN (eds.), *La peine dans tous ses états. Hommage à Michel Van de Kerchove*, Larcier, 2011, p. 127; J. ALIX, *Les obligations positives de pénalisation et de punition*, cit., p. 230.

punishment and therefore bans many measures taken in the trial or in the sentencing phase aimed *de facto* at granting impunity⁶². The sanction imposed, indeed, is regarded as the outcome of the proceedings, essential to ensure the deterrent effect of the whole legal system, and therefore falls under this procedural dimension of protection⁶³.

It becomes thus clear, as it will be discussed more in depth later, that, although the opposite standpoint adopted, there is actually an overlap between the scope of the procedural obligation to investigate and the one of the right to a fair criminal trial under Article 6 in that they both concern the same judicial proceedings and often the same procedural deficiencies. However, the procedural obligation to investigate has a wider scope of application⁶⁴. Not only, as just seen, it covers also the final stage of enforcement of the sentence⁶⁵, but it also starts to apply before the right to a fair trial does. Indeed, the procedural obligation covers also those very first steps pertaining to preliminary proceedings when it should be decided whether the person under suspicion should be charged or not, that are normally undertaken before the actual bringing of a criminal charge and to which, by contrast, Article 6 does not apply yet⁶⁶.

B) Limits to the duty to investigate and punish

v. No right in itself to prosecute or punish: an obligation of means

The fact that the duty to investigate and punish extends also to the trial stage and to the imposition of a penalty should not, however, suggest that it confers also the right to have

⁶² *Infra*, §..

⁶³ In this sense, J. ALIX, *Les obligations positives de pénalisation et de punition*, cit.; HOTTELIER, *La nécessaire complémentarité des droits matériels et des garanties de procédure*, in *Revue trimestrielle des droits de l'homme*, 2007, 70, p. 573.

⁶⁴ In this sense also, E. BREMS, *Procedural protection*, cit.

⁶⁵ *Kitanovska Stanojkovic and others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016.

⁶⁶ See the joint concurring opinion of judges Casadevall, Berro-Lefevre, Sikuta, Hirvelä, López-Guerra, Sajó and Silvis to the judgement *Jaloud v. the Netherlands* [GC], 20 November 2011, no. 47708/08, § 4. On the scope of application of Article 6 see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Right*, cit., p. 376. In brief, the guarantees of the right to a fair trial under Article 6 apply at pre-trial stage only in so far as their initial inobservance risks to seriously compromise the fairness of the entire proceedings (*Imbrioscia v. Switzerland*, no. 13972/88, 24 November 1993, § 36). In particular they start applying from the moment that a preliminary investigation has been opened and the suspect has officially learnt of the investigation or begun be affected by it (*Eckle v. Germany*, no. 8130/78, 15 July 1982, §74).

a person prosecuted or sentenced for a criminal offence, nor that it entails an absolute obligation for all prosecutions to result in a conviction or in a particular sentence⁶⁷.

To the contrary, it is to be stressed, as constantly insisted on by the Court, that the duty to investigate is not an obligation of result, but one of means only, in the sense that the national authorities must take all the reasonable steps available to them in order to establish the facts and to identify and punish those responsible⁶⁸. In other words, it is a qualified, not absolute obligation⁶⁹. Nonetheless, the multiple and subtle quality requirements that an investigation should meet in order to be Article 2 compliant, allow a very detailed scrutiny by the Court on how these efforts were undertaken and on how the State has exercised or not its duty to punish⁷⁰. As it has been correctly commented, it is true that State enjoy a “criminal procedural autonomy” in implementing this international obligation, however such autonomy is exercised under a very strict surveillance⁷¹.

Therefore, as no right to have third parties prosecuted nor sentenced for a criminal offence can be asserted independently, there would be no violation of the duty to effectively investigate where, notwithstanding all the reasonable efforts employed by the authorities in compliance with the requirements under Article 2, the investigation ends without concrete, or with only very limited, results⁷². Likewise, an acquittal⁷³ or the discontinuation of criminal proceedings at the preliminary investigation stage does not run counter to the procedural obligation, if the evidence gathered by the authorities is sufficient to rule out any criminal responsibility⁷⁴. What is decisive is, instead, the diligence showed by the criminal law authorities: they should have done all that could be reasonably expected of them in the circumstances of this particular case and they must have submitted the case

⁶⁷ Armani da Silva v. the United Kingdom [GC], cit., § 238; Giuliani and Gaggio v. Italy [GC], no. 234508/02, 24 March 2011, § 306; Mustafic-Mujic and others v. the Netherlands (dec.), no. 49037/15, 30 August 2016, § 107. See also, M. MONTAGNA, *Necessità della completezza delle indagini*, cit., p. 345.

⁶⁸ According to L.A. SICILIANOS, *Out of harm's way, positive obligations under Article 2 of the European Convention on Human Rights*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life*, cit., p. 29, all positive obligations are, in principle, obligations of means.

⁶⁹ Bati and others v. Turkey, nos. 33097/96 and 57834/00, 3 June 2004, § 134.

⁷⁰ O. CAHN, *Obligations positives procédurales et droit à la vie*, cit., p. 235, describes the duty to investigate as a «hybrid obligation», rather than a mere obligation of means; see also, F. SUDRE, *Droit Européen et International de droits de l'homme*, cit., p. ??, and R. ARIAV, *National Investigations into Human Rights*, cit., p. 861.

⁷¹ See, F. TULKENS – S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l'homme*, cit., p. 130.

⁷² Brecknell v. the United Kingdom, cit., § 66; Giuliani and Gaggio v. Italy [GC], cit., § 306; Nencheva v. Bulgaria, no. 48609/06, 18 June 2013, § 134; Mikheyev v. Russia, no. 77617/01, 26 January 2006, § 107.

⁷³ Otasevic v. Serbia, no. 32198/07, 5 February 2013, § 34.

⁷⁴ Giuliani and Gaggio v. Italy [GC], cit., § 320. See also, B. EMMERSON, A. ASHWORTH, A. MACDONALD (eds.) *Human Rights and Criminal Justice*, cit., p. 821.

to the careful scrutiny required⁷⁵. A true duty to prosecute and punish, therefore, arises only where warranted by the findings of the official investigation and trial respectively⁷⁶.

In other words, there is a limit to the obligation of effectively investigate and punish certain human right violations, and this limit results primarily from the need to respect at once the rights of the defence and other Convention rights.

As the Court has made clear, the duty to investigate under Articles 2 or 3 «does not oblige States to do so by conduct that violates the absolute prohibition of inhuman treatment under Art. 3 or in a manner that breaches the right of every defendant to a fair trial under Art. 6»⁷⁷. To the contrary, the Court suggests that it is in the face of the most serious cases that respect for the right to a fair trial is to be ensured to the highest possible degree. This holds true also for other Convention's provisions: in relation to Article 7, for instance, the Court has maintained that «the national authorities cannot be expected to discharge their positive obligations under Article 3 of the Convention by acting in breach of the requirements of its Article 7, one of which is that the criminal law must not be construed extensively to an accused's detriment⁷⁸».

It must be kept in mind indeed that an infringement of the defence's rights during the criminal investigations may even prove to become the cause of their ineffectiveness, and therefore lie at the heart of the violation of such procedural obligation, in cases for example when due to such an error all the subsequent investigative acts become null and void, thus undermining the capability of the procedure to establish the facts⁷⁹. Similarly, a violation of the rights of the accused in the trial phase, which amounts to a grave breach of the criminal procedure rules and imports the repetition of orders for remittal within the same set of proceedings and the impossibility of examining the case on the merits, is capable of impairing the effectiveness of the proceedings as a whole⁸⁰.

⁷⁵ See, *Njezic and Stimac v. Croatia*, no. 29823/13, 9 April 2015.

⁷⁶ This is how the reference by the Court to the «obligation of States to prosecute», which can be sometimes found in the case-law, as for instance in *Margus v. Croatia* [GC], cit., § 127, or *C.N. and V. v. France*, no. 67724/09, 11 October 2012, § 104, is to be understood. In this sense see also, J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings*, cit., p. 55, who argues that the procedural obligation includes also, at least in those situations in which it is warranted, the obligation to prosecute and punish.

⁷⁷ *Gäfgen v. Germany* [GC], cit., § 177; see also *Osman v. the United Kingdom* [GC], cit., § 116, underlying the need to respect also the guarantees of Articles 5 and 8.

⁷⁸ See, *Myumyun v. Bulgaria*, cit., § 76.

⁷⁹ See, for instance, *Gedrimas v. Lithuania*, no. 21048/12, 12 July 2016, § 84, where the investigation's ineffectiveness was caused also by the initial failure by the authorities to accord the appropriate status to the suspects, who were instead heard as witnesses. Such a procedural error, discovered only years after, rendered all the subsequent investigative acts null and void, so that their results could not be used and had to be repeated at a time when it was impossible to do so.

⁸⁰ See, *Kosteckas v. Lithuania*, no. 960/13, 13 June 2017, §§ 43-45, where the repetition of remittals by the appellate court motivated by the total lack of reasoning in the first instance judgment and

The duty to investigate and punish, therefore, is to be carried out by fully respecting the other Convention rights which may be involved, and above all the rights of fair trial under its criminal head⁸¹ and this, first and foremost, also in the interest of the principle of effectiveness itself.

As regards defence rights, a prominent role in confining the duty to investigate and punish is played by the presumption of innocence protected by Article 6 § 2. Such guarantee becomes relevant in particular with reference to decisions not to prosecute on account of lack of sufficient evidence.

vi. *The existence of an evidential threshold test to justify prosecution*

Although, as mentioned earlier, no duty to prosecute can be asserted *per se*, it has been observed that several statements of the Court support the proposition that yet a duty to bring a prosecution exists where there is sufficient evidence, howsoever defined⁸². A very significant issue that comes about in this connection is whether the existence of a statutory evidential threshold to justify a prosecution is compatible or not with the duty to effectively investigate and punish.

This question was raised in a recent case, *Armani da Silva v. the United Kingdom*⁸³ which concerned the terrorist attack in the London underground in 2005, following which the brother of the applicant was shot dead by the police who believed him to be the terrorist, yet he was later found to be innocent and unrelated to the attack. Upon termination of the criminal proceedings against the police officers involved by a decision not to prosecute, the victim's sister challenged before the Court of Strasbourg, *inter alia*, the evidential threshold test set forth by law for justifying prosecution, contesting its compatibility with the duty to punish. In particular, according to English law, a prosecution may be brought

the de fact changing of the charges against the defendants founded the violation of the procedural obligation to effectively investigate and punish for these lead to the proceedings becoming time-barred thus preventing an examination of the case on the merits; *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, no. 3524/14, 12 January 2017, § 40, where the violation of the rights of the defence importing the ineffectiveness of the proceedings was rooted in a lack of sufficient information on the nature of the accuse.

⁸¹ In *Brecknell v. the United Kingdom*, cit., § 71, the Court expressly held that «the police must discharge their duties in a manner which is compatible with the rights and freedoms of the individuals and they cannot be criticized for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonable held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results». See also, *Dordevic v. Croatia*, § 139, 2012.

⁸² B. EMMERSON, A. ASHWORTH, A. MACDONALD (eds.) *Human Rights and Criminal Justice*, 2012, Sweet and Maxwell, p. 821.

⁸³ *Armani da Silva v. the United Kingdom* [GC], cit.

only if the evidence collected is enough to provide for a «realistic prospect of conviction»⁸⁴. The main argument was that such standard was excessively high, in that it prevented the possibility of any prosecution even when meaningful evidence had been collected and thus it *de facto* led to the impunity of those responsible.

The Grand Chamber however dismissed the claim, holding that Article 2 cannot be interpreted so as to impose a requirement on the authorities to launch a prosecution irrespective of the evidence which is available⁸⁵. It held that States should be permitted to have a threshold evidential test to prevent trials when there are weak prospects of conviction, and that they enjoy a wide margin of appreciation in setting it⁸⁶, as in doing so they are called to balance competing interests, such as those of victims, the potential defendant and public at large. Thus only an arbitrary threshold would be at odds with the procedural obligation to effectively investigate and punish⁸⁷. Furthermore, the adequacy of such evidential test should be assessed in the context of the criminal justice system taken as a whole; hence a more stringent test could prove justified in systems like the English one where unmeritorious cases cannot be filtered out subsequently at trial⁸⁸. Also, it was ruled out that the evidential test should be derogated or lowered on account of the serious nature of the crimes involved, such as for instance those involving the use of lethal force by State agents⁸⁹.

In reaching these conclusions, the Court relied strongly upon the need to respect the presumption of innocence and the rights of the defence, stating that «prosecutions should never be embarked upon lightly, irrespective of the evidence collected, on account of all the negative repercussions that being under trial normally entail for the defendant⁹⁰»; indeed, individuals must also be protected against arbitrary decisions and unjustified

⁸⁴ Code for Crown Prosecutors, Section 5. The test to bring a prosecution is actually made up by two stages: first there is the evidential stage (according to which the prosecutor must be satisfied that there is enough evidence to provide a “realistic prospect of conviction”), and second, there is the public interest stage (even when there is enough evidence, the prosecutor should consider whether a prosecution is required in the public interest). See also, B. EMMERSON, A. ASHWORTH, A. MACDONALD (eds.) *Human Rights and Criminal Justice*, cit., p. 821.

⁸⁵ *Armani da Silva v. the United Kingdom* [GC], cit., § 266. This approach is to be found, although expressed in less explicit terms, also in previous case-law, see *Giuliani and Gaggio v. Italy* [GC], cit., § 320; *Gurtekin and others v. Cyprus* (dec.), 11 March 2014, nos. 60441/13, 68206/13, 68667/13, § 27; *Brecknell v. the United Kingdom*, cit., § 71.

⁸⁶ See L. LAVRYSEN, *The scope of the rights and the scope of obligations. Positive obligations*, cit., p. 162, on the applicability of the doctrine of the margin of appreciation and balancing also on positive obligations flowing from absolute and unqualified rights such as Articles 2 or 3.

⁸⁷ *Armani da Silva v. the United Kingdom* [GC], cit., § 268.

⁸⁸ *Id.*, § 270. Indeed, in the English system once the prosecution has been brought, the judge must leave the case to the jury as long as there is some evidence, even if it is of a tenuous nature (the so-called “Galbraith test”, see § 166 of the judgment).

⁸⁹ *Id.*, § 272.

⁹⁰ *Id.*, § 265-276.

prosecutions⁹¹. Furthermore, according to the Grand Chamber, the setting of an evidential test for bringing a prosecution does not simply serve the interests of the defence, rather it also contributes to the objective interest of preserving public confidence in the prosecutorial systems, which could be undermined if cases were brought to trial without sufficient evidence to justify it⁹².

Therefore, given the presumption of innocence and the need to preserve public confidence in the judicial system, a threshold evidential test in national law that bars prosecution when there is no sufficient evidence to offer reasonable prospects of a conviction is not an arbitrary obstacle which is incompatible with the duties to investigate and punish serious crimes⁹³; it is instead the expression of an inherent limit to the very nature of such duties which must be discharged by respecting the rights of the defence.

vii. *The revival of the investigative obligation*

Yet following an initial decision not to prosecute on account of lack of sufficient evidence, the procedural obligation to investigate could nonetheless be revived when new elements concerning those facts come into light at a later stage.

Obviously, if any new assertion or allegation could trigger a fresh investigative obligation, an excessive burden would be placed on national authorities⁹⁴. Therefore, the case-law confines this effect to a «plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator» or, more in general, «any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further»⁹⁵.

Such a reopening of the case, implicitly required by the procedural limb of Article 2, even if occurred after a decision which is final according to the relevant national law, would not breach the right not to be tried or prosecuted twice guaranteed by Article 4 of Protocol No. 7, on the ground that a clear distinction is to be drawn between the duplication of criminal

⁹¹ Bakke v. Norway (dec.), 21 July 2016, no. 43641/14, § 21.

⁹² See also, M.E. GENNUSA, *Armani da Silva c. Regno Unito: il diritto alla vita ai tempi del terrorismo*, in *Quaderni costituzionali*, 2016, 3, p. 600.

⁹³ The issue was addressed subsequently also in the case Mustafic-Mujic and others v. the Netherlands (dec.), cit., concerning the liability of Dutch officers for the massacre of Srebrenica, in which the Court upheld the Court of Appeal's decision not to order a prosecution upon the considered view that the case would not end in a conviction (§ 123).

⁹⁴ For such consideration see also, J. CHEVALIER-WATTS, *Effective Investigations under Art. 2 of the European Convention in Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, cit., p. 712 ff., reminding that the Court seeks to interpret positive obligations in a way that does not impose impossible or disproportionate burdens on the authorities.

⁹⁵ Brecknell v. the United Kingdom, cit., § 70-71. See also, Jelic v. Croatia, no. 57856/11, 12 June 2014, § 85.

proceedings, which is prohibited under the first paragraph, and the resumption of a trial in exceptional circumstances, which is permitted under the second paragraph⁹⁶. The latter provision, indeed, expressly envisages the possibility of a prosecution on the same charges, in accordance with domestic law, when the case is reopened following the discovery of new evidence or of a fundamental shortcoming in the previous proceedings⁹⁷.

When a fresh obligation to further investigate arises, however, the nature and extent of such investigation will depend on the particular circumstances of each case and will inevitably differ from that to be expected immediately after the commission of the crime. In particular, such new investigation may be restricted to «verifying the credibility of the source, or of the purported new evidence» and to whether a full investigation could be launched⁹⁸. Once again, also in this case the authorities are entitled to take into account the prospects of success of any prosecution, noting that with a considerable lapse of time since an incident evidence deteriorates or cease to exist and the prospects of any effective investigation leading to the prosecution of suspects increasingly diminish⁹⁹.

In view of the potential influence of the passage of time, it is also to no surprise that the quality requirements inherent to the duty to investigate may apply to the fresh obligation to a lesser extent, depending on the circumstances of the case. The promptness requirement, for instance, will not to have the same significance in such “historical cases”, as most likely there will be no urgency of securing the crime scene¹⁰⁰. Only the requirement of independence of the authorities will in any case remain unchanged, as the passage of time does not have any bearing on it¹⁰¹.

⁹⁶ Art. 4 of Protocol No. 7 rules: «1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provision of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. (...)».

⁹⁷ See, Nikitin v. Russia, no. 50178/99, 20 July 2004, § 44-45. On this issue see, G. DELLA MONICA, *Ne bis in idem*, in A. GAITO (ed.) *I principi europei del processo penale*, cit., p. 339.

⁹⁸ *Ibidem*. See also, Saygi v. Turkey, no. 37715/11, 27 January 2015, § 48; Gasyak and others v. Turkey, no. 27872/03, 13 October 2009, § 61-63; Gurtekin and others v. Cyprus (dec.), cit., § 21; Palić v. Bosnia and Herzegovina, no. 4704/04, 15 February 2011, § 70.

⁹⁹ Gurtekin and others v. Cyprus, cit., § 22.

¹⁰⁰ See, Varnava and others v. Turkey [GC], no. 16064/90, 18 September 2009, §§ 191-192; Gurtekin and others v. Cyprus (dec.), cit., § 21-22;

¹⁰¹ See *infra* §...

viii. Limits flowing from the State's jurisdiction

The engagements undertaken by States to respect and protect human rights under the Convention in general are limited pursuant to Article 1 to persons falling under their own jurisdiction¹⁰². This limitation accordingly applies also to the positive obligation to investigate and punish serious human rights offences, which arises only in respect to facts occurred under a State's jurisdiction, be it territorial or, in certain exceptional circumstances, also extra-territorial. So far, these exceptional circumstances allowing a departure from the territoriality principle for the establishment of jurisdiction have been found to exist not only when the facts have taken place on board aircrafts and vessels registered in, or flying the flag of that State¹⁰³, but also when they occurred in the context of military operations abroad where an individual is under the authority and control of the State agents, or when the State exercises effective control over an area¹⁰⁴.

To the contrary, the nationality of the victim does not appear to be a special feature capable of triggering the State's jurisdiction to facts occurred beyond its territory, although the question has been left partially open. On the one side, in relation to Article 2, the Court has expressly held in sharp terms that «Art. 2 does not require member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals»¹⁰⁵. On the other hand, in relation to the inherently transnational offence of human trafficking, the Court has recently found that Article 4 does not require States to provide for universal jurisdiction over trafficking offences committed abroad against non-nationals¹⁰⁶. It did not address the question, however, of whether universal jurisdiction for cases involving a State's national is to be provided, as that was irrelevant for the particular case. Furthermore, the question of universal jurisdiction in respect of own nationals has never

¹⁰² See, among others, *Bankovic and others v. Belgium and others (dec.)* [GC], 52207/99, 12 December 2001, § 66.

¹⁰³ See, *Bakanova v. Lithuania*, no. 11167/12, 31 May 2016, § 63, in which the Court upheld the existence of the obligation to investigate into a death occurred on board a Lithuanian ship while travelling abroad.

¹⁰⁴ On the obligation to investigate deaths occurred in the context of military operations abroad when the person was under the authority and control of the State agents or when the State exercises effective control over an area, see *Al-Skeini and others v. the United Kingdom* [GC], cit., § 149; *Jaloud v. the Netherlands* [GC], cit., § 152. See also, B. EMMERSON, A. ASHWORTH, A. MACDONALD (eds.) *Human Rights and Criminal Justice*, cit., p. 819. On the concept of extra-territorial jurisdiction in the ECtHR's case-law, see J. VERVAELE, *Extraordinary Rendition e sparizione forzata transnazionale nel diritto penale e nel diritto internazionale dei diritti umani*, in *Criminalia*, 2012, p. 136-139.

¹⁰⁵ See, *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, § 242-243; and, although less clearly, *M. and others v. Italy and Bulgaria*, no. 40020/03, 31 July 2012, § 167-169.

¹⁰⁶ *J. and others v. Austria*, no. 58216/12, 17 January 2017, § 114. For a comment of this judgement see, V. STOYANOVA, *J. and others v. Austria and the strenghtening of States' obligation to identify victims of human trafficking*, 7 February 2017, in www.strasbourgobservers.com.

been addressed yet neither Article 3 for acts of torture, ill-treatment and enforced disappearances.

In light also of the international law on the issue, it cannot be anticipated what the solution of the Court to this problem would be. Indeed, according to most international law conventions, States shall exercise their jurisdiction when the victim is one of its nationals only if they consider it appropriate¹⁰⁷. Therefore, even if the Court were to adopt the negative and less burdensome solution proposed in *Ranste v. Cyprus and Russia* under Article 2 also to facts of torture, ill-treatment, human trafficking it would still be in line with the relevant international law standards.

C) Autonomous nature and temporal scope of the obligation to investigate

At last, it is necessary to clarify what relationship exists between the procedural obligation to investigate read into Article 2 and the other Convention's provisions mentioned below¹⁰⁸ and the substantive obligation to respect those same rights. In the landmark case *Silih v. Slovenia*¹⁰⁹, the Court held that the duty to investigate into alleged violations of a substantive right protected by the Convention, be it the right to life or others, «has evolved into an autonomous and separate duty» and is a distinct and «detachable obligation» which, although triggered from acts concerning the substantive facet of the relative provisions, can give rise to a finding of a separate and independent violation¹¹⁰.

In other words, the procedural obligation to investigate has its own distinct scope and operates independently from the substantive limb of protection: it shields right-holders from a different and additional kind of injustice than the infringement of the substantial right in itself, which concerns solely the need for and the quality of an investigation into an alleged human right violation. In this sense, it has been maintained that the adding of this procedural layer to the scope of substantive Convention rights has introduced a «duplication of the right guaranteed», which has now two autonomous and separate

¹⁰⁷ See, for instance, Art. 5(1)(c) of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; Art. 9(1)(c) of the UN Convention for the Protection of all Persons from Enforced Disappearances of 20 December 2006; Art. 15(2) of the UN Convention against Transnational Organized Crime, supplemented by the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons of 15 November 2000. The only exception is Art. 31(1) of the Council of Europe Anti-trafficking Convention of 3 May 2005, which makes it instead mandatory to establish jurisdiction in respect of offences committed against own nationals.

¹⁰⁸ See *infra* §.

¹⁰⁹ *Silih v. Slovenia* [GC], no. 71463/01, 9 April 2009, § 159. See also, *Janowiec v. Russia* [GC], cit., § 142.

¹¹⁰ The procedural obligation of Article 2 is also to be kept distinct from the obligation to provide for an effective remedy under Article 13, even though failure to comply with it may have consequences on the latter. See, *Armani da Silva v. the United Kingdom* [GC], cit., § 231.

dimensions¹¹¹. This means that a State can be held liable for a violation of Article 2 for not having undertaken any effective investigation even when it is not ultimately responsible for the death itself under the substantive limb of that article¹¹². Likewise, an individual may complain about the ineffectiveness of the investigations into an ill-treatment, without necessarily alleging that the State's liability also for the ill-treatment in itself.

Of course, the detachable nature of the procedural obligation directly affects the jurisdiction of the Court also from a temporal perspective: when a death or another fact triggering the duty to investigate has taken place before the entry into force of the Convention, a State may nonetheless be held liable for the investigation subsequently undertaken into such event to the extent that those procedural acts have taken place after the critical date, i.e. the entry into force of the Convention¹¹³.

In these cases, however, the procedural obligation will come into effect provided that there is a «genuine connection» between the triggering event and the entry into force of the Convention. In particular, a «genuine connection» is established only if two criteria are met: the lapse of time between the offence to be investigated and the critical date is reasonably short – normally not longer than ten years - and the major part of the investigation or the most important procedural steps took place or ought to have taken place after the critical date¹¹⁴. Holding otherwise, it will be impossible for the Court to make a global assessment of the effectiveness of the investigations.

When the «genuine connection test» is not met, only in extraordinary situations the Court may, as an exception, have jurisdiction to examine the investigations undertaken into facts which took place before the entry into force of the Convention. This occurs, in particular,

¹¹¹ See, E. DUBOUT, *La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour Européenne des droits de l'homme*, cit., p. 472. Such autonomous nature, however, coexists with the instrumental nature of the procedural obligations, these having been designed to improve the protection of the substantive right, see E. BREMS, *Procedural protection*, cit., p. 159. It is assumed that better investigative standards lead to greater accountability and consequently to a greater eradication of the substantive rights' infringements, see J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate ill-treatment of persons with disabilities*, in *Columbia Human Rights Law Review*, 2013, p. 245.

¹¹² See *Ramsahai v. the Netherlands* [GC], no. 52391/99, 15 May 2007, § 322. See also, O. CAHN, *Obligations positives procédurales*, cit., p. 237; E. BREMS, *Procedural protection*, cit., p. 141; H. TRAN, *Les obligations de vigilance des États parties à la Convention Européenne des Droits de l'Homme*, Bruylant, 2012, p. 141.

¹¹³ This reasoning concerns strictly instantaneous facts, not continuing situations, such as enforced disappearances, which have originated before the entry into force of the Convention but persist also afterwards. In these cases, no problem of temporal jurisdiction arises, see *Varnava and others v. Turkey*, cit., § 148-149. See, O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life*, cit., p. 152.

¹¹⁴ See, *Janowiec v. Russia* [GC], cit., § 148. For an application of these principles, in cases in which temporal jurisdiction was ultimately established, see *Petrovic v. Serbia*, cit., § 68; *Mocanu v. Romania* [GC], cit., § 207-211; *Otasevic v. Serbia*, cit., § 23-26.

when the triggering event was of «a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention», such as in cases of international crimes¹¹⁵. Such possibility of extending the scrutiny of the Court into the past encounters, however, the insurmountable limit of the existence of the Convention itself: no matter how serious and grave, investigations into facts occurred before 1950, the date of adoption of the Convention, fall outside the Court's jurisdiction¹¹⁶.

4. The material scope of application the right to effective criminal investigations

The procedural obligation to investigate into alleged human rights violations, as already mentioned, arises only with respect to breaches of certain provisions, which represent the *noyaux dur* of the Convention¹¹⁷. Moreover, even in relation to those provisions, not any kind of infringement, but only the ones of a more serious nature trigger to duty to carry out specifically criminal investigations, in application of what seems to be a principle of proportionality and *extrema ratio* of criminal law¹¹⁸. As mentioned above, criminal proceedings are indeed required only when the criminalisation of the conduct is required under the substantive obligations of protection of a Convention right.

Even though it could be generally maintained that, in principle, the obligation to investigate and punish arises in respect to all intentional infringements of physical integrity and breaches of a right resulting from an act of violence¹¹⁹, in view of the casuistic approach of the case-law however, it proves necessary at this point to try to give a detailed account of these different situations that enjoin the national authorities to make an infringement of the Conventions' provisions a criminal offence and to launch criminal investigations into it.

A) The right to life under Article 2

With regards to the right to life protected by Article 2, which is the first provision into which the Court has read such procedural obligation, a general duty to investigate and establish

¹¹⁵ Janowiec v. Russia [GC], cit., § 150.

¹¹⁶ Janowiec v. Russia [GC], cit., § 151, in which jurisdiction on the criminal proceedings into the events of the Katyn massacre was eventually ruled out, these having took place before the entry into force of the Convention.

¹¹⁷ The existence of a hierarchy among Convention rights is argued by A. ASHWORTH, *Security, Terrorism and the Value of Human Rights*, in B. GOLD, L. LAZARUS (eds.), *Security and Human Rights*, Hart Publishing, 2007, p. 203.

¹¹⁸ In this sense see also, F. VIGANÒ, *L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali*, cit., p. 2668.

¹¹⁹ In this sense also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p. 141.

the facts of the case arises in relation to all violent deaths, irrespective of whether State agents, private individuals¹²⁰ or person unknown were involved, and to all cases of death other than from natural causes¹²¹. Furthermore, this procedural obligation is applicable not only when one has actually died, but also when the person was subject to an enforced disappearance and can be presumed dead¹²², and where an individual has sustained life-threatening injuries or was exposed to an imminent risk to his or her life, although he or she eventually survived¹²³.

However, as mentioned above, a criminal investigation is not called for not in each of these cases. In certain circumstances, also civil, administrative or disciplinary proceedings that are able to establish the cause of the death may be sufficient to discharge the procedural obligation.

In this connection, the case-law shows that a criminal remedy is considered the only adequate response first of all in respect to intentional killings, regardless of whether perpetrated by a private person, State agents or unknown persons¹²⁴, and then in relation to enforced disappearances¹²⁵. The same is true also when the death is caused by an

¹²⁰ For the first time by *Ergi v. Turkey*, no. 23818/94, 28 July 1998, § 82. See also, *Yasa v. Turkey*, cit., § 100; *Osman v. the United Kingdom [GC]*, cit., § 115-122; *Rantsev v. Cyprus and Russia*, cit., § 231.

¹²¹ For example, deaths occurring in «suspicious circumstances» or resulting from road traffic accidents (see note...) or labour accidents (see *Pereira Henriques v. Luxembourg*, no. 60255/00, 9 May 2006). In this sense see E. MYJER, *Investigation into the use of lethal force: standards of independence and impartiality*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life*, cit., p. 115; HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 214; M. MONTAGNA, *Necessità della completezza delle indagini*, cit., p. 349 ss.

¹²² See, inter pluris, *Turluyeva v. Russia*, no. 63638/09, 20 June 2013; *Kaya v. Turkey*, cit.; *Cyprus v. Turkey [GC]*, no. 25781/94, 12 May 2014, § 132. See A. MOWBRAY, *Duties of investigation*, cit. p. 437 for further references. If the person cannot be presumed dead, Art. 2 is not applicable but the investigative duty arises under Article 5 in respect of the arbitrary and unacknowledged detention, see *infra* §...

¹²³ See *Makaratzis v. Greece [GC]*, no. 50385/99, 20 December 2004, §52-55; *Budayeva and others v. Russia*, no. 15339/02, 20 March 2008; *Kotelnikov v. Russia*, no. 45104/05, 12 July 2016, § 97; *Brincat and others v. Malta*, no. 60908/11, 24 July 2014, § 82 with further references.

¹²⁴ See, A. ASHWORTH, *Positive obligations in criminal law*, cit., p. 203.

¹²⁵ *Turluyeva v. Russia*, cit.; *Cyprus v. Turkey [GC]*, cit., § 132 «upon proof of an arguable claim that an individual who was last seen in the custody of the State, subsequently disappeared in a context which may be described as life-threatening». According to O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, cit., p. 146, enforced disappearances are «comprised of a three-stage act: the arrest or detention of a person by State agents or by a person acting with the latter's support or acquiescence; followed by the refusal to acknowledge the detention or give information about the fate of the detainee; and, as a consequence removing such person from the protection of the law». For a similar definition see also, Art. 7 (2)(i) of the Rome Statute of the International Criminal Court, 17 July 1998; and, Art. 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

alleged disproportionate use of force by State agents¹²⁶ and also where it occurs in suspicious circumstances while the victim is in the custody of State agents¹²⁷.

In turn, if the infringement of the right to life is not caused intentionally, «the positive obligation to set up an “effective judicial system” does not necessarily require criminal proceedings to be brought in every case, and may be satisfied if civil, administrative, or disciplinary remedies are available to the victims»¹²⁸. Accordingly, with regards to unintentional infringements of the right to life, a distinction should be drawn between ordinary cases for which other kinds of proceedings are sufficient, provided that they are able to establish the cause of the death¹²⁹, and other rather exceptional situations for which a criminal remedy is instead required.

Given the casuistic approach of the Court, however, the distinction between the two categories is not always drawn by a clear line¹³⁰, apart from in the following situations in which the case-law is more consolidated.

¹²⁶ See, *Giuliani and Gaggio v. Italy* [GC], cit.; *Armani da Silva v. the United Kingdom* [GC], cit.

¹²⁷ See, *Petrovic v. Serbia*, cit., § 80, concerning the alleged suicide of a person while in police custody; see also, *Slimani v. France*, no. 57671/00, 27 July 2004, § 30, for deaths of detainees in suspicious circumstances out of a lack of appropriate medical treatment; see also, *Perevedentsev v. Russia*, no. 39583/05, 24 April 2014, § 105; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, 14 March 2002, § 74.

¹²⁸ *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, 17 January 2002, § 51, in the field of medical negligence; *Mastromatteo v. Italy*, no. 37703/97, 24 October 2002, § 94-94, with respect to negligence of judicial authorities; *Maiorano v. Italy*, no. 28634/06, 15 December 2009, with respect to negligence of prison authorities; *Branko Tomasic and others v. Croatia*, no. 46598/06, 15 January 2009. See also, F. TULKENS, *The paradoxical relationship*, cit., p. 589; J. ALIX, *Les obligations positives de pénalisation*, cit., p. 225.

¹²⁹ See, *Basyuk v. Ukraine*, no. 51151/10, 5 November 2015, § 62: «if neither the pertinent facts surrounding the death nor the liability of the parties involved has been established, there appear to be no basis for taking a clear stand which forum, civil or criminal, would have been appropriate in the circumstances»; and *Zoltai v. Hungary and Ireland* (dec.), no. 61946/12, 29 September 2015, § 28: «What is important, however, is that whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress». See also, *Alp v. Turkey* (dec.), no. 3757/09, 9 July 2013; *Draganschi v. Romania* (dec.), no. 40890/04, 18 May 2010; *Molie v. Romania* (dec.), no. 13754/02, 1 September 2009.

¹³⁰ See, O. CAHN, *Obligations positives procedurals.*, cit., p. 239, who maintains that the «immaturity» of the procedural obligation does not lend their scope of application to be traced precisely. In this sense also M. SIMONATO, *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, Wolters Kluwer, 2014, p. 48. This holds true, for instance, with regards with road traffic accidents where sometimes a civil remedy is deemed to be sufficient (*Kotelnikov v. Russia*, cit., § 101) and in others a criminal one is required. The distinction seems to lie in the particular circumstances of the case, especially in the presence of any aggravating circumstances (*Basyuk v. Ukraine*, cit., § 57). It should be noted that in non-life threatening cases road traffic accidents may be addressed also under Article 3 (see, *Kraulaidis v. Lithuania*, no. 76805/11, 8 November 2016).

Firstly, civil or other types of proceedings are normally sufficient in the specific sphere of medical negligence¹³¹, inasmuch as these are capable of establishing the cause of the death and identifying those responsible, and may lead, where needed, to the imposition of an appropriate sanction, such as an award of compensation or a disciplinary measure¹³². However, the Court has held that, even in the sphere of medical negligence, in certain exceptional circumstances that go beyond mere ordinary professional negligence, a civil remedy which is left to the initiative of the victims is not sufficient¹³³. Here also, however, is not perfectly clear what these «exceptional circumstances» are. It has been suggested that the distinction could hinge on the collective or individual nature of the episode at issue¹³⁴, but it does not always appear to be correct: individual cases of medical negligence in which a criminal remedy was required, and collective ones in which a civil action in damages was held to be a sufficient avenue are also to be found in the case-law. For instance, the Court maintained that «where a patient is confronted with a failure by a hospital department to provide medical treatment and this results in the patient's life being put in danger» and where «the negligence attributable to that hospital's medical staff went beyond a mere error or medical negligence, in so far as doctors working there, in full awareness of the facts and in breach of their professional obligations, did not take all the emergency measures necessary to attempt to keep their patient alive» then a criminal remedy is required¹³⁵. By contrast, however, this notion of «exceptional circumstances beyond ordinary medical negligence» has not been resorted to with respect to cases of multiple HIV blood contamination in hospitals, for which the availability of civil actions for damages has been found to be sufficient to discharge the procedural obligation¹³⁶.

The most significant category of unintentional deaths for which, by contrast, a criminal response is always required is that of deaths caused by negligence in the context of «dangerous activities», when lives have been lost as a result of events occurring under the responsibility of public authorities and where it is established that «the negligence

¹³¹ Calvelli and Ciglio v. Italy [GC], cit., § 51.

¹³² For a health-care case in which, although sufficient in theory, the civil remedy was not in practice capable of discharging the procedural obligation on the ground that it did not provide the opportunity to clarify the cause of the death, see *Ionita v. Romania*, no. 81270/12, 10 January 2017, § 81.

¹³³ *Nencheva and others v. Bulgaria*, cit., § 125, concerning the death of children in a social care institution.

¹³⁴ In this sense D. XENOS, *Asserting the Right to Life (Art. 2 ECHR) in the Context of Industry*, in *German Law Journal*, 2007, 3, p. 231; C. LAGROIX, *L'influence de la jurisprudence de la Cour Européenne des droits de l'homme. Le droit au procès pénal en cas de catastrophe*, cit., p. 173.

¹³⁵ *Mehemet Senturk and Bekir Senturk v. Turkey*, no. 13423/09, 9 April 2013, §104-105; *Asiye Genc v. Turkey*, no. 24109/07, 27 January 2015, § 73.

¹³⁶ *G.N. and others v. Italy*, no. 43134/05, 15 March 2011, § 96; *Karchen v France (dec)*, no. 5722/04, 4 March 2008.

attributable to State officials goes beyond an error of judgement of carelessness in that the authorities in question, fully realizing the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity»¹³⁷. In such circumstances, Article 2 imposes a criminal response on the grounds that «public authorities are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused an incident»¹³⁸.

The notion of «dangerous activity» is a broad one¹³⁹, and although it normally refers to industrial activities¹⁴⁰, which are dangerous by their very nature, it has been interpreted to include also other activities, whether public or not, which may pose life at risk¹⁴¹, such as, at least in some cases, public transports¹⁴².

The above considerations mandating for a criminal action have been equally found to apply also to unintentional deaths or life-threatening illnesses caused by natural disasters¹⁴³ and environmental disasters such as situations of very severe pollution¹⁴⁴, two phenomenon

¹³⁷ Öneriyildiz v. Turkey [GC], cit., § 93. See also, J. ALIX, *Les obligations positives de pénalisation et de punition*, cit.

¹³⁸ *Ibid.*

¹³⁹ According to D. VOZZA, *Obblighi di tutela penale del diritto alla vita ed accertamento del nesso causale*, in *dirittopenalecontemporaneo.it*, 11 October 2016, the list of the «dangerous activities» is open and provisional.

¹⁴⁰ Öneriyildiz v. Turkey [GC], cit., a case concerning the death of thirty-nine people resulting from a landslide following an explosion at a waste-treatment factory. On this specific issue see, D. XENOS, *Asserting the Right to Life (Art. 2 ECHR) in the Context of Industry*, cit., p. 231.

¹⁴¹ In Iliya Petrov v. Bulgaria, no. 19202/03, 24 April 2012, § 72, the notion has been applied to the life-threatening injuries sustained by a child in an amusement park, after having entered into a building in which there was a electric transformer not in safety.

¹⁴² In Kalender v. Turkey, no. 4314/02, 15 December 2009, § 52-53, concerning a railway crash the Court applied the notion of «dangerous activity» thus requiring a criminal law remedy; in Mikhno v. Ukraine, no. 32514/12, 1 September 2016, § 131 concerning an airplane crash the same notion was applied; by contrast, in a case concerning an airplane crash, Gunes and others v. Turkey (dec.), no. 33273/11, 13 September 2016, § 21 the Court, in a questionable decision, did not refer to the same notion and held civil proceedings to be sufficient.

¹⁴³ Budayeva and others v. Russia, cit., § 142, a case concerning several deaths following a mudslide; Murillo Saldias and others v. Spain (dec.), no. 76973/01, 28 November 2006, concerning camper caught in a flood at an official camping site; Kolyadenko and others v. Russia, no. 17423/05, 28 February 2012, §190, a case concerning a flood; M. Ozel and others v. Turkey, no. 14350/05, 17 November 2015, § 189, a case concerning several deaths resulting from the collapse of buildings following an earthquake. On this specific topic, see C. LACROIX, *L'influence de la jurisprudence de la Cour Européenne des droits de l'homme. Le droit au procès pénal en cas de catastrophe*, cit., p. 173.

¹⁴⁴ Brincat and others v. Malta, cit., § 120 a case concerning the death of a person following an illness caused by exposure to asbestos at the workplace run by a public company; Smaltini v. Italy (dec.), no. 43961/09, 24 March 2015, § 51-53, concerning the death of the applicant following an illness allegedly caused by the severe pollution from the industrial plant Ilva. The complaint under Article 2 concerning the lack of criminal investigations by the other applicants who suffered from illnesses which did not attain the life-threatening level were not examined. See also the case A.A.

which have been considered to be comparable to that of dangerous activities, as in all such cases State responsibility comes into play on account of a failure to take positive measures of prevention.

In conclusion, and by way of simplification, a criminal response under the procedural limb of Article 2 is always required in relation to intentional killings, to death occurred in suspicious circumstances in the custody of State agents and to exceptional cases of negligent deaths, such as those resulting from dangerous activities and natural calamities; whereas normally, unless exceptional circumstances arise, civil remedies are sufficient in front of unintentional deaths.

B) Freedom from torture and ill-treatment under Article 3

The State's duty to investigate and punish arises also under Article 3, primarily with respect to ill-treatment suffered by the police or other State agents¹⁴⁵, but also at the hands of private individuals¹⁴⁶. In this connection, it has been held that «Art. 3 requires States to put in place effective criminal law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals»¹⁴⁷.

The procedural obligation to set forth and implement criminal law provisions, therefore, covers all serious acts of violence that have reached the minimum level of severity necessary to attract the protection of Article 3¹⁴⁸. That minimum «depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim¹⁴⁹». This standard, moreover, appears to be normally lower for cases of injuries

and others v. Italy, no. 37277/16, communicated to the Government on 24 June 2016 concerning the polluting emissions coming from the Ilva plant.

¹⁴⁵ The procedural obligation under Article 3 was articulated for the first time in Assenov and others v. Bulgaria, no. 24760/94, 28 October 1998, §102. See, A. MOWBRAY, *Duties of investigation*, cit., p. 443. The same principle applies in relation to ill-treatment inflicted by foreign State agents on its territory, with the State's connivance or acquiescence, see Al-Nashiri v. Poland, no. 28761/11, 24 July 2014, § 485.

¹⁴⁶ The extension of the procedural obligation to ill-treatment by private individuals was reached in M.C. v. Bulgaria, cit., § 151; see also, among many, Preminyin v. Russia, no. 44973/04, 10 February 2011, § 72. For more on this topic see, J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate*, cit., p. 214.

¹⁴⁷ Valiulienė v. Lithuania, cit., § 75.

¹⁴⁸ See, among many, Irina Smirnova v. Bulgaria, 13 October 2016, § 70; Abdu v. Bulgaria, no. 26827/08, 11 March 2014, § 39; Balazs v. Hungary, no. 15529/12, 20 October 2015, § 56-57.

¹⁴⁹ See, A. v. the United Kingdom [GC], no. 3455/05, 19 February 2009, § 20. For more on this quantitative threshold under Article 3 in general see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the*

inflicted by a State official on a detained person¹⁵⁰. Therefore, apart from the classic cases of ill-treatment by the police or physical assaults by private individuals¹⁵¹, infringements of Article 3 triggering the procedural obligation include, for instance, hatred motivated violence¹⁵², rape and any non-consensual sexual act, including in the absence of physical resistance by the victim¹⁵³, and also serious instances of domestic violence and harassment, in view of its humiliating and debasing character for the victim¹⁵⁴. Finally, it must be kept in mind that Article 3 also has an extraterritorial effect, which means that such provision is breached when an individual is removed from a State where there are substantial grounds to believe that such removal would expose him to a serious risk of being subject to ill-treatment in the destination country¹⁵⁵. Accordingly, also this kind of allegation is capable of triggering the domestic authorities' procedural obligation to

European Convention on Human Rights, cit., p. 236 ff. With respect to non-sufficiently serious violence incapable of triggering the positive obligations under Article 3, such as trivial disputes see *Ilieva and Georgieva v. Bulgaria* (dec.), no. 9548/07, 17 April 2012; *Tonchev v. Bulgaria* no. 18527/02, 19 November 2009; *B.V. and others v. Croatia* (dec.), no. 38435/13, 15 December 2015. It is to be highlighted, however, that acts of violence infringing personal integrity are protected also under Article 8, which thus becomes the only applicable provision where the minimum threshold of gravity under Article 3 is not reached, see *infra* §...

¹⁵⁰ *Otasevic v. Serbia*, cit., § 32.

¹⁵¹ *Beganovic v. Croatia*, no. 46423/06, 25 June 2009; *Secic v. Croatia*, no. 40116/02, 31 May 2007; *Abdu v. Bulgaria*, cit.; *Vuletic v. Croatia* (dec.), 19256/13, 23 June 2015.

¹⁵² *Identoba and others v. Georgia*, no. 73235/12, 12 May 2015; *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016.

¹⁵³ See, among many, *M.C. v. Bulgaria*, cit.; *M.G.C. v. Romania*, no. 61495/11, 15 March 2016; *G.U. v. Turkey*, no. 16143/10, 18 October 2016; *W. v. Slovenia*, no. 24125/06, 23 January 2014; *I.C. v. Romania*, no. 36934/08, 24 May 2016. Effective investigations into allegations of rape and sexual violence are normally addressed under both Articles 3 and 8.

¹⁵⁴ See *Valiulienė v. Lithuania*, cit.; *Irina Smirnova v. Bulgaria*, cit.; *Mudric v. Moldova*, no. 74839/10, 16 July 2013; *M.G. v. Turkey*, cit.; *Balsan v. Romania*, cit.; and, *M. and M v. Croatia*, no. 50175/12, 2 May 2017, for domestic violence towards a child. However, in other previous cases episodes of domestic violence were considered solely under the procedural limb of Article 8, see *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008; *A. v. Croatia*, no. 55164/08, 14 October 2010. The distinction between the provisions on which the violation is grounded seems to depend on the gravity of the facts complained of, but it not always proves to be true: the inconsistency of the Court's approach to cases of domestic violence as to the applicability of Article 3 or 8 is highlighted by R.J.A. MCQUIGG, *The European Court of Human Rights and Domestic Violence: Valiulienė v. Lithuania*, in *International Journal of Human Rights*, 2014, 18, p. 756; see also, C. PARODI, *La Corte di Strasburgo alle prese con la repressione penale della violenza sulle donne*, in *dirittopenalecontemporaneo.it*, 22 May 2013; and, L. LAZARUS, *Positive Obligations and Criminal justice: duties to protect or coerce?*, in *University of Oxford Legal Research Paper Series*, 2013, no. 41.

¹⁵⁵ See, among many, *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, § 124-136. For more on the extraterritorial effect of Article 3 see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 244-256.

investigate, in particular into the unlawful transfer of the individual to such a country where he faces a real and imminent risk of ill-treatment¹⁵⁶.

Unlike what happens in relation to infringements of the right to life, under Article 3 there are no situations in which civil proceedings to obtain compensation or other types of proceedings may as well be sufficient to deliver such procedural obligation: a strict criminal law remedy is in principle always required against ill-treatments that contravene Article 3. The sole limited exception concerns offences committed by minors, for which the Court, without dispensing the State from carrying out an effective criminal investigation, has accepted that at the end of those proceedings, criminal sanctions may be replaced by other measures such as, for instance, community service¹⁵⁷. To the contrary, if the offences are committed by minors under the age of 14, for which the national system does not provide any criminal liability, the procedural obligation under criminal law does not come into play, as other means of protection and prevention are called for¹⁵⁸.

C) Freedom from slavery and forced labour under Article 4

Despite the high importance of this right, demonstrated by the fact that it is declared by Article 15 to be non-derogable, during the first fifty years of the Convention's existence, this provision has been rarely invoked. However, the emergence of various forms of human trafficking has sparked much interest in it¹⁵⁹. It is in the judgement *Siliadin v. France*¹⁶⁰ that the Court has asserted for the first time the States' obligation to criminalise and effectively prosecute abuses falling within the material scope of Article 4, that is any act amounting to slavery, servitude and forced labour¹⁶¹. The obligation of criminal law protection was later

¹⁵⁶ See, *Khamidkariyev v. Russia*, no. 42332/14, 26 January 2017, § 153, a case concerning the disappearance and unlawful transfer of the applicant from Russia to Uzbekistan, where he would face the real and imminent risk of being ill-treated in detention on account of his being a person convicted of a religious extremism crime. For similar cases, see also *Savridin Dzburayev v. Russia*, no. 71386/10, 25 April 2013, § 190. See also, *El-Masri v. the former Yugoslav Republic of Macedonia [GC]*, no. 39630/09, 13 December 2012, § 186.

¹⁵⁷ *Beganovic v. Croatia*, cit., § 85.

¹⁵⁸ *Dordevic v. Croatia*, no. 41526/10, 24 July 2012, § 141-143.

¹⁵⁹ See, A. ASHWORTH, *Positive obligations in criminal law*, cit., p. 206; B. EMMERSON, A. ASHWORTH, A. MACDONALD (eds.) *Human Rights and Criminal Justice*, cit., p. 832.

¹⁶⁰ *Siliadin v. France*, cit. On this landmark case, see H. CULLEN, *Siliadin v. France: Positive obligations under Art. 4 of the European Convention on Human Rights*, in *Human Rights Law Review*, 2006, 6, p. 585.

¹⁶¹ See also, *CN v. the United Kingdom*, cit.; *C.N. and V. v. France*, cit.. On the specific issue of forced labour see also the case, *Chowdury and others v. Greece*, no. 21884/15, 30 March 2017.

extended also to the phenomenon of human trafficking in *Rantsev v. Cyprus and Russia*¹⁶², when the Court went much further finding that such conduct also engaged the protection of Article 4.

Therefore, any conduct infringing Article 4 triggers the procedural obligation to effectively investigate, prosecute and punish the offenders, no space being left to mere civil proceedings, just like under Article 3¹⁶³.

D) The right to liberty and security under Article 5

A parallel procedural obligation to investigate arises under Article 5 in respect to cases of «unacknowledged or arbitrary detention» or «enforced disappearances»¹⁶⁴, which are regarded as the most grave form of violation of that provision and a complete negation of its guarantees¹⁶⁵. Accordingly, States are required to carry out effective criminal investigation into an arguable claim that a person has been taken into custody by State agents *incommunicado* and has not been seen since.

Besides, Article 5, just like Article 3, also has an extraterritorial dimension, whereby a State would be in contravention of such provision if it were to transfer an individual to a country where he or she was at real risk of a flagrant breach of his or her rights under Article 5, as

¹⁶² *Rantsev v. Cyprus and Russia*, cit., § 272-285. On human trafficking see also, *L.E. and others v. Greece* (dec.), cit., § 68 and the case *T.I. and others v. Greece*, no. 40311/10, communicated to the Government on 6 September 2016. See also, V. STOYANOVA, *L.E. v. Greece: Human trafficking and the scope of States' positive obligations under the ECHR*, in *European Human Rights Law Review*, 2016, p. 290. In the view of A. ASHWORTH, *Positive obligations in criminal law*, cit., p. 208, this was a «bold step» taken by the Court, which implied a new right into Article 4, that no one shall be subjected to human trafficking.

¹⁶³ For more on this subject and for the specific definitions of those conducts and the implications on national criminal law, see V. STOYANOVA, *Art. 4 of the ECHR and the obligation of criminalizing slavery, servitude, forced labour and human trafficking*, cit., p. 407.

¹⁶⁴ For this notion, the Court relies on the international law definition given by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances, adopted on 20 December 2006 and entered into force on 23 December 2010, which reads: « enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law».

¹⁶⁵ See, among many, *Turkuyeva v. Russia*, cit., §117-119. However, if the disappearance of a person takes place in circumstances that make the death of that individual plausible, the complaint will be examined under Article 2. See, A. MOWBRAY, *Duties of investigation*, cit. p. 446.

it would occur were he or she to be subject to arbitrary detention¹⁶⁶. It is in application of such doctrine that the Court has, thus, considered that the practice of the “extraordinary renditions” – defined as the «extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment» which, as implying also a form of arbitrary detention, constitutes an «anathema to the rule of law and the values protected by the Convention»¹⁶⁷, gives rise to an investigative duty on the authorities also under Article 5¹⁶⁸.

E) The right to respect for private life and home under Article 8

In addition to Article 3, protection against acts of violence committed by other individuals infringing a person’s physical and physiological integrity is provided also by Article 8, which enshrines the positive obligation for States to adopt an appropriate legal framework for the protection of personal integrity even in the sphere of the relations of individuals between themselves. The nature of the action capable of meeting such positive obligation, however, depends on the particular aspect of private life that is at issue. The Court has found that where «fundamental values and essential aspects of private life are at stake» then efficient criminal law provisions and their application in practice through effective investigations and prosecution are required¹⁶⁹. It is interesting to remember that, despite its derogable nature, it was in respect of this right that the obligation to criminalize was introduced for the first time¹⁷⁰.

To the contrary, in respect of less serious acts affecting psychological integrity and not involving any violence or abuse, the State’s positive obligation could be fulfilled also when

¹⁶⁶ See, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, 17 January 2012, § 231-233. For more on this topic see, HARRIS, O’BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 298-300.

¹⁶⁷ *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], cit., § 221 and 239.

¹⁶⁸ See, for the first time, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], cit.. See also, *Al-Nashiri v. Poland*, cit., and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014. For more on this topic see, C. MELONI, *Extraordinary renditions della CIA e responsabilità europee: il punto di vista della Corte europea dei diritti dell’uomo*, in *dirittopenalecontemporaneo.it*, 10 June 2013.

¹⁶⁹ See, *X and Y v. the Netherlands*, cit., § 23-24; *M.C. v. Bulgaria*, cit., § 150; *K.U. v. Finland*, no. 2872/02, 2 December 2008, § 43-45, concerning the malicious misrepresentation of a minor on internet.

¹⁷⁰ See, *X and Y v. the Netherlands*, cit., §23-24. For such considerations, see A. ASHWORTH, *Positive obligations in criminal law*, cit., p. 199.

civil remedies capable of affording adequate protection are available¹⁷¹. The same holds true also for acts infringing aspects other than personal integrity, such as the right to privacy and of peaceful enjoyment of one's home, which are also protected by Article 8¹⁷².

Therefore, also in relation to infringements of the rights protected by Article 8, just like what happens for the right to life, one should draw a distinction between cases in which criminal law is mandated and others where there is no such requirement. The obligation to criminalize and to effectively investigate and punish comes into play under Article 8 only in respect to acts that infringe those «essential aspects of private life», such as, for instance, rape and sexual abuse, serious instances of domestic violence, and other forms of wilful physical attack on the personal integrity of a person, such as minor physical injuries and verbal threats¹⁷³. It also appears that episodes of harassment including verbal assaults and physical threats, which in principle could be redressed by civil proceedings, require instead a criminal law remedy when aggravated by a racist motivation¹⁷⁴.

F) Other provisions

Positive duties to take steps to undertake effective investigations accrue also with respect to violent behaviours in the context of the freedom of religion under Article 9¹⁷⁵, the freedom of expression under Article 10¹⁷⁶ and the freedom of assembly under Article 11¹⁷⁷. However, these cases appear less frequently and the Court, rather than examining the obligation to investigate in itself, normally addresses the issue of the investigations within the more

¹⁷¹ Soderman v. Sweden [GC], no. 5786/08, 12 November 2013, § 85, concerning the covert filming of a naked child. The decision in this case was criticized by Judge Pinto de Albuquerque in his dissenting opinion, in whose view the obligation to criminalize also child prognography should have been stated. See *B.V. and others v. Croatia*, cit., § 154, for other examples of acts of more trivial nature such as long-lasting disputed between neighbours.

¹⁷² See, *Irina Smirnova v. Bulgaria*, cit., § 92, where the applicant complained of having been obliged to tolerate the presence inside her house of persons foreign to her household and their disagreeable conduct; see also, *Noveski and others v. the former Yugoslav Republic of Macedonia* (dec.), no. 25163/08, 13 September 2016, for acts of violence causing damage only to the property, without any physical violence; see also, *Craxi (no. 2) v. Italy*, no. 25337/94, 17 July 2003, §74-75 for the disclosure of personal information related to intercepted communications without the person's consent; see also, *H.M. v. Turkey*, no. 34494/97, 8 August 2006, for illegal searches.

¹⁷³ *Sandra Jankovic v. Croatia* (dec.), 43440/98, 12 October 2000, § 47.

¹⁷⁴ See, *R.B. v. Hungary*, no. 64602/12, 12 April 2016, §§ 83-84. On the duty of the authorities to uncover a possible racist motivation see *infra*.

¹⁷⁵ See, *Karahmed v. Bulgaria*, no. 30587/13, 24 February 2015, § 110, for a failure to investigate disruption of Muslim prayers by offensive and violent demonstrators.

¹⁷⁶ See, *Ozgur Gundem v. Turkey*, no. 23144/93, 16 March 2000, § 45-46 for the lack of an investigation into a campaign of violence against a newspaper.

¹⁷⁷ See, *Ouranio Toxo and others v. Greece*, no. 74989/01, 20 October 2005, § 43, for the absence of an investigation into an attack on the headquarters of a political party.

general positive obligations of the State to protect the freedoms at stake, therefore also without lingering on the kind of investigation required, if necessarily criminal or not.

A peculiar approach is however adopted in relation to the obligations to carry out effective investigations under Article 1 of Protocol 1, as the Court in that connection has specified under which circumstances the investigations must be of criminal nature. Admittedly it found that «when an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that (...) adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained. Furthermore, where the interference is of a criminal nature, this obligation will in addition require that the authorities conduct an effective criminal investigation and, if appropriate, prosecution¹⁷⁸». At the same time, however, it has been accepted that in the context of property crimes the possibility of bringing civil proceedings against the alleged perpetrators «may provide the victim with a viable alternative means of securing the protection of his rights (...) provided that a civil action has reasonable prospects of success». Therefore, a State would fail to fulfill its procedural obligations only «if the lack of prospects of success of civil proceedings is the direct consequence of exceptionally serious and flagrant deficiencies in the conduct of criminal proceedings arising out of the same set of facts¹⁷⁹».

Therefore, in respect to these non-violent cases arising from other Convention's provisions, no clear pattern as to the procedural obligation implied emerges¹⁸⁰ and, moreover, they all have in common that the standards of effectiveness applied by the Court are clearly less demanding than those applied in cases of violence under Article 2, 3 and the other provisions mentioned previously.

¹⁷⁸ Blumberga v. Latvia, no. 70930/01, 14 October 2008, § 67.

¹⁷⁹ *Id.*, § 68. See also, L. LAVRYSEN, *Human Rights in a Positive State*, cit., p. 65.

¹⁸⁰ In this sense, E. BREMS, *Procedural protection*, cit., p. 144.

SECTION II: THE QUALITY REQUIREMENTS OF AN EFFECTIVE INVESTIGATION

1. The type of scrutiny on the quality of the investigations

As one would probably expect, the procedural obligation to investigate and punish cannot be discharged by the simple opening of a criminal investigation, which would not by itself offer any guarantee. The Court instead requires the criminal enforcement system to operate effectively and therefore oversees also the quality of the criminal proceedings in place, according to multiple and detailed parameters it has itself elaborated, acting in this way as a sort of judge of the procedure¹⁸¹. In its judgements, indeed, the following formula is likely to be found: «The Court notes that a criminal investigation was carried out in the current case by the domestic authorities. It remains to be assessed whether it was effective¹⁸²».

Although the procedural obligation remains one of means only, the strictness with which the Court enforces it lies at the heart of the doctrine's success: the obligation to effectively investigate and punish would indeed be meaningless if its standards were too relaxed¹⁸³. States are therefore required to give a detailed account of why and how they decide to exercise or not their criminal law enforcement machinery, and their margin of appreciation in this respect becomes very narrow¹⁸⁴. Nonetheless, the requirements set forth in the case-law must be regarded as minimum standards, and not as the best possible practice, it being open to States to provide for further and higher guarantees¹⁸⁵.

Before going into detail onto each of these specific qualitative criteria elaborated in the case-law, it is however necessary to understand what type of scrutiny is exercised by the Court on the quality and effectiveness of the criminal proceedings. To do so, it must be born in mind firstly that the several quality requirements to be met in order to comply with the procedural obligation are often connected to each other and may sometimes even

¹⁸¹ E. DUBOUT, *La procéduralisation des obligations relatives aux droits fondamentaux substantiels*, cit., p. 472; E. BREMS, *Procedural protection*, cit., p. 148. O. CAHN, *Obligations positives procedurals*, cit., p. 247 criticizes the Court's refusal to define clearly the criteria against which the effectiveness is to be measured, stating that the incoherent and casuistic approach makes it impossible for a State to foresee if it has complied with the procedural obligation or not.

¹⁸² See, among many, *Miclea v. Romania*, no. 69582/12, 13 October 2015, § 40; *Chinez v. Romania*, no. 2040/12, 17 March 2015, § 48.

¹⁸³ In this sense also, J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate*, cit., p. 248.

¹⁸⁴ H. TRAN, *Les obligations de vigilance des États*, cit., p. 136; S. MIRANDOLA, *The involvement of the deceased victim's next of kin in criminal investigations: an analysis of the standards under Article 2 of the Convention and of Directive 2012/29/EU on the rights of victims of crime*, in L. EARLY, A. AUSTIN, C. OVEY, O. CHERNISHOVA (eds.) *The Right to Life*, cit., p. 180.

¹⁸⁵ See, *Brecknell v. the United Kingdom*, cit., § 70.

overlap: it is possible, indeed, that certain aspects of the procedure be relevant to determine compliance or not with more than one of the different standards set by the Court. In the recent judgment *Mustafa Tunc and Fecire Tunc v. Turkey*, the Court has for the first time addressed head-on and clarified the relation existing between these multiple requirements, expressing the guiding principle for assessing alleged violations of the procedural obligation. It held that:

« (...) the Court considers it appropriate to specify that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed.»¹⁸⁶

The type of scrutiny carried out by the Court to verify compliance with the procedural obligation under Article 2 and others, therefore, consist of a global assessment of the effectiveness and adequacy of the criminal investigations as a whole. Although it does verify the respect of each specific requirement, ultimately the Court will assess whether the single shortcomings discerned did have an impact on the overall effectiveness of the proceedings or not. This is because the single requirements should not be examined in isolation and irrespective of the other parameters, rather it is their combination which makes an investigation effective¹⁸⁷.

This holistic method strongly resembles the «overall examination of the fairness of the criminal proceedings» frequently used by the Court to verify respect of the right to a fair trial under Article 6, defined as the «proceedings as a whole» test and the «taken together» approach¹⁸⁸. Also under the latter provision, indeed, very specific rights are guaranteed to

¹⁸⁶ *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 225.

¹⁸⁷ See, *Armani da Silva v. the United Kingdom* [GC], § 243; *Sarbyanova-Pashliyska and Pashliyska v. Bulgaria*, cit., § 41; *Kraulaidis v. Latvia*, cit., § 63, in which the Court stated that «while none of the shortcomings in the investigation appears to be particularly grave when taken by itself, it is important to assess the proceedings as a whole».

¹⁸⁸ For this definition see, R. Goss, *Criminal fair trial rights: Art. 6 of the European Convention on Human Rights*, Hart Publishing, 2014, p. 116 ff., who strongly criticizes this approach as ambiguous

the defence, but a failure to ensure one of them does not necessarily and automatically imply a violation of the right to a fair trial, as such rights are regarded as elements, among others, of the concept of a fair trial¹⁸⁹.

The stance taken by the Court has been thus described as a «significant flaw test»¹⁹⁰ and an «outcome-oriented approach»¹⁹¹: the Court is not concerned with allegations of errors or isolated omissions, what matters is not the single shortcoming by itself, but rather the actual impact of that procedural error on the investigation as a whole and, more particularly, whether it undermined its ability to establish the facts and punish those responsible¹⁹². Only in such case a violation of the procedural obligation will be found. The outcome of the assessment, therefore, will be largely dependent of the specific circumstances of each case: the lack of a single investigative measure could be decisive in certain cases, but in other even several deficiencies may not diminish the investigation's ability to establish the facts.

Thanks to such a new development of the Court's scrutiny, which is most likely to have a great impact on the outcome of several cases, the critical remarks advanced in the past against the previous method adopted by the Court on account of its being excessively formalistic, now turn to be disputable¹⁹³.

and vague on the ground that it is poorly defined and inconsistently applied. In this sense also, S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 87-88, who holds that this method leaves Article 6 «in a cloud of ambiguity».

¹⁸⁹ Al-Khawaja and Tahery v. United Kingdom [GC], nos. 26766/05 and 22228/06, 15 December 2011, § 143-146. This is especially true for the right to confront witnesses, but does not apply to all rights implied under Article 6, see R. GOSS, *Criminal fair trial rights*, cit., p. 116 ff. On this approach towards the right to confront witnesses see, M. BIRAL, *L'overall examination: nuove frontiere sul diritto a confrontarsi con i testimoni*, in *Archivio Penale*, 2013, 1, p. 1; S. MIRANDOLA, *Usa probatorio delle dichiarazioni dei testimoni assenti e giurisprudenza europea: variazioni sul tema 'Al-Khawaja'*, in *Cassazione Penale*, 2017, 1, p. 368.

¹⁹⁰ M. GIALUZ, *La protezione della vittima tra Corte EDU e Corte di Giustizia*, in L. LUPARIA (ed.), *Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali*, Wolters Kluwer, 2015, p. 28. See also, Siliadin v. France, cit., § 130 for a reference to the «significant flaws».

¹⁹¹ J. KUKAVICA, V. FIKFAK, *Strasbourg's U-Turn on Independence as part of an Effective Investigation under Article 2*, in *Cambridge Law Journal*, 2015, 74, 3, p. 415.

¹⁹² Sarbyanova-Pashliyska and Pashliyska v. Bulgaria, cit., § 41 and 43, were the excessive length of the proceedings did not affect the overall adequacy of the criminal law response and therefore no violation of the procedural obligation was found. See also, Hugh Jordan v. the United Kingdom, no. 24746/94, 4 May 2001, § 107; B.V. and others v. Croatia (dec.), cit., § 151. See also, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 217.

¹⁹³ For a critic of the formalistic approach see, J. CHEVALIER-WATTS, *Effective Investigations under Art. 2*, cit., p. 701. Indeed, before the clarification on the nature of this scrutiny rendered in the case Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., the Court's stance was much more formalistic, as in many cases it was confined to detecting the single shortcomings in order to conclude for a violation. This occurred, for example, in the case Ramsahai v. the Netherlands [GC], in which the majority's decision was strongly criticized by several dissenting judges on account of the

An additional reason supporting the non-formalistic approach in this context is that, on several occasions, the Court has accepted that the nature and degree of scrutiny which satisfy the minimum threshold of an investigation's effectiveness is to be assessed «on the basis of all the relevant facts and with regards to the practical realities of the investigation work»¹⁹⁴. It has constantly held, indeed, that the procedural obligation to investigate must be interpreted in a way which does not impose an excessive or unreasonable burden on the authorities¹⁹⁵.

This holds true especially in relation to specific situations in which the Court takes into account the difficult context in which the investigations take place, for example during armed conflict or contexts of generalised violence where it is clear that obstacles may be placed in the way of investigators which compel the use of less effective investigative measures¹⁹⁶, in the context of anti-terrorist operations¹⁹⁷, but also where the case objectively complex, as for instance when it concerns war crimes or post-war situations¹⁹⁸. In front of these situations, the Court is indeed prepared to make reasonable allowances for the relatively difficult conditions in which the authorities have to work and a negative outcome will result only where the shortcomings were not inevitable even in the particular difficult conditions of the case¹⁹⁹. At the same time, however, the Court strongly reminds that such difficult situations do not relieve the authorities from the obligation to effectively investigate²⁰⁰.

It should be underlined, lastly, that also the specific offence to be investigated may affect to a certain extent the scope of the Court's scrutiny. Even though these quality requirements apply equally to all situations in which the procedural obligation to investigate

excessively formalistic approach. In this sense see also, J. KUKAVICA, V. FIKFAK, *Strasbourg's U-Turn on Independence*, cit., p. 415.

¹⁹⁴ *Armani da Silva v. the United Kingdom* [GC], cit., § 234; *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 181.

¹⁹⁵ *Osman v. the United Kingdom* [GC], cit., § 116; *Palic v. Bosnia and Herzegovina*, cit., § 70.

¹⁹⁶ *Al-Skeini and others v. the United Kingdom* [GC], cit., § 164; *Jaloud v. the Netherlands* [GC], cit., § 226; *Mocanu and others v. Romania* [GC], cit., § 319; *Hasan Yasar and others v. Turkey*, no. 50059/11, 11 October 2016, § 53.

¹⁹⁷ *Tagayeva and others v. Russia*, no. 26562/07, 13 April 2017, § 497.

¹⁹⁸ *Jelic v. Croatia*, cit., § 78-79, in relation to the difficulties of investigating into killings by State agents during the war and post-war recovery in a newly independent State. See also, *B. and others v. Croatia*, cit., § 62; *Njezic and Stimac v. Croatia*, cit.; *Palic v. Bosnia and Herzegovina*, cit., § 70; *Association "21 December 1989" and others v. Romania*, no. 33810/07, 24 May 2011, § 142. For more on the topic see, O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, cit., p. 153.

¹⁹⁹ *Jaloud v. the Netherlands* [GC], cit., § 226.

²⁰⁰ Indeed, the Court has acknowledged that the procedural obligation to investigate applies even in very difficult security conditions, including of armed conflict or contexts of generalised violence. See also, A. PETROPOULOU, *Liberté et sécurité. Les mesures antiterroristes et la Cour Européenne des droits de l'Homme*, Editions Pedone, 2014, p. 333.

has been found to arise, regardless of the Convention's provision concerned²⁰¹, the Court has sometimes stated that its control may be less exacting in respect to certain cases, such as those not involving the use of force by State agents, and be particularly stringent in the opposite case or when the facts happen to individuals in their custody²⁰². This holds all the more true when confronting the duty to investigate violent crimes under Articles 2 or 3 with the parallel obligation to investigate less serious crimes under other provisions, such as those under Article 1 of Protocol No. 1 relating to property crimes²⁰³.

Nonetheless, it does not appear that such general statement has indeed translated in significant differences in the application of the standards and in a more relaxed treatment for the former situations, since as acknowledged by the Court, «the requirements for an official investigation are similar»²⁰⁴.

2. The duty to activate *ex officio*

Since the very first time it was established, the duty to investigate was defined as a duty to open «an effective official investigation»²⁰⁵. From the very beginning, the official nature of the proceedings to be launched into an alleged human right's violation has thus been stressed. This essential trait of the proceedings more precisely means that:

«the authorities must act on their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin to lodge a formal complaint or to request particular lines of inquiry»²⁰⁶, «or to take responsibility for the conduct of any investigative procedures.»²⁰⁷

²⁰¹ The Court has held that the provisions of Articles 2 and 3 contain «converging principles» in relation to the procedural obligation to investigate, see *Mocanu and others v. Romania* [GC], cit., § 314. See also, *Perevedentsev v. Russia*, cit., § 104, where it is stated that these principles are applicable to different categories of cases. In this sense also, H. TRAN, *Les obligations de vigilance des États*, cit., p. 137.

²⁰² *Armani da Silva v. the United Kingdom* [GC], cit., § 234; *Bakanova v. Lithuania*, cit., § 67; *Preminyin v. Russia*, cit., § 74. See also, *Petrovic v. Serbia*, cit., § 83 with reference to deaths occurred under the custody of State agents.

²⁰³ *Blumberga v. Latvia*, cit., § 67, where it was held that in relation to such «less serious crimes the State would only fail to fulfill its positive obligation in that respect only where flagrant and serious deficiencies in the criminal investigation or prosecution can be identified».

²⁰⁴ *Preminyin v. Russia*, cit., § 74. The only exception concerns the admissibility of strict statute of limitation periods, see *infra*...

²⁰⁵ *McCann v. the United Kingdom* [GC], cit., § 161.

²⁰⁶ *Nachova and others v. Bulgaria* [GC], no. 43577/98, 6 July 2005, § 111.

²⁰⁷ *Petrovic v. Serbia*, cit., § 74; *McKerr v. the United Kingdom*, cit., § 111.

The duty to launch an investigation, therefore, arises automatically on national authorities once they have become aware of the alleged violation. In this respect, a distinction should be drawn between two situations that differently affect the starting point of such obligation and the relative onus on the victims to inform the authorities.

Indeed, no official complaint is needed when the facts are already known by the authorities. The Court found that the mere fact that the authorities have been informed of the death gives rise *ipso facto* to the investigative obligation, even in the absence of an express complaint²⁰⁸. Likewise, even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used. Especially in cases of ill-treatment, the authorities must take into account the particularly vulnerable situation of the victims and that they will often be less ready or willing to make a complaint²⁰⁹; however, this does not entail that States are required, under the procedural obligation, to adopt adequate detecting and reporting mechanism, failing which their responsibility would be engaged²¹⁰.

This holds true also in the context of «dangerous activities»: a criminal complaint is not mandatory in cases where the authorities are better placed to know about the original cause of the claim, as the circumstances surrounding the death are confined within the knowledge of State officials²¹¹.

By contrast, in cases where the authorities may not necessarily be aware of the facts, the lodging of a formal criminal complaint is mandated, all the more where the events at stake purportedly are the result of a secret operation carried out without any legal basis²¹². A true duty of diligence is here incumbent on victims: they are expected to apply promptly to the domestic authorities, since any delays could risk compromising the effectiveness of the following investigations²¹³. This duty, however, is to be assessed in the light of the particular circumstances of the case, taking into consideration also the possible vulnerability of the victim, the complexity of the case and the nature of the human rights violations at stake²¹⁴.

²⁰⁸ Mocanu and others v. Romania [GC], cit., § 265; El-Masri v. the former Yugoslav Republic of Macedonia [GC], cit., § 186; Petrovic v. Serbia, cit., § 74. See also, H. TRAN, *Les obligations de vigilance des États*, cit., p. 141.

²⁰⁹ Bati and others v. Turkey, cit., § 133; Otasevic v. Serbia, cit., § 30. For the same standard under Article 4 see, Rantsev v. Cyprus and Russia, cit., § 287; J. and others v. Austria, cit., § 107.

²¹⁰ See, O’Keeffe v. Ireland [GC], no. 35810/09, 28 January 2014, in which the Court dismissed the applicant’s complaint of a lack of effective detection of cases of sexual harassment on children in public schools, which prevented her case to be investigated earlier.

²¹¹ Brincat and others v. Malta, cit., § 123.

²¹² El-Masri v. the former Yugoslav Republic of Macedonia [GC], § 140, in relation to extraordinary renditions.

²¹³ Mocanu and others v. Romania [GC], § 264-65; Vuletic v. Croatia, § 24; Velikanov v. Russia, no. 4124/08, 30 January 2014, § 57. An additional duty of diligence is incumbent on victims to lodge the application to the Court as soon as they realize that the investigation is ineffective, see *ibidem* and Kamenica and others v. Serbia (dec.), no. 4159/15, 4 October 2016.

²¹⁴ El-Masri v. the former Yugoslav Republic of Macedonia [GC], cit., § 142.

In case of inertia of the victim in filing such official complaint, therefore, the duty to investigate *ex officio* does not arise and the complaint before Strasbourg will, in principle, be declared inadmissible for non-exhaustion of the domestic remedies or for failure to respect the six-month time-limit²¹⁵.

Yet, once the matter has been brought to the knowledge of the authorities by an official complaint, it is for the public prosecutor or other investigative authorities to ensure that an effective investigation is carried out into the victim's complaint²¹⁶. In this sense, the official nature of the investigation rules out - at least in respect of cases where the alleged perpetrators are State agents - the existence of a burden on victims to undertake a form of subsidiary private prosecution, where provided in the national legal system, to remedy the inaction of the public prosecutor²¹⁷. The Court has held in this regard that, once the matter has come to the attention of the authorities, victims are not required to pursue prosecution on their own, as this is a responsibility of the public prosecutor, who is certainly better, if not exclusively equipped, in that respect²¹⁸.

However, a subtle distinction should be drawn here between subsidiary prosecution, intended as a remedy to the inertia of the public prosecutor, and an ordinary private prosecution, where national law provides that certain offences are never to be prosecuted by the State, but only upon action of the victim itself. In respect to this latter situation, the Court has found that the Convention does not necessarily requires State-assisted prosecution, but it has left a wide margin of appreciation to the States. It has held that «its role is not to replace the national authorities and choose in their stead from among the wide range of possible measures that could suffice to secure adequate protection of the applicant from acts of violence», rather «the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim»²¹⁹. The question remains open, however, if such a leeway is afforded to States only in cases where the alleged perpetrators are private individuals or whether it has a more general value.

²¹⁵ Jorgensen and others v. Denmark (dec.), no. 30173/12, 28 June 2016, § 51; Mocanu and others v. Romania [GC], cit., § 31.

²¹⁶ Matko v. Slovenia, no. 43393/98, 2 November 2006, § 90; Stojnsek v. Slovenia, no. 1926/03, 23 June 2009, § 79, both cases concerning an alleged ill-treatment by State agents.

²¹⁷ On the notion of private prosecution see, M. CAIANIELLO, *Poteri dei privati nell'esercizio dell'azione penale*, Giappichelli, 2003.

²¹⁸ Matko v. Slovenia, cit., § 90; Stojnsek v. Slovenia, cit., § 79; Andonovski v. the former Yugoslav Republic of Macedonia, cit., § 90, where the Court stressed that «the judicial investigation initiated upon the applicant's complaint cannot justify the public prosecutor's lack of action». This does not imply, however, that if a victim does embark on a private prosecution those proceedings are not to be taken into account when assessing the investigations undertaken as a whole, see Otasevic v. Serbia, cit., § 25.

²¹⁹ Beganovic v. Croatia, cit., § 80; Valiuliené v. Lithuania, cit., § 85.

In conclusion, the official nature of the investigation is to be understood as a principle of mandatory investigations. It means that national authorities are under the obligation to act immediately as soon as an alleged serious human right violation has come to their knowledge, either directly or from an official complaint filed by the victim, and that the launch of a criminal investigation cannot be conditioned upon the initiative of the victims to lodge a formal complaint or to undertake a subsidiary private prosecution, nor upon a formal authorisation by other administrative authorities²²⁰.

A) Standards of credibility of the complaint

In the section above it has been demonstrated that, in certain circumstances, an official complaint by the victim is necessary for the obligation to investigate to arise. Obviously, not any kind of complaint shall have this effect, but only those who appear to be well-substantiated. To hold otherwise, an excessive and unreasonable burden would be placed on national authorities. The grounded nature of the complaint, obviously, does not normally come into play with regards to infringements of the right to life under Article 2, as the fact that a death has occurred in suspicious circumstances is capable by itself to trigger the duty to investigate. What could be in issue in such context is the life-threatening nature or not of the injuries sustained, but this is a question that relates more to the minimum gravity of the injuries in order to fall within the scope of Article 2, rather than to the credibility of the complaint itself.

The content and credibility of the complaint is instead often at stake in cases concerning Articles 3 and 4²²¹. In this connection, it is well-established in the case-law that Article 3 requires the authorities to investigate allegations of ill-treatment only when they are «arguable» and «raise a reasonable suspicion»²²². Likewise, with a slightly different formulation, for the investigative duty to arise under Article 4, the circumstances must have given rise to a «credible suspicion» that the person was subject to a treatment in violation of such provision, which is «not inherently implausible»²²³. In view of the importance of this

²²⁰ See, *Coraman v. Turkey*, no. 16585/08, 15 July 2014, § 40, in which domestic law required an authorisation by the Prefect for bringing criminal proceedings against members of the police.

²²¹ Also under Article 3 the credibility of the complaints is a separate, though interconnected question, from that of the gravity of the purported ill-treatment, which concerns the reaching of the minimum threshold of severity to fall under that provision. See *supra* §...

²²² *Assenov and others v. Bulgaria*, cit., § 101. See also, *M. and others v. Italy and Bulgaria*, cit., § 100; *Dilek Aslan v. Turkey*, no. 34364/08, 20 October 2015, § 53; *Tanis v. Turkey (dec.)*, cit., § 51.

²²³ *C.N. v. the United Kingdom*, cit., § 71.

criterion for the emergence of the procedural obligation, it is therefore necessary to analyse what an «arguable claim» is.

First of all, it should be stressed that the fact that the Court has not found it proven that the applicant was ill-treated, or that the claim in such regard was not arguable, does not preclude the complaint under Article 3 from being «arguable» for the purposes of the obligation to investigate²²⁴. Here also, the procedural obligation's autonomous and separate nature from the underlying substantive obligation emerges. Furthermore, it appears that the evaluation of the credibility of the complaint is undertaken *ex ante*, with reference to the moment in which it was submitted to the authorities, without taking into consideration any other evidence or finding subsequently come into light.

Secondly, the assessment of the arguable nature of the complaint is made *in concreto*, from an objective viewpoint and depends on the specific circumstances of each case²²⁵. In most cases, the claim is regarded as arguable where medical evidence supporting the allegations is available and the account of the facts is sufficiently detailed and precise²²⁶. However, there may be instances in which a claim may be deemed to be arguable even in the lack of any medical evidence²²⁷. In some cases, the victim may be relieved from submitting medical evidence in support of his or her allegations in view of his or her vulnerability, as that could be impossible in the circumstances at hand, and the seriousness of the allegations and their detailed nature is sufficient to trigger the obligation to investigate²²⁸. In others, by contrast, there must be other elements that confirm the allegations and raise a reasonable suspicion, such as for example the existence of a general practice of mistreatment known to the public²²⁹. Finally, a decisive argument in support of the arguable nature of the claim appears to be the fact that national authorities have indeed

²²⁴ See, *Dilek Aslan v. Turkey*, cit., § 53; *Mehmet Yaman v. Turkey*, no. 36812/07, 24 February 2015, § 65; *Skant v. Ukraine*, no. 25922/09, 6 September 2016, § 43-44; *Alpar v. Turkey*, cit., § 42.

²²⁵ In this sense also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p.137.

²²⁶ See, *Turbylev v. Russia*, no. 4722/09, 6 October 2015, § 67-68; *Premininy v. Russia*, cit., § 92; *Kitanovski v. the former Yugoslav Republic of Macedonia*, cit., § 87; *Alberti v. Italy*, no. 15397/11, 24 June 2014, § 65; *M. and M. v. Croatia*, no. 10161/13, 3 September 2015, § 136; *Nalbandyan v. Armenia*, no. 9935/06, 31 March 2015, §121-122. For a case where the lack of medical evidence rendered the complaint not arguable see, *Tanis v. Turkey (dec.)*, cit., § 51.

²²⁷ See *Ciorcan and others v. Romania*, no. 29414/09, 17 January 2017, § 150, where the Court explicitly accepted that «a sufficiently detailed description of the ill-treatment allegedly suffered at the hands of State agents justifies an investigation on the part of the domestic authorities, which should include a collection of the victim's medical reports».

²²⁸ *Mudayevy v. Russia*, no. 33105/05, 8 April 2010, § 115; *Etxebarria Caballero v. Spain*, no. 74016/12, 7 October 2014, § 44; *M. and others v. Italy and Bulgaria*, cit., § 101.

²²⁹ See, *Indelicato v. Italy*, no. 31143/96, 18 October 2001, § 37; *Mehdiyev v. Azerbaijan*, no. 59075/09, 18 June 2015, § 66.

opened an investigation into it. In such a case, the Court proceeds on the assumption that the complaint is credible, without lingering much on its specific content²³⁰.

In essence, the criteria on which the Court bases its assessment of the arguable nature of a complaint are very poorly defined and appear to be highly dependent on the specific circumstances of each case. This lack of clarity, nonetheless, seems to favour a broad interpretation of what an «arguable claim» is, which benefits the victims by extending the investigative obligation even in less strong cases where no medical report is submitted.

3. Independence of the authorities in charge of the investigations

Another standard against which compliance with the procedural obligation is to be verified concerns the independence of the investigation, both in law and in practice. In particular,

«the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.»²³¹

The requirement of independence, not surprisingly, is normally called into question only in relation to cases where the alleged killing or ill-treatment have occurred at the hand of State agents; when the alleged perpetrators are, instead, private individuals, issues of independence of the authorities are less likely to arise.

If one considers, as mentioned before, that the procedural obligation extends beyond the strict investigation phase also to the subsequent trial and that it binds not just a particular authority but rather the respondent State as a whole²³², it becomes apparent that all persons and bodies involved in the criminal law enforcement must be independent²³³. Thereby not only the police and the prosecutor, but also the forensic experts charged with carrying out specific checks should enjoy formal and *de facto* independence from those implicated in the events²³⁴. Furthermore, when a form of judicial review over a decision not

²³⁰ See, *Alpar v. Turkey*, cit., § 42; *C.N v. the United Kingdom*, cit., § 72, in relation to an Article 4 claim.

²³¹ *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 177; *Hugh Jordan v. the United Kingdom*, cit., § 105; *Giuliani and Gaggio v. Italy* [GC], § 300.

²³² See, *Mustafic-Mujic and others v. the Netherlands* (dec.), cit., § 102.

²³³ In *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 219, reference is made to «the investigative authorities in the broad sense».

²³⁴ See, *Giuliani and Gaggio v. Italy* [GC], cit., § 323; *Karpisiewicz v. Poland* (dec.), 11 December 2012, § 59; *Karabet and others v. Ukraine*, no. 38906/07, 17 January 2013, § 264; *Mikhno v. Ukraine*, cit., § 137. The lack of independence of a court-appointed expert may raise issues also

to prosecute is provided by domestic law, then also the judge or court responsible for reviewing such decision should abide by the independence requirement²³⁵, as well as the trial court itself²³⁶, where the case is actually sent to trial.

Turning to its substance, it is to be noted that this requirement touching upon the subjects charged with the investigations actually embraces two distinct aspects: on one side, the statutory or institutional independence (section A) and, on the other, practical independence (section B). These two elements however are not always to be taken separately, but their assessment seems, to a certain extent, to converge and overlap, especially following the Court's definite shift away from an absolutist understanding and towards an «outcome-orientated approach» in the interpretation of the standard of independence²³⁷.

A. Institutional or statutory independence

The first category, which is called statutory or institutional independence, encompasses both the existence in domestic regulation of appropriate statutory or regulatory safeguards of independence for those responsible for the investigations, as well as the lack of any institutional or hierarchical connection between the investigative authorities in the broad sense and the persons suspected to be implicated in the events. Whilst there are cases in which only one of these aspects is called into question, in many others these are interrelated. The mere aspect of statutory independence, for example, is often put into question in the context of cases assigned to military jurisdiction, where the prosecutor or the judges competent to investigate or decide on crimes committed by the military are also military servicemen in a relationship of subordination within the military hierarchy²³⁸.

In these cases of lack of appropriate statutory safeguards, however, the central issue is how the independence of the criminal law enforcement authorities is to be assessed. It has long been unclear, indeed, whether the element of independence in the context of the

from the perspective of Article 6, see *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008, § 179. See also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p. 149.

²³⁵ See, *Ramsahai v. the Netherlands* [GC], cit., § 351-355. See also, E. MYJER, *Investigation into the use of lethal force*, cit., p. 129.

²³⁶ *Mikhno v. Ukraine*, cit., § 138; *Mustafic-Mujic and others v. the Netherlands* (dec.), cit., § 111-114.

²³⁷ See next section. In this sense also, J. KUKAVICA, V. FIKFAK, *Strasbourg's U-Turn on Independence*, cit., p. 419.

²³⁸ Among many, *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 217-234; *Birgean v. Romania*, no. 3626/10, 14 January 2014, § 72; *Elena Apostol and others v. Romania*, no. 24093/14, 23 February 2016, § 33.

procedural obligation under Article 2 and other provisions had to meet similar criteria to those required under Article 6 for a fair trial, or whether a lower standard was sufficient. As a result of persisting inconsistencies in previous case-law, which had revealed the existence of two opposite approaches, a more pragmatic one and another which can be described as absolutist²³⁹, the question was eventually addressed and resolved in the leading-case *Mustafa Tunc and Fecire Tunc v. Turkey*²⁴⁰.

In such occasion, the Court acknowledged that, although the statutory criteria of independence of the judge for a fair trial under Article 6 may inspire the examination of similar procedural issues under other provisions such as Article 2²⁴¹, these requirements nonetheless may not be assessed in the same manner. The main difference is rooted in the fact that, whilst under Article 6 the independence of the court is an aim to be guaranteed in itself, in the context of the procedural obligation to investigate such feature is only one of the several standards which jointly serve towards ensuring the effectiveness of the criminal proceedings²⁴².

Thereby, Article 6 requires an absolute independence of the judge, which is to be assessed *in abstracto* according to the relevant statutory provisions. By contrast, the procedural limb of Article 2 and other provisions «does not require an absolute independence», but only «that the authorities are sufficiently independent of the persons and structures whose responsibility is likely to be involved»²⁴³. Accordingly, what is called for is a concrete examination of the independence of the investigation in its entirety in the light of all the specific circumstances of the case, rather than an abstract assessment of the compliance with the statutory criteria elaborated under Article 6. An «outcome-oriented approach²⁴⁴» has thus been clearly established, and the opposite absolutist one according to which a perceived lack of statutory independence would be sufficient to find a violation of the procedural obligation, irrespective of whether it had had a bearing on the effectiveness of the investigations or not, was in fact rejected²⁴⁵.

²³⁹ See also, J. KUKAVICA, V. FIKFAK, *Strasbourg's U-Turn on Independence*, cit., p. 418.

²⁴⁰ *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 217-234.

²⁴¹ In *Elena Apostol and others v. Romania*, cit., § 33, the criteria for the assessment of the independence of a court under Article 6 are recalled when starting the assessment under Article 2.

²⁴² *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], § 220-222. See also *Mikhno v. Ukraine*, cit., § 140, where the Court in light of such a difference, examined the independence of the court firstly under Article 2 and then also under Article 6, which was applicable in that case under its civil limb because it concerned a claim for damages lodged by the victim as a civil party in the criminal proceedings.

²⁴³ *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 223.

²⁴⁴ Definition adopted by J. KUKAVICA, V. FIKFAK, *Strasbourg's U-Turn on Independence*, cit., p. 419.

²⁴⁵ For cases in which this absolutist approach was followed by the Court see, for example, *Ramsahai v. the Netherlands* [GC], cit., § 222; *Al-Skeini and others v. the United Kingdom* [GC], § 174; *Birgean v. Romania*, cit., § 72. A. MOWBRAY, *Duties of investigation*, cit. p. 440, welcomed such demand of a «strict institutional independence».

Therefore, it is now clear that the finding of a lack of statutory or institutional independence of the authorities, due to the abstract absence of appropriate regulatory safeguards according to the criteria of Article 6, is not *per se* sufficient to conclude for the ineffectiveness of the criminal response, but it simply leads to a stricter scrutiny on whether the investigations as a whole were conducted independently enough²⁴⁶. In other words, a second step is necessary: it must be determined that such a flaw in the statutory independence has compromised the effectiveness of the proceedings by undermining their ability to shed light into the facts and punish those responsible. This further examination *in concreto* is carried out by verifying, on the one hand, whether the authority whose statutory independence is tainted, be it a prosecutor or a member of the court or other, had any special ties to the persons likely to be investigated on; and, on the other, whether there is tangible evidence of bias in his conduct²⁴⁷. It appears that the presence of either one of these situations is enough to ultimately undermine its independence.

As to the first aspect, the fact that the investigators belong to the same force or corps of the persons whose responsibility is likely to be involved is not sufficient in itself in order for their independence to be flawed, but other concrete elements are needed to support such a conclusion²⁴⁸. In any case, however, no problems would arise when investigative measure of «technical and objective nature» are undertaken by a special unit within that force, that has specific expertise, for example of technical and scientific nature²⁴⁹.

The independence of the investigators is, conversely, negatively affected when there are special ties, hierarchical or of other kind, among these and the persons who are likely to be involved (a situation which, as mentioned before, could be contentious in itself even when no preliminary issue of appropriate statutory independence arises). Apart from the most extreme cases in which the investigators are themselves the potential suspects²⁵⁰, such special relationships emerge where the investigators are direct colleagues or have a close working or personal relationship or a hierarchical link with the persons implicated in the

²⁴⁶ Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 224.

²⁴⁷ *Id.*, § 237. See also, Mikhno v. Ukraine, cit., § 136.

²⁴⁸ *Id.*, § 243; Ozpolat and others v. Turkey, no. 23551/10, 27 October 2015, § 88; Karpisiewicz v. Poland, cit., § 59, though with specific reference to the medical experts appointed in the investigations.

²⁴⁹ Giuliani and Gaggio v. Italy [GC], cit., § 322; Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 244; Ozpolat and others v. Turkey, cit., § 88; Guerdner and others v. France, no. 68780/10, 17 April 2014, § 83. According to S. SKINNER, *The Right to Life, Democracy and State Responsibility in "Urban Guerrilla" Conflict: the European Court of Human Rights Grand Chamber Judgement in Giuliani and Gaggio v. Italy*, in *Human Rights Law Review*, 2011, 3, p. 567, an elucidation on the distinction between «technical and objective tasks» and others would be needed to determine when the independence of the authorities may be impinged upon or not.

²⁵⁰ Kolevi v. Bulgaria, cit., § 211; Scavuzzo Hager v. Switzerland, no. 41773/98, 7 February 2006, § 81; Orhan v. Turkey, no. 25656/94, 18 June 2002, § 342; Maslova v. Russia, no. 15980/12, 14 February 2017, §§ 87-88.

events or likely to be so²⁵¹. In such case, even the fact that the investigations were supervised by another independent authority, such as for example a prosecutor, is not held to be enough of a safeguard to remedy such an important flaw²⁵². The only possible exception, which however appears to have been suggested merely in theory and never actually fulfilled in practice, is where special reasons of urgency do not allow the waiting for the arrival of another unit in taking the first investigative steps²⁵³.

As to the second aspect concerning a tangible proof of bias in its conduct, if the authority whose statutory independence is tainted is the prosecutor or another investigator, such evidence is to be searched in its way of pursuing the investigations: it should be considered whether he followed all possible lines of inquiry, whether he collected all the necessary evidence and whether he did not accept in an acritical manner the versions of events supplied by those involved²⁵⁴. In relation to judges, instead, it is their manner of deciding which falls under scrutiny: the Court must be convinced that they were not inclined to refrain from shedding light on the facts, to accept without question the conclusions submitted to them or to prevent the instigation of criminal proceedings against the suspects²⁵⁵.

In other words, it is the practical independence of the authorities involved which is ultimately evaluated when assessing the concrete impact of the lack of statutory independence on the overall effectiveness of the investigation. It is demonstrated, once more, that these different profiles are thus interrelated and often overlap.

B. Practical independence

Coming at last to the the other profile mentioned at the beginning, as opposed to the institutional or statutory independence, the so-called «practical independence» can come into play by itself, or as just seen, as one of the aspect to take into consideration in the concrete assessment of the lack of statutory independence on the investigations' effectiveness.

²⁵¹ Aktas v. Turkey, no. 24351/94, 24 April 2003, § 301; Uzeyir Jafarov v. Azerbaijan, no. 54204/08, 29 January 2015, § 49; Alikaj and others v. Italy, no. 47357/08, 29 March 2011, § 101; Ozpolat and others v. Turkey, cit., § 88; Karabet and others v. Ukraine, cit., § 279; Mafalani v. Croatia, no. 32325/13, 9 July 2015, § 99; B. and others v. Croatia, cit., § 73; Otasevic v. Serbia, cit., § 33. *A contrario*, see Jaloud v. the Netherlands [GC], cit., § 187-190.

²⁵² Ramsahai v. the Netherlands [GC], cit., § 337; McKerr v. the United Kingdom, cit., § 128; Hugh Jordan v. the United Kingdom, cit., § 120.

²⁵³ See, Ramsahai v. the Netherlands [GC], cit., § 338; Alikaj and others v. Italy, cit., § 104.

²⁵⁴ Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 239-242.

²⁵⁵ Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 251.

It is more similar of a concept to that of impartiality, with which it is often interchanged by the Court. It has been described as «self-reliance in ascertaining and evaluating the evidence²⁵⁶» or as meaning that «the persons carrying out the investigations should not be subjected to any restrictions, improper influence, inducement, pressure, threat or interference, whether direct or indirect, from those implicated in the events»²⁵⁷. Practical independence is normally tainted, therefore, when investigators rely heavily and automatically accept the reports or statements by State agents implicated in the incident, failing to scrutinize their veracity and accuracy and without conducting any further relevant inquiries²⁵⁸. This does not imply, however, that practical independence is necessarily tainted when a prosecutor relies on the police reports of the investigations: it is clear that this is often inevitable as it is meant to be so, hence it can be an issue in itself. The question is whether the prosecutor has sufficiently assessed its veracity and reliability or not²⁵⁹.

In order for the impartiality to be ensured where those involved in the investigations are public figures of high rank who may potentially have an influence over the investigators, in some cases, the Court further requires the adoption of special measures to reduce the risk of collusion and to remove the persons potentially implicated from having even an indirect power over the other actors of the investigation or potential witnesses²⁶⁰.

Finally, as mentioned in the beginning, also the experts involved in the investigations are expected to be not only institutionally or hierarchically independent, but also impartial: their impartiality could, for instance, be called into question where they appear to have preconceived ideas on the guilt or innocence of the suspect, because before carrying out their task they have openly expressed their opinion on the matter²⁶¹. Here also, however, a pragmatic approach is called for and such apparent lack of a clear mind could be countervailed in the specific circumstances of the case.

C. Judicial review of the investigations

Another issue which has come forth in relation to independence of the investigations is whether this standard is to be interpreted as requiring also a form of judicial review at the end of the investigation phase to scrutinize their effectiveness and independence.

²⁵⁶ A. MOWBRAY, *Duties of investigation*, cit. p. 440.

²⁵⁷ E. MYJER, *Investigation into the use of lethal force*, cit., p. 128.

²⁵⁸ Ergi v. Turkey, cit., § 83; Kaya v. Turkey, cit., § 89; Mafalani v. Croatia, cit., § 101; Nalbandyan v. Azerbaijan, cit., § 123; Timus and Taurus v. the Republic of Moldova, no. 70077/11, 15 October 2013, § 55. See, *a contrario*, Giuliani and Gaggio v. Italy [GC], cit., § 321.

²⁵⁹ See, Jaloud v. the Netherlands [GC], cit., § 191-194; Ramsahai v. the Netherlands [GC], cit., § 344.

²⁶⁰ See, Turluyeva v. Russia, cit., § 109.

²⁶¹ Giuliani and Gaggio v. Italy [GC], cit., § 323.

The Court, although acknowledging that such a judicial review would be an important additional safeguard for the transparency and independence of the investigations, however, did not interpret Article 2 as to necessarily require the intervention of a court or judge at the closing of the investigations²⁶². In reaching this conclusion it relied strongly on its understanding of the procedural obligations as not imposing on State's any particular model or system of criminal justice. Yet, it also accepted that when a judicial review of a decision not to prosecute is provided, then such review must be taken into account in the evaluation of the independence of the investigation as a whole, in particular by assessing whether it could have rectified the shortcomings detected in the prosecutor's investigation²⁶³.

It seems, nonetheless, that the door has been left open for a different solution to be reached in the future: indeed, the Court carefully stated that «such intervention may prove necessary in certain cases, given the nature of the facts in issue and the particular context in which they occur»²⁶⁴. The question that still remains open, therefore, is whether such approach not requiring any judicial review at the end of the investigations could be limited only to similar cases (in particular where no flagrant shortcoming in the investigations had been found) or it could be extended also to different situations and be of general application.

4. Promptness and reasonable expedition

In addition to the standards of independence and of activation *ex officio*, it has been found that also a requirement of «promptness and reasonable expedition» is implicit in the context of the procedural obligation to investigate and prosecute alleged human rights violations. After all, the effectiveness of criminal proceedings is inevitably dependent on their temporal dimension, not only when considering the State's duty to enact criminal provision, but also in order to ensure the subjective rights of fair trial of the defendants²⁶⁵. In particular, the Court has considered that:

«while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating (...) may generally be regarded as essential in maintaining public

²⁶² Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 232-233. See also, before, Gurtekin and others v. Cyprus (dec.), cit., § 28; Petrovic v. Serbia, cit., § 93.

²⁶³ See, Petrovic v. Serbia, cit., § 93; Ramsahai v. the Netherlands [GC], cit., § 351-355.

²⁶⁴ Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 233.

²⁶⁵ For such considerations see, A. BARGI, *La ragionevole durata del processo*, in A. GAITO (ed.) *I principi europei del processo penale*, cit., p. 392 ff.

confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts»²⁶⁶.

The rationale behind this requirement seems to lie mostly in the fact that «the passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family»²⁶⁷. Indeed, time is often essential in preserving vital evidence at a scene and in questioning witnesses while their memories are fresh and detailed.

Promptness and reasonable expedition imply two different cumulative demands, so that the failure to ensure just one of them could in itself be detrimental to the effectiveness of the investigations as a whole.

On the one hand, promptness means that the investigations should start as soon as possible, immediately when the procedural obligation arises, that is when a complaint is made by the victim or when the authorities are aware or ought to be aware of the facts²⁶⁸. It also appears that the more serious the allegations, the prompter the authorities' response should be²⁶⁹. There is no precise time-limit within which investigation should ideally be launched, but the scrutiny of the Court is very strict: the passage of years from the events will certainly fall foul of this standard²⁷⁰, but the same may occur with a delay of some months or only weeks²⁷¹.

²⁶⁶ Paul and Audrey Edwards v. the United Kingdom, cit., § 72; Hugh Jordan v. the United Kingdom, cit., § 108; Al-Skeini and others v. the United Kingdom [GC], cit., § 166.

²⁶⁷ Paul and Audrey Edwards v. the United Kingdom, cit., § 86; Perevedentsev v. Russia, cit., § 108.

²⁶⁸ See *supra*. Where the victim submits the complaint long after the facts, the authorities are not responsible for the delay in initiating the investigations, see Velikanov v. Russia, cit..

²⁶⁹ Al-Nashiri v. Poland, cit., § 491, concerning an episode of extraordinary rendition; Turluyeva v. Russia, cit., § 106, for a case of enforced disappearance; C.A.S. and C.S. v. Romania, no. 26692/05, 20 March 2012, § 74, for a case of sexual abuse on a minor. See also, Milena Felicia Dumitrescu v. Romania, no. 28440/07, 24 March 2015, § 57.

²⁷⁰ M.C. and A.C. v. Romania, cit., § 120, for a delay of one year; Hugh Jordan v. the United Kingdom, cit.; Kelly and others v. the United Kingdom, cit.; Premininiy v. Russia, cit., § 94, Nencheva and others v. Bulgaria, cit., § 130, and Al-Nashiri v. Poland, cit.; Tas v. Turkey (dec.), no. 25690/08, 13 October 2015, § 71, for a delay of two years; M.G. v. Turkey, cit., § 90 and Coraman v. Turkey, cit., § 41 for a delay of five years.

²⁷¹ C.A.S. and C.S. v. Romania, cit., § 74 for a delay of three weeks; Razzakov v. Russia, no. 57519/09, 5 February 2015, § 60, for a delay of five months; Suleyman Demir and Hasan Demir v. Turkey, no. 19222/09, 24 March 2015, § 51, for a delay of three and a half months; Hilal Mammadov v. Azerbaijan, no. 81553/12, 4 February 2016, § 95, for a delay of one month; Denis Vasilyev v. Russia, no. 32704/04, 17 December 2009, § 124, for a delay of six months.

On the other hand, it is also expected that, once opened, the criminal proceedings be pursued with determination and without any unjustified delays²⁷². Clearly, it is not sufficient that solely the investigations in strict sense are conducted expeditiously, but when charges are brought against an individual then also the trial stage should conform to such standard of reasonable expedition²⁷³. Therefore, whilst a lack of promptness normally concerns the failure to open criminal investigations in due time, a finding of excessive length of the procedure could upset either the preliminary investigative stage or the following trial, not to mention also both phases²⁷⁴. It could be, indeed, that the diligence of the authorities in carrying out the trial phase cannot remedy initial failings and delays in the investigations, especially where these have caused important evidence to be lost²⁷⁵.

Situations which could negatively affect the reasonable duration of the investigation phase in a strict sense and that are normally taken into consideration by the Court are, among many, the presence of prolonged periods of unexplained inactivity²⁷⁶, frequent remittals of the case to the investigators by the competent superior authority for additional integrative investigations upon acknowledgment of their incompleteness²⁷⁷, significant delays in hearing the potential suspect or witnesses²⁷⁸, delays due to a lack of coordination among the investigating authorities²⁷⁹, the fact that the case is continuously transferred to the

²⁷² See, A. MOWBRAY, *Duties of investigation*, cit. p. 442.

²⁷³ See, *McKerr v. the United Kingdom*, cit., § 114; *Suleyman Demir and Hasan Demir v. Turkey*, cit., § 51; *Ebcin v. Turkey*, no. 19506/05, 1 February 2011, § 55. See also M. MONTAGNA, *Necessità della completezza delle indagini*, cit., p. 352.

²⁷⁴ See, for example, *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, § 132.

²⁷⁵ See, *Nencheva and others v. Bulgaria*, cit., § 130. See also, *B.V. v. Belgium*, no. 61030/08, 2 May 2017, for a case in which the shortcomings of the initial investigations could not be redressed by the reopening of the investigations some years later due to the passage of time.

²⁷⁶ See, *Mocanu and others v. Romania* [GC], cit., § 339; *McCaughey v. the United Kingdom*, no. 43098/09, 16 July 2013, § 137; *Timus and Taurus v. the Republic of Moldova*, cit., § 54; *Kraulaidis v. Lithuania*, cit., § 59; *M.C. and A.C. v. Romania*, cit., § 120; *Karpylenko v. Ukraine*, no. 15509/12, 11 February 2016, § 129; *Nencheva and others v. Bulgaria*, cit., § 129, for almost four years of inactivity during the investigations; *Y. v. Slovenia*, cit., § 99, where the police report was communicated to the prosecutor only one year after the conclusion of the investigations and where the investigation judge took 22 months to decide on the prosecutor's request to open a judicial investigation.

²⁷⁷ *Savridin Dzhurayev v. Russia*, no. 71386/10, 25 April 2013, § 194; *Karabet and others v. Ukraine*, cit., § 287; *Milena Felicia Dumitrescu v. Romania*, cit., § 58; *S.Z. v. Bulgaria*, no. 29263/12, 3 March 2015, § 49.

²⁷⁸ *Al-Skeini and others v. the United Kingdom* [GC], cit., § 170 and 174, where the delay contributed to the accused becoming untraceable; *Suleyman Demir and Hasan Demir v. Turkey*, cit., § 52, where the suspects and witnesses were heard only three and a half years after the incident; *C.A.S. and C.S. v. Romania*, cit., § 74 for a delay of two months in hearing the suspect; *Aydan v. Turkey*, no. 16281/10, 12 March 2013, § 112, for the relevance of a delay of only seven days. See also, *Turluyeva v. Russia*, cit., § 105; *Basenko v. Ukraine*, no. 24213/08, 26 November 2015, § 62.

²⁷⁹ See *Selim Yildirim and others v. Turkey*, cit., § 71; *Milena Felicia Dumitrescu v. Romania*, cit., § 57. See also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p.150.

competence of different prosecutors²⁸⁰ or that the investigations are discontinued and then reopened several times²⁸¹ or that a significant lapse of time passes before the order to resume the investigations is implemented²⁸². However, also a very swift termination of the investigation may be indicative of a deficiency: it has been noted, indeed, that «the authorities should not rely on hasty or ill-founded conclusions to close an investigation»²⁸³ and that «where examinations are incomplete and superficial, (...) these steps cannot be considered as a prompt and serious attempt to find out what happened, but rather as a hasty search for any reasons for discontinuing the investigation»²⁸⁴.

Shortcomings that, in turn, may hamper the expedition of the trial stage are, besides significant delays occurring between the issuing of the indictment and the beginning of trial²⁸⁵, also the commission of procedural errors that result in a need to start over the proceedings²⁸⁶, and frequent adjournments of the hearings, owing to either the absence of the defendant²⁸⁷ or his counsels²⁸⁸ or to a failure to duly notify the defendant of the date of the hearing²⁸⁹. Indeed, although the Court in principle accepts that the absence of the defendant may cause some delays in the progress of trial, however, it requires that domestic courts take all reasonable efforts to find him and to ensure his attendance, and not simply choose to postpone the hearings instead, mindful of the fact that considerable delays may adversely affect the effectiveness of proceedings to the detriment of both the victims and defendants, regardless of their outcome²⁹⁰. In other words, it is crucial that the

²⁸⁰ *Al-Nashiri v. Poland*, cit., § 493, where the prosecutors in charge were disqualified from dealing with the case, and subsequently the case was transferred to other prosecutors; *Turluyeva v. Russia*, cit., § 106.

²⁸¹ See, *Kraulaidis v. Lithuania*, cit., § 61; *Perevedentsev v. Russia*, cit., § 112; *Mudayev v. Russia*, cit., § 105; *Basenko v. Ukraine*, cit., § 63.

²⁸² See, *Perevedentsev v. Russia*, cit., § 111.

²⁸³ *EI-Masri v. the former Yugoslav Republic of Macedonia [GC]*, cit., § 183; *Savridin Dzhurayev v. Russia*, cit., § 188.

²⁸⁴ *Karabet and others v. Ukraine*, cit., § 286.

²⁸⁵ *N.D. v. Slovenia*, no. 16605/09, 15 January 2015, § 60, where trial commenced only six years after the indictment brought by the prosecutor due to a problem of court backlog; *M. and M. v. Croatia*, cit., § 150 there was a standstill of two years between the defendant's challenge of the penal order against him and the first hearing after the resumption of the proceedings.

²⁸⁶ *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, cit., § 40, where first a procedural defect led the appellate court sending the case back to the investigation stage and then changes in the composition of the bench had to be dealt with by restarting the trial; *Kosteckas v. Lithuania*, cit., § 43-35, where the repetition of remittals by the appellate court motivated by the total lack of reasoning in the first instance judgment and the *de facto* changing of the charges against the defendants.

²⁸⁷ *Ugur v. Turkey (dec.)*, no. 63819/10, 1 March 2016, § 104; *M.A. v. Slovenia*, no. 3400/07, 15 January 2015, § 50; *W. v. Slovenia*, cit., § 66; *Oztunc v. Turkey*, no. 14777/08, 9 February 2016, § 76-90.

²⁸⁸ *Sukru Yildiz v. Turkey*, no. 4100/10, 17 March 2015, § 67.

²⁸⁹ *Milena Felicia Dumitrescu v. Romania*, cit., § 60.

²⁹⁰ *Ugur v. Turkey*, cit., § 104; *M.A. v. Slovenia*, cit., § 50. See also, *Ebcin v. Turkey*, cit., § 55.

authorities show interest in finding the defendant and bringing him to justice²⁹¹. Symptoms to the contrary would be, for instance, the fact that sanctions for failure to attend were not envisaged where provided²⁹², the fact that only few inquiries are undertaken when the defendant is not to be found²⁹³ and that international arrests warrants are not timely issued in cases where the defendant is known to be abroad²⁹⁴. Finally, even an excessively formalistic interpretation of domestic law may reveal the unwillingness of the authorities to bring the defendants to justice and may thus upset the fair balance required between the interests of the victims and those of the defence. In a case against Turkey, in particular, the Court held that the interpretation given by the domestic courts of the rule according to which a defendant who had absconded could not be convicted without having been heard by the appellate court, even where he had already been heard at a previous stage of the proceedings, and even where the appellate judge simply has to apply a new more lenient law adopted in the meanwhile, was excessively formalistic and determined a complete paralysis of the proceedings, which was not even called in order to respect the fair trial rights of the defence since Article 6 does not proscribe proceedings *in absentia* in themselves²⁹⁵.

A. Developments in the assessment of the reasonable expedition

The similarities existing between the criteria for the assessment of the reasonableness of the duration of a criminal proceedings in the context of the procedural obligations to investigate and the ones used to verify respect of the reasonable length of the proceedings guarantee under Article 6 are surprising. In both cases, indeed, there is no absolute time-limit of reasonableness, but the degree of diligence expected of the authorities in carrying out the proceedings expeditiously depends instead on the specific circumstances of the case.

Under both provisions the most relevant factor normally taken into consideration in evaluating the expedition required is the complexity of the case²⁹⁶. Accordingly, in the

²⁹¹ See, *Oztunc v. Turkey*, cit., § 76-80, where it is also specified that the obligation to apprehend the defendants is one of means only.

²⁹² See, *M.A. v. Slovenia*, cit., § 50.

²⁹³ See, *W. v. Slovenia*, cit., cit., § 67.

²⁹⁴ See, *M.A. v. Slovenia*, cit., § 50; *W. v. Slovenia*, cit., § 67, where international arrest warrants were issued only ten years after the discovery of the defendants residing abroad. The issuing of international arrest warrant comes into play also in relation to the State's duty to cooperate, see *infra*.

²⁹⁵ See, *Oztunc v. Turkey*, cit., § 81-90.

²⁹⁶ The complexity of the case is a factor taken into account by the Court to determine whether the length of the proceedings was reasonable under Article 6, together with other factors such as the conduct of the applicants and of the competent authorities and what is at stake for the applicant.

specific context of the procedural obligation to investigate, the Court is ready to tolerate lengthier criminal proceedings where, for example, the scope of the case is very wide, it involves a significant number of suspects, victims or witnesses, or recourse to multiple forensic examinations²⁹⁷, or where there are particular practical difficulties in gathering the evidence²⁹⁸. In some cases, it is also taken into account whether the delays were attributable or not to the applicant, by the same token as under Article 6²⁹⁹. In at least one case, moreover, when addressing the delays in the criminal proceedings under Article 2, the Court referred explicitly to the standards used under Article 6³⁰⁰.

In addition to these criteria, however, in the context of the procedural obligations there are specific situations which in the Court's view would always call for an even speedier response and for a greater diligence on the part of the authorities. When the investigations concern crimes of violence against women, indeed, the Court has found that, in view of the particular situation of insecurity and vulnerability in which the victims found themselves, the authorities should react within the shortest time possible³⁰¹. Furthermore, it has been suggested that when the proceedings concern crimes of sexual violence against minors a speedy trial is all the more required in order to reduce as much as possible the risks of secondary victimisation resulting from the criminal proceedings themselves, since they are perceived as a distressing and traumatic situation³⁰². Lastly, it has been pointed out that, although the requirement of promptness and reasonable expedition is implicit in all cases,

For more on this subject see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 440.

²⁹⁷ Paul and Audrey Edwards v. the United Kingdom, cit., § 86; M.C. and A.C. v. Romania, cit., § 121; Nencheva and others v. Bulgaria, cit., § 130. For cases in which the Court took into account the fact that the case was relatively simple, see Kotelnikov v. Russia, cit., § 106; Kraulaidis v. Lithuania, cit., § 59; Timus and Taurus v. the Republic of Moldova, cit., § 54; S.Z. v. Bulgaria, cit., § 51. For a case where the complexity justified the length of the criminal proceedings see, Cestaro and others v. Italy, cit., § 223.

²⁹⁸ See, Al-Nashiri v. Poland, cit., § 493, for the difficulties of gathering evidence of the existence of a secret detention site in Poland run by United State agents. See also, Association "21 December 1989" and others v. Romania, cit., § 142.

²⁹⁹ Sukru Yildiz v. Turkey, cit., § 67; Kotelnikov v. Russia, cit., § 105-106; Hilal Mammadov v. Azerbaijan, cit., § 95.

³⁰⁰ Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria, cit., § 41.

³⁰¹ See, M.G. v. Turkey, cit., § 93-95. In reaching such conclusion the Court relied also on Art. 49 of the Council of Europe Istanbul Convention on preventing and combating violence against women and domestica violence, signed on 11 April 2011, which reads: «Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings».

³⁰² See, N.D. v. Slovenia, cit., § 61; W. v. Slovenia, cit., § 69, both concerning cases of rape against a minor.

where there is a possibility of removing an individual from a harmful situation «the investigation must be undertaken as a matter of urgency»³⁰³.

By contrast, there are “historical cases”, where the events occurred in a distant past, in which the standard of expedition is more relaxed than in respect of recent incidents³⁰⁴.

When discussing how the assessment of a lack of promptness and of excessive length of the criminal proceedings is carried out under the procedural obligation to effectively investigate and punish, account should be given of what seems to be a very recent shift undergoing in the Court’s approach, as a result of the leading-case *Mustafa Tunc and Fecire Tunc v. Turkey*, in which the general principles guiding the assessment of the investigations’ shortcomings have been set forth³⁰⁵.

In the past, the Court’s approach seemed to be, at least in certain cases, quite formalistic. The finding of significant delays in the progress of the proceedings or already in the opening of the investigations, indeed, could lead in principle to a finding of ineffectiveness of the criminal investigations as a whole, regardless of whether such deficiency did actually prejudice their capability of establishing the facts and identifying and punishing those responsible. In the Court’s words, «it is established that Article 2 requires investigations to begin promptly and to proceed with reasonable expedition (.), and this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation»³⁰⁶. In application of such reasoning, the Court has sometimes concluded that «while it is not possible to speculate whether these delays (...) prejudiced in any way the outcome of the proceedings, in the Court’s opinion they cannot be reconciled with the procedural requirement of promptness. Accordingly, there has been a violation of the respondent State’s procedural obligations under Art. 3 of the Convention»³⁰⁷.

Following the definitive establishment in the abovementioned judgement of the opposite outcome-oriented approach and of the need for a global assessment of the investigations as a whole, however, it is most probable that such a formalistic method will not be followed anymore in the future³⁰⁸. To the contrary, it is very likely that the finding of significant delays in the national proceedings will result in the violation of the procedural obligation only where

³⁰³ *Rantsev v. Cyprus and Russia*, cit., § 287, in relation of a case of human trafficking.

³⁰⁴ See *supra*.

³⁰⁵ See *supra*.

³⁰⁶ *McCaughey v. the United Kingdom*, cit., § 130. This premise, however, was criticized by judge Kalaydjieva in her concurring opinion to the judgement. See also, *Ebcin v. Turkey*, cit., § 56, where the fact that the criminal proceedings ultimately ended in convictions did not alter the finding of ineffectiveness of the proceedings out of their excessive length.

³⁰⁷ *Y. v. Slovenia*, cit., § 99-100.

³⁰⁸ The formalistic approach however has not completely disappeared yet, but is still adopted in certain cases, see *Bouyid v. Belgium [GC]*, cit., § 132. The case-law does not appear fully coherent on this point.

it can be proven that they concretely compromised the adequacy and effectiveness of the investigations as a whole.

This occurred, for instance, in a recent case in which the Court took the view that «the requirement of promptness under Article 2 should not be examined in isolation and irrespective of the other parameters, the combination of which makes an investigation effective»³⁰⁹. Therefore, notwithstanding the significant delay incurred in the investigations and trial, which lasted in total for over fifteen years, the Court held that the criminal proceedings had achieved their essential purpose, as the cause of the death had nevertheless been established and the responsible convicted and ordered to pay compensation to the victim. In this sense, the delay, although regrettable, cannot be said to have caused a loss of evidence to the detriment of the quality of the results of the proceedings. In the Court's view, therefore, the delay in itself is not sufficient to ground a violation of the procedural obligation on account of the fact that it did not ultimately undermine the effectiveness of the proceedings³¹⁰. Thereby, a significant shift from the methods used to assess the reasonable length of the proceedings under Article 6 has taken place, in that under such provision excessive delays in the proceedings will always result in a violation of the right to a fair trial.

There is one case, however, in which the effectiveness of the proceedings is always inevitably impaired by the excessive delays in their progress, that is where the unjustified protraction of the criminal proceedings results in the expiry of the statute of limitations periods and thus in precluding any examination on the merits of the case being undertaken. In the Court's view, indeed, «regardless of the final outcome of the proceedings, the protection mechanisms available under domestic law should operate in practice in a manner allowing for the examination of the merits of a particular case within a reasonable time»³¹¹. Therefore, where the inactivity or lack of diligence of the authorities leads to the proceedings becoming statute-barred and thus hinders the examination of the merits of the case, the procedural obligation is not complied with³¹². Indeed, «the deterrent effect of the criminal system would not be sufficient to ensure the prevention against acts of ill-treatment where the perpetrators at the end of criminal proceedings may benefit from

³⁰⁹ Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria, cit., § 41.

³¹⁰ *Id.*, § 42-43.

³¹¹ N.D. v Slovenia, cit., § 58; M.C. and A.C. v. Romania, cit., 112; W. v. Slovenia, cit., § 65.

³¹² For cases in which the expiration of limitation periods due to the inactivity of the authorities has grounded a violation of the procedural obligation see, Mazukna v. Lithuania, no. 72092/12, 11 April 2017, § 86; Kotelnikov v. Russia, cit., § 106; Mehmet Yaman v. Turkey, no. 36812/07, 24 February 2015, § 71; Milena Felicia Dumitrescu v. Romania, cit., § 62; M.C. and A.C. v. Romania, cit., § 123; Angelova and Iliev v. Bulgaria, no. 55523/00, §§ 101-103, 26 July 2007; Vasil Hristov v. Bulgaria, no. 81260/12, 16 June 2015, § 42; Preminy v. Russia, cit.; Temizalp v. Turkey, cit., § 38; Saba v. Italy, no. 36629/10, 1 July 2014, § 79.

prosecution becoming time-barred due to the inactivity of the authorities»³¹³, thus enjoying virtual impunity³¹⁴.

In other words, the discontinuation of criminal proceedings without any examination of the merits owing to the expiration of limitation periods is incompatible with the procedural obligations to investigate and punish where this has occurred as a result of flaws in the action of the domestic authorities and their lack of diligence in dealing with the case³¹⁵. This conclusion holds true in general, irrespective of the involvement of State agents or not in the case³¹⁶. However, as it will be discussed in depth later, where State agents are involved the expiration of limitation periods will be incompatible with the procedural obligations to effectively investigate and punish also where it is not determined by a lack of promptness in the authorities' actions³¹⁷.

5. Adequacy and thoroughness

Coming now to the requirements that directly affect the substance of the procedural obligation, an investigation in order to be effective must first of all be adequate, that is it must be capable of leading to the establishment of the facts and, where appropriate, to the identification and punishment of those responsible³¹⁸. Indeed, the primary purpose of the duty to investigate is that of establishing the circumstances of the facts in the most complete and precise manner as possible³¹⁹.

Yet, the requirement of adequacy and thoroughness takes many forms: it relates firstly to the scope and broadness of the procedure (par. A), then also to the collection of all the evidence available (par. B) and finally to the assessment of the facts and the reasoning of

³¹³ Oztunc v. Turkey, cit., § 72.

³¹⁴ See also, Bati and others v. Turkey, cit., § 136.

³¹⁵ See, Mocanu and others v. Romania [GC], cit., § 346; Valiuelienė v. Lithuania, cit., § 85; Beganovic v. Croatia, cit., § 85; Kosteckas v. Lithuania, cit., § 44. See also S.Z. v. Bulgaria, cit., § 46: «*La prescription des poursuites pénales en raison de l'inactivité des autorités compétentes a ainsi pu amener la Cour à conclure au non-respect des obligations positives de l'État* ». It is interesting to observe that the discontinuation of criminal proceedings upon expiry of the limitation periods which leads to a failure to examine the civil action brought by the civil party also determines a violation of the civil party's right of access to a court under Article 6, see Lacerda Gouveia and others v. Portugal, no. 11868/07, 1 March 2011, § 71.

³¹⁶ For a case concerning private individuals see, Kraulaidis v. Lithuania, cit., § 63.

³¹⁷ See *infra*.

³¹⁸ See, Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 172; Armani da Silva v. the United Kingdom [GC], cit., § 233.

³¹⁹ In this sense see, H. TRAN, *Les obligations de vigilance des États parties*, cit., p. 142. See also, F. VIGANÒ, *L'arbitrio del non punire*, cit., p. 2689-2691, according to whom the ultimate *raison d'être* of the procedural obligation to investigate and punish is not so much the imposition of a sanction on those responsible, but rather the carrying out of an investigation that allows the establishment of the facts which is the essential premise for any effective judicial protection.

the authorities' decisions (par. C).

A. Broadness of the investigations

The adequacy and thoroughness of the investigation relates first of all to the scope of the procedure³²⁰. Indeed, to comply with such requirement the investigations must in the first place be broad enough to explore all the circumstances surrounding the death or ill-treatment which could be relevant for the understanding of the situation in its entirety and for the establishment of the facts in an objective manner. In other words, «the carrying out of an investigation solely with a view to establishing or ruling out the involvement of other persons in a suspicious death is not sufficient to satisfy the procedural obligation; the national authorities' obligation also extends to establishing the cause of the death»³²¹.

Where the proceedings concern, for example, a death resulting from the use of lethal force by a State agent, the Court has found that «the investigation must be capable of determining whether the force used was or was not justified in the circumstances», thus duly considering also the crucial issue of proportionality of the force used³²², and that it must also «be broad enough to permit the investigating authorities to take into account not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as to planning and control of the operation in question»³²³. Similarly, in the context of medical negligence, the proceedings must be capable of establishing the cause of the death of the patient under the care and responsibility of health professionals and any liability on the part of the latter³²⁴.

The need of thoroughness in exploring all the relevant circumstances, therefore, concerns firstly the factual aspects of the case³²⁵. For instance, an investigation into only one episode

³²⁰ In this sense also E. BREMS, *Procedural protection*, cit., p. 148.

³²¹ *Sultan Dolek v. Turkey*, no. 39541/98, 2 October 2007, § 69. See also, *Tagayeva and others v. Russia*, cit., § 500, in which the cause of the death of one third of the victims of the terrorist attack in the school of Beslan was never established.

³²² *Hugh Jordan v. the United Kingdom*, cit., § 105; *Armani da Silva v. the United Kingdom [GC]*, cit., § 233. See also, *Kaya v. Turkey*, cit., § 267; *Dinu v. Romania*, no. 64356/14, 7 February 2017, §§ 84-85; *Giuliani and Gaggio v. Italy [GC]*, § 309; *Salin and Karsin v. Turkey*, no. 44188/09, 23 June 2015, § 78; *Kaverzin v. Ukraine*, cit., § 114; *Yusiv v. Lithuania*, no. 55894/13, 4 October 2016, § 72; and, *Jaloud v. the Netherlands [GC]*, cit., § 199-200, where the Court also stresses that establishing whether the use of force was justified or not in the circumstances is also crucial to the exercise of the rights of the defence in the ensuing proceedings.

³²³ *Al-Skeini and others v. the United Kingdom [GC]*, cit., § 163. See *Giuliani and Gaggio v. Italy [GC]*, cit., § 309 for an investigation into a case of killing by a State agent that complied with such requirements. See also, F. VIGANÒ, *Obblighi convenzionali di tutela penale*, cit., p. 284-287.

³²⁴ *Silih v. Slovenia [GC]*, cit., § 192.

³²⁵ For cases in which the Court found a failure of the investigators in establishing certain important factual aspects see, *Perevedentsev v. Russia*, cit., § 115; *Karpylenko v. Ukraine*, cit., § 128; *Kalender v. Turkey*, cit., § 56; *Nachova and others v. Bulgaria [GC]*, cit., § 114; *Ilya Petrov v.*

of violence instead of into the entire situation of persistent harassment to which the person was subject constitutes an obvious shortcoming affecting the adequacy of the proceedings in this regards³²⁶. The same occurs, for example, where the investigation into the disappearance of an individual who had taken into custody of State agents does not seek to elucidate the circumstances and legal grounds of his arrest and of his alleged release³²⁷. Apart from the objective circumstances of the case, the requirement of completeness obviously extends also to the potential individuals involved in the case. An investigation inquiring solely into the responsibility of certain suspects, and not others, will fall foul of such standard³²⁸. In the specific context of war crimes, the foregoing implies that the investigation should not be restricted to bringing to justice only those militaries in command for their failure to prevent or punish war crimes committed by their subordinates, but that the proceedings must be extended to pursue the prosecution of also the direct perpetrators, who cannot be exonerated from their own criminal responsibility³²⁹.

In addition to all the relevant factual circumstances, also the legal classification of the offence and the charges brought play an important role in determining the broadness of the investigations. It is clear, indeed, that a too narrow definition of a criminal offence in substantive could lead to certain facts being necessarily left outside the scope of the proceedings which become therefore too limited and inadequate. This was the case, for instance, in *C.N. v. the United Kingdom*, where due to flaws in substantive criminal law, the investigations were limited to criminal offences which normally, but not necessarily, accompany the offences of servitude, slavery and forced labour, with the consequence that victims of such treatment who were not at the same time victims of those related offences were left without any remedy³³⁰.

Moreover, a very important role in determining the appropriate scope of the investigations

Bulgaria, no. 19202/03 , 24 April 2012, § 76; Nencheva and others v. Bulgaria, cit., §§ 134-137; Denis Vasilyev v. Russia, cit., §§ 125-127; Muhacir Cicek and others v. Turkey, no. 41465/09, 2 February 2016, § 76. See also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p. 143-144.

³²⁶ M. and M. v. Croatia, cit., § 145. Likewise, proceedings limited to the injuries inflicted on two demonstrators and not covering, instead, the general situation of violence in which the whole demonstration took place were also considered excessively narrow in scope, see *Identoba and others v. Georgia*, cit., § 75.

³²⁷ See, *Turluyeva v. Russia*, cit., § 108.

³²⁸ See, for example, *S.Z. v. Bulgaria*, cit., § 50, in which the authorities failed to investigate into the possible involvement of certain persons that had been indicated as possible suspects by the victims; and, *Kolevi v. Bulgaria*, cit., § 203, where the investigators completely overlooked the possible involvement of some police officers who had been mentioned by the witnesses. See also, *Avsar v. Turkey*, no. 25657/94, 10 July 2001, § 406.

³²⁹ See, *Jelic v. Croatia*, cit., §§ 88-90; *B. and others v. Croatia*, cit., § 66. In both cases the adequacy of the investigation was tainted owing to the authorities' failure to identify the direct offenders although there were some leads to follow.

³³⁰ *C.N. v. the United Kingdom*, cit., § 76.

is played by the victims' reports to the authorities and the information they brought to their attention, which normally, where not completely frivolous, should always deserve some degree of verification³³¹. The Court, indeed, seems to take into account whether the victims' allegations and suspicions have all been inquired into or to the contrary, discarded without explanation³³².

Furthermore, in order to establish the facts of the case, it is expected of the authorities in charge of the investigations to explore all possible lines of inquiry: any potential hypothesis and explanation must be contemplated and inquired into at the beginning of the investigation, even if it will ultimately be discarded on account of the subsequent findings. In other words, the restricted and limited scope of an investigation could affect its effectiveness. This means that the investigators should not leave out *a priori* any obvious hypothesis other than the one which they ultimately accept or discard, in that «failing to follow an obvious line of enquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible»³³³. In this connection, the Court does not «in general consider it appropriate to interfere with the lines of inquiry pursued by the authorities or the findings of fact made by them, unless they manifestly fail to take into account relevant elements or are arbitrary and biased»³³⁴. For example, in *S.Z. v. Bulgaria*, the Court reproached the national authorities for having investigated only into the episode of abduction of the applicant in view of prostitution, yet failing completely to explore the victim's allegations of the existence of a criminal organization aimed at trafficking in human beings³³⁵.

i. Duty to uncover possible discriminatory motives

When considering the broadness and comprehensiveness of the proceedings, special attention is given to the exploration of possible racist or discriminatory motives for the acts of violence under investigation, in that a failure to inquire into them would breach the procedural obligation. In other words, not only the crime but also the underlying intention

³³¹ For a discussion on the rights of victims to request and submit evidence see *infra*...

³³² See, *Sultan Dolek v. Turkey*, cit., § 80 where the Court took notice that the authorities did not explore the allegations of threats put forward by the victims. See also, *Tagayeva and others v. Russia*, cit. § 506.

³³³ *Kolevi v. Bulgaria*, cit., § 201; *Giuliani and Gaggio v. Italy [GC]*, cit., § 302. See, *Hasan Yasar and others v. Turkey*, cit., §§ 51-52, for a case in which the prosecutor is reproached for having followed only one line of inquiry, completely overlooking the other possible ones suggested by the victims and also by his superior.

³³⁴ *S.Z. v. Bulgaria*, cit., § 50.

³³⁵ *Id.* For a case in which the investigators were deemed to have followed all the possible leads, see, *Gurtekin and others v. Cyprus (dec.)*, cit., §§ 25-26.

needs to be investigated³³⁶.

Since the judgement *Nachova and others v. Bulgaria*, the Court has indeed found that the procedural obligations under Article 2 and the other already mentioned provisions imply also the duty of States to uncover the existence of a possible causal link between racist attitudes and an act of violence, in order to elucidate whether ethnic hatred played any role in the events³³⁷. Such additional obligation has been subsequently further extended to any prejudice-motivated and hate crime in general, be it for racial reasons or other discriminatory grounds of different kind, such as for example based on sexual orientation and identity³³⁸.

In particular, the following definition and rationale has been put forward:

«when investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to ascertain whether there were racist motives and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events. Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.»³³⁹

The distinction between ordinary violent crimes and prejudice-motivated violence must be made both in law and in practice. It is clear, indeed, that a lack of differentiation in the domestic criminal provisions would make the investigative efforts to discover discriminatory motives in practice impossible or, even in the best cases, useless. It is no surprise that the scope of the investigative actions is pre-determined by the legal classification of the crime according to the criminal legislation in force³⁴⁰. Thereby, the Court actually requires national substantive criminal laws to provide for such a distinction

³³⁶ See, A. SEIBERT-FOHR, *Prosecuting serious human rights offences*, Oxford University Press, 2009, p. 135.

³³⁷ *Nachova and others v. Bulgaria* [GC], cit., §§ 160-161. The Court further acknowledged that such obligation is also part of the responsibility of States under Article 14, and thus, owing to such interplay, the provisions on which it will be examined depends on the particular circumstances of the case.

³³⁸ See, *Identoba and others v. Georgia*, cit., § 77; *M.C. and A.C. v. Romania*, cit., §§ 105-106.

³³⁹ *Abdu v. Bulgaria*, cit., § 44.

³⁴⁰ In *Myumyun v. Bulgaria*, cit., § 68, the Court acknowledged that in general «an indispensable prerequisite» for discharging the procedural obligation is the concomitant obligation of States to have criminal law provisions appropriately penalising human rights offences; see also, *Cestaro v. Italy*, cit., § 209; *Gafgen v. Germany* [GC], cit., § 117.

between ordinary crimes and hate crimes, by regarding racist or discriminatory motives as an aggravating circumstance in the commission of the offence or as a separate aggravated form of crime, punished more heavily³⁴¹. Accordingly, before considering the practical details of the investigations, the Court examines the relevant domestic legislation in order to assess whether it allows to take into due consideration – or else said, to punish more severely - the peculiarity of bias-motivated crimes and whether it is in principle capable to unveil the discriminatory motive behind the offence³⁴².

Coming thus again to the strict investigative duty, this has been interpreted, in particular, to the effect that any plausible evidence and substantiated allegation suggesting possible racist or discriminatory motives for the acts of violence, as for example evidence of racist or homophobic verbal abuse during the incident or the fact that the perpetrators are known to belong to a racist ideology³⁴³, call for an initial verification on the part of the authorities and possibly for a thorough investigation of all the facts in order to uncover any possible racist overtones. Even in the absence of specific allegations suggesting discriminatory motives in the particular case, the general context of the attack has to be taken into account: admittedly, the duty to investigate into them arises also when general practices of discrimination and hostility against members of a particular community or an ethnic minority are of common knowledge in a certain country³⁴⁴. This is especially true with regards to Roma, who in the Court's view are a «specific type of disadvantaged and vulnerable minority» that require special protection and, when it comes to offences committed against them, also «vigorous investigations»³⁴⁵.

Furthermore, the obligation on the authorities to seek a possible link between the racist

³⁴¹ See, *Skorjanec v. Croatia*, no. 25536/14, 28 March 2017, § 60-62. In this sense also, anticipating the findings of such judgment, J. ALIX, *Les obligations positives de pénalisation et de punition*, cit., p. 226; F. TULKENS – S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l'homme*, cit., p. 131, who stresses that the Court impose such requirement without using those term in an explicit manner.

³⁴² For cases in which the domestic legislation provided in theory sufficient protection, see *Abdu v. Bulgaria*, cit. § 47; *M.C. and A.C. v. Romania*, cit., § 124; *Identoba and others v. Georgia*, cit., § 77; *Balazs v. Hungary*, cit., § 58; *Skorjanec v. Croatia*, cit., § 60-62. See, *R.B. v. Hungary*, cit., § 90 for a case in which the domestic criminal provisions failed to provide an appropriate legal avenue to seek remedy for a racially motivated attack.

³⁴³ In this sense see, *Abdu v. Bulgaria*, cit., §§ 49-50; *Nachova and others v. Bulgaria [GC]*, cit., § 164; *R.B. v. Hungary*, cit., § 88; *Balazs v. Hungary*, cit., § 61. For the same factual circumstances in relation to a case of homophobic hate, see *Identoba and others v. Georgia*, cit., § 77. For a case in which, *a contrario*, there was no evidence of racial overtones warranting an investigation into such circumstance see, *Beganovic v. Croatia*, cit., §§ 95-98, and *Seidova and others v. Bulgaria*, no. 310/04, 18 November 2011, §§ 71-74.

³⁴⁴ See in this sense, in relation to police abuses against Roma people in Romania, *Ciorcan and others v. Romania*, cit., §§ 163-164; also on Roma issues, see *R.B. v. Hungary*, cit., § 84. See also, *Sakir v. Greece*, no. 48475/09, 24 March 2016, §§ 70-72, for general episodes of racist violence in Athens.

³⁴⁵ *Balazs v. Hungary*, cit., § 53.

attitudes and a given act of violence arises not only in relation to victims that have or are perceived to have a peculiar characteristic or status, but also towards individuals who become hate crime victims not because of their own personal status, but owing to their special relationship or association, such as friendship, marriage, membership in a group or else, with persons who have that status³⁴⁶. In the recent case *Skorjanec v. Croatia*³⁴⁷, which concerned an episode of violence perpetrated against a couple, the Court reproached the fact that the domestic courts treated only the partner of the applicant as victim of a hate crime because of his Roma origins, whereas the applicant could not be regarded as such merely on the ground that she was not Roma herself, and was treated merely as a witness. In the Court's view, however, this should not have prevented the authorities to consider whether a link between the attack on the applicant and a racist motive existed because of her relationship with the other victim, who was of Roma origins. Such a failure was thus regarded as an insufficient assessment of the circumstances of the case, irreconcilable with the State's obligation to take all reasonable steps to unmask a possible racist motive behind the attack. Put in other terms, the Court has thereby established that «in assessing hate crimes it is not the background of the victim which is essential, but the nature of hate of the perpetrators³⁴⁸».

Indeed, in situations like the ones just described, where there is plausible evidence suggesting possible hate motives for the acts of violence, a complete omission by the authorities to look into such possible discriminatory motives would irreversibly taint the adequacy of the investigations, whose scope would not be sufficiently broad³⁴⁹. Yet, being mindful of the difficulties inherent in proving discriminatory motivations, the Court does not regard this duty as an absolute obligation, but rather expects all reasonable investigative measures to be undertaken by the authorities, having regard to the circumstances of the case. In other words, it will be scrutinized whether the investigators sought for possible evidence in support of the allegations by all means, regardless of their actual final outcome. In particular:

«the authorities must do whatever is reasonable in the circumstances to collect

³⁴⁶ According to OSCE, *Hate Crime Laws: A Practical Guide*, OSCE/ODIHR, 2009, available at <http://www.osce.org/odihr/36426?download=true>, «persons affiliated or associated with a group that shares a protected characteristic can easily be overlooked as a category to include in hate crime laws. Therefore, hate crime laws should also penalize those who attack others on the basis of their association with members of protected group».

³⁴⁷ *Skorjanec v. Croatia*, cit., § 66-71.

³⁴⁸ S. OUALD CHAIB, *Skorjanec v. Croatia: victims of racist hate-crime "by association" protected by the ECHR*, in *strasbourgobservers.com*, 13 June 2017.

³⁴⁹ See, *Sakir v. Greece*, cit., § 72 where the investigators overlooked completely the racist motivations behind the attack.

and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination»³⁵⁰.

The case *Abdu v. Bulgaria*³⁵¹ is very significant in this sense: the prosecutor's decision finding that racial motivation for the violence suffered by the applicant was not established was heavily criticized by the Court in light of the fact that before reaching such conclusion no attempt was made to actually interrogate the suspects on the motivation for their acts nor to question the witnesses on any insults they might have heard during the fight.

In other words, it is the diligence of the authorities in gathering the evidence available which proves decisive. At the same time, however, diligence is necessary, but it may not be sufficient. Indeed, once all the evidence available has been duly collected, the Court will then also review whether and to what extent the authorities have submitted the case to the careful scrutiny required by the procedural obligations. It will thus scrutinize the assessments made of the circumstances of the case and the reasons given for their decisions. For instance, in the case *Balazs v. Hungary*³⁵², concerning the attack by a private individual against a Roma, although the authorities were sufficiently diligent in gathering all the evidence available on the possible racist motives of the violence, the Court nevertheless concluded that they had failed to subject the case to the careful scrutiny required as their assessment of the circumstances of the case was manifestly unreasonable, in that they insisted in identifying an exclusive racist motive, instead of being satisfied of the existence of mixed motives among which a racist one, and also failed to explain why the racist motive could not be deduced from some hate crimes indicators detected such as the perpetrator's posts on internet.

B. Duty to collect and secure the evidence

Apart from its scope, the thoroughness of an investigation is measured also from the quantity and quality of evidence that it has gathered in order to permit a full establishment of the facts and the identification of those responsible. In particular:

«the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony,

³⁵⁰ M.C. and A.C. v. Romania, cit., § 113; *Balazs v. Hungary*, cit., § 52.

³⁵¹ *Abdu v. Bulgaria*, cit., §§ 49-50.

³⁵² *Balazs v. Hungary*, cit., §§ 58-75.

forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death.»³⁵³

The first crucial diligence obligation weighing on the authorities in order to comply with the adequacy criterion is, therefore, the duty to take all the necessary and available steps in order to secure and collect all the relevant evidence available. Albeit being impossible to reduce the variety of situations which might occur to a bare check-list of acts of investigations to be undertaken³⁵⁴, it appears from an analysis of the case-law that there are certain investigative measures which are regarded as essential for the establishment of the facts, failing which the efforts undertaken are not deemed to be adequate³⁵⁵.

It is important to underline in this connection, however, that the omission of a particular act of investigation does not automatically taint the adequacy of the proceedings, but, pursuant to the outcome-oriented approach adopted by the Court in this context, only those deficiencies undermining their ability to establish the cause of death or the person responsible will risk falling foul of this standard³⁵⁶.

Furthermore, when assessing the adequacy of the investigative measures undertaken by the authorities to gather evidence, a crucial role is played also by the requests coming from the victims: the Court, indeed, often takes into account whether the authorities have failed to perform the acts requested even though these might have contributed to the establishment of the facts³⁵⁷. It must be considered, however, that there is not absolute duty in this sense, but that the authorities – during the investigations and at trial – may filter the admission or the collection of evidence according to its relevance or superfluity³⁵⁸.

According to the peculiar circumstances of each case, the measures in principle deemed to be essential for an investigation to be adequate include: an audition of all the

³⁵³ Armani da Silva v. the United Kingdom [GC], cit., § 233; Al-Skeini and others v. the United Kingdom [GC], cit., § 166.

³⁵⁴ See, Velikova v. Bulgaria, no. 41488/98, 18 May 2000, § 80; Timus and Taurus v. the Republic of Moldova, cit., § 48.

³⁵⁵ In this sense see also, H. TRAN, *Les obligations de vigilance des États parties*, cit., p. 144.

³⁵⁶ Armani da Silva v. the United Kingdom [GC], cit., § 233; Al-Skeini and others v. the United Kingdom [GC], cit., § 166. For a concrete example see, Mustafic-Mujic and others v. the Netherlands (dec.), cit., § 119.

³⁵⁷ See, for instance, Etxebarria Caballero v. Spain, cit.; Ataun Rojo v. Spain, no. 3344/13, 7 October 2014; Pereira-Henriques v. Luxembourg, cit., § 62.

³⁵⁸ In this sense see, Dinu v. Romania, cit.; Perrillat-Bottonet v. Switzerland, no. 66773/13, 20 November 2014, § 68; Bubbins v. the United Kingdom, no. 50196/99, 17 March 2005, § 155; Y. v. Slovenia, cit., § 98. For more on this topic, see *infra* ...

eyewitnesses³⁵⁹, which presupposes taking every effort in order to identify them³⁶⁰; the hearing of the victim³⁶¹; the questioning of the suspects³⁶²; the preserving and sealing-off of the scene in order to secure the integrity of the evidence likely to be important in solving the case³⁶³; the reconstruction of the events where necessary for the establishment of the facts³⁶⁴; a confrontation between the victim and the alleged perpetrators or among the witnesses, where their versions of the events are irreconcilable³⁶⁵; and forensic evidence, such as ballistic examinations of the bullets³⁶⁶, the collection of fingerprints of the weapons³⁶⁷, forensic examination of the premises³⁶⁸, medical examinations of the injuries

³⁵⁹ For examples of cases in which the Court has reproached the failure to question all the material witnesses, see *Sakir v. Greece*, cit.; *Mammadov v. Azerbaijan* (dec.), 13 May 2014; *Bouyid v. Belgium* [GC], cit., § 128; *Vasil Hristov v. Bulgaria*, cit., § 41; *Karaahmed v. Bulgaria*, cit.; *Otasevic v. Serbia*, cit., § 33; *M.C. v. Poland*, no. 23692/09, 3 March 2015, § 107. In this connection, the lack of power to compel witnesses to testify is an important deficiency taken into consideration by the Court, see *Paul and Audrey Edwards v. the United Kingdom*, cit.; *Hugh Jordan v. the United Kingdom*, cit., § 127.

³⁶⁰ See *Al-Skeini and others v. the United Kingdom* [GC], cit., § 170; *Yusiv v. Lithuania*, cit., § 73.

³⁶¹ For examples of cases in which the failure to hear the victim was held to be a significant shortcoming see, *Alberti v. Italy*, cit., § 65-66; *Sakir v. Greece*, cit.; *Muhacir Cicek v. Turkey*, cit.; *Nalbandyan v. Azerbaijan*, cit., § 126; *Matko v. Slovenia*, cit., § 90; *M. and others v. Italy and Bulgaria*, cit., § 106.

³⁶² For the omission to question the suspects see, *Secic v. Croatia*, cit.; *Scavuzzo-Hager v. Switzerland*, cit., § 83; *Matko v. Slovenia*, cit., § 90. This investigative measure obviously presupposes on part of the authorities also taking every effort in order to identify the possible suspects, see *Ataykaya v. Turkey*, no. 50275/08, 22 July 2014, § 50; *Vasil Hristov v. Bulgaria*, cit., § 41; *L.E. v. Greece*, cit., § 83; *W. v. Slovenia*, cit., § 67. However, in *Mustafic-Mujic and others v. the Netherlands* (dec.), cit., § 119, the Court noted that the failure to hear the suspects was immaterial in that case since the details of their involvement were already well known; it took into consideration also that it was unclear what additional information hearing them could have brought, since they were also entitled to the right to silence.

³⁶³ See, *Mustafa and Fecire Tunc v. Turkey* [GC], cit.; by contrast, for cases in which the authorities had omitted to do so, see *Guzelaydin v. Turkey*, no. 26470/10, 20 September 2016, § 89; *Jaloud v. the Netherlands* [GC], cit., § 217-220 where in particular the bullet was not stored; *Tagayeva and others v. Russia*, cit., § 515-516, where the location of the bodies on the crime scene had not been reported and no samples were collected to find traces of explosives.

³⁶⁴ For a similar omission see, *Gramada v. Romania*, no. 14974/09, 11 February 2014; *Makbule Kaymaz and others v. Turkey*, no. 651/10, 25 February 2014; *Alberti v. Italy*, cit. *A contrario*, where failure to reconstruct the events did not undermine the adequacy of the proceedings as the facts had already been fully established see, *Camekan v. Turkey*, cit..

³⁶⁵ For such an omission see, *Mammadov v. Azerbaijan*, cit.; *Bouyid v. Belgium* [GC], cit., § 128; *Nalbandyan v. Azerbaijan*, cit., § 126.

³⁶⁶ For a similar omission see, *Gramada v. Romania*, cit..

³⁶⁷ For a similar shortcoming see, *Guzelaydin v. Turkey*, cit.; *Makbule Kaymaz and others v. Turkey*, cit.

³⁶⁸ For the omission of medical examinations see, *Mikhail Nikolayev v. Russia*, no. 40192/06, 6 December 2016, cit.; *Nalbandyan v. Azerbaijan*, cit., § 125; *Matko v. Slovenia*, cit., § 90; *M. and others v. Italy and Bulgaria*, cit., § 106. Moreover, the hearing of the doctor who drafted the medical report could also prove essential, see *Bouyid v. Belgium* [GC], cit., § 128; *Etxebarria Caballero v. Spain*, cit.; *Ataun Rojo v. Spain*, cit.

sustained and their causes³⁶⁹ or an autopsy³⁷⁰. In cases where there are discrepancies between the statements given by the witnesses, or the victim and the suspect, the domestic authorities are further expected to make an effort to clarify the facts and solve those contradictions³⁷¹.

Furthermore, with respect to cases of sexual violence where often direct evidence of the fact is missing, a stringent need to test the credibility of the victim with increased diligence and a context-sensitive approach arises, especially where he or she is particularly vulnerable, such as in cases of minors or disabled individuals. In the Court's view, the necessary measures that should be resorted to under such circumstances in order to allow a better assessment of the credibility of the victim's statements, either during the investigations or at trial, are a psychological expertise, a confrontation, the questioning of persons close to the victim such as family or friends, the exploration on whether there might be any reasons to bring false accusations³⁷².

In order for the investigation to be adequate, however, gathering all the evidence available is a necessary but not sufficient condition: the Court, indeed, further expects from the authorities the taking of all necessary measures in order to secure also the quality of the evidence collected, in view of its being genuine to the highest possible degree. In this connection, the standards against which the investigators' diligence is assessed vary according to the type of evidence at issue.

In respect to eyewitness testimony, for instance, the Courts takes into consideration both the time and the manner in which the questioning took place. It is argued that taking the witness' statements immediately after the events would be the best solution, as the passing of time entails a high risk that their memory of the events fades and that their statements thus become unreliable or contaminated³⁷³. At the same time, it is necessary for the interviews to be conducted in an appropriate manner, which reflects a serious attempt to establish the facts, and not in a merely perfunctory way as a pure formality. This means that the questioning of a witness, especially when a police agent, cannot be confined to the simple taking of written statements or to asking to provide his or her account of the

³⁶⁹ For a similar omission see, *Sakir v. Greece*, cit.; *Nadrosov v. Russia*, no. 9297/02, 31 July 2007, § 43.

³⁷⁰ For a case in which an autopsy was not carried out see, *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania* [GC], no. 47848/08, 17 July 2014, § 146.

³⁷¹ See, *Miclea v. Romania*, cit., § 42. This duty is complemented, where solving the discrepancies is not possible, by the duty to explain those inconsistencies in their reasoning, see *infra*...

³⁷² In this sense see, *G.U. v. Turkey*, cit.; *C.A.S. and C.S. v. Romania*, cit., § 78; *I.C. v. Romania*, cit.; *I.G. v. the Republic of Moldova*, cit., § 43 *a contrario*, *Y v. Slovenia*, cit., § 98. For a case in which the domestic authorities' efforts in assessing the victim's credibility were held to be sufficient, see *M.P. v. Bulgaria*, cit., § 113.

³⁷³ See, *Al-Skeini and others v. the United Kingdom* [GC], cit., § 173; *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 197; *Miclea v. Romania*, cit., § 41.

events, without the investigators conducting any further inquiry on its veracity and no question whatsoever being put to him or her, or only questions of very superficial and standard nature lacking specificity³⁷⁴. On the other hand, however, the need to question the witness in an appropriate manner has not been interpreted in the sense of requiring necessarily a cross-examination and that the prosecutor hears oral evidence before deciding whether or not to prosecute³⁷⁵.

Furthermore, in certain circumstances the Court expects from the authorities also the taking of positive steps in order to better ensure the quality and credibility of the oral evidence. Thereby, a crucial duty weighing on the authorities is that of taking appropriate measures to prevent or reduce risks of collusion or distortion of the truth among the witnesses or suspects, such as for example keeping them separate from one another before being questioned³⁷⁶.

Secondly, the Court seems to suggest also the adoption of protection measures where necessary to obtain a genuine declaration from the witness or victim, owing to the fact that he or she is in a situation of vulnerability. This occurred, for instance, in relation to an irregular migrant witness, where the Court reproached the police for failing to ensure that he was heard in conditions that granted his credibility and the exactitude of the information provided³⁷⁷. The same happened with respect to detainees having allegedly suffered from ill-treatment: here also the Court blamed the investigators for failing to ensure the victims' and witnesses' safety as regards any fears of intimidation or retaliation, since they had not been heard in private, but in the presence of the prison administration authorities³⁷⁸. Finally, the adoption of protection measures highly concerns children and minor witnesses or victims. In *G.U. v. Turkey*, for instance, the main shortcoming affecting the proceedings was that no effort had been made to hear the victim, who was a minor, in conditions which were conducive to obtaining a more precise and reliable description of the events, such as for example by interviewing him not in a public hearing but behind closed doors and with the assistance of a psychologist. In this case, the Court has even gone further, suggesting that criminal procedures should take into due account the vulnerability of children that are

³⁷⁴ See, *Nalbandyan v. Azerbaijan*, cit., § 126; *Otasevic v. Serbia*, cit., § 33; *Matko v. Slovenia*, cit., § 90; *Chmil v. Ukraine*, no. 20806/10, 29 October 2015, § 89; *Miclea v. Romania*, cit., § 42.

³⁷⁵ See, *Armani da Silva v. the United Kingdom* [GC], cit., § 263.

³⁷⁶ See, *Jaloud v. the Netherlands* [GC], cit., § 206-208; *Ramsahai v. the Netherlands* [GC], cit., § 330; *Makbule Kaymaz and others v. Turkey*, cit., § 141; *Muhacir Cicek and others v. Turkey*, cit., § 74; *Suleyman Demir and Hasan Demir v. Turkey*, cit., § 52. In this connection, the non-adoption of such measure would in principle taint the adequacy of the investigations even where there is no evidence of actual collusion.

³⁷⁷ See, *Sakir v. Greece*, cit., § 68. A similar conclusion was reached, *mutatis mutandis*, in *Al-Skeini and others v. the United Kingdom* [GC], cit., § 170, where it was suggested that the authorities should have persuaded the Iraqi witnesses that they would not place themselves at risk by coming forward and giving information.

³⁷⁸ See, *Karabet and others v. Ukraine*, cit., §§ 273-276; *Karpylenko v. Ukraine*, cit., § 128.

involved in them, as victims or witnesses, and that States should adopt rules of procedure that ensure and secure the collection of statements from children³⁷⁹. The protection of victims and witnesses during criminal proceedings seems therefore to have a double function: it comes into play not only as a measure to safeguard the integrity of their private life under Article 8³⁸⁰, but also, at the same time, as a necessary instrument to ensure the reliability of the evidence and, in that way, the effectiveness of criminal proceedings.

To the contrary, in certain cases the witness' protection measures may clash with the need to gather all the evidence available in the most complete manner: this occurs, for instance, in relation to decisions to grant anonymity to a witness. In this regard the Court has had the opportunity to make clear that the principles emerging from its case-law on anonymous witnesses under Article 6 may be relevant also to assess whether such a measure is compatible with the State's duty to provide for an appropriate forum for securing the public accountability of those responsible for a human right offence³⁸¹. Accordingly, it found that any handicaps under which the victims may have laboured as a result of such decision may be counterbalanced by the fact that the witness were nonetheless compelled to give evidence, though hidden from the public, in sight of the judge and their lawyers.

Another type of evidence whose quality often falls under the extensive review of the Court is forensic and expert evidence. In relation to such evidence, it has been made clear, first of all, that «a forensic examiner must enjoy formal and *de facto* independence, have been provided with specialised training and have a mandate which is broad in scope»³⁸². Therefore, aside from a lack of independence, both the involvement of an expert who is not properly qualified, and an excessively restricted scope of its mandate which fails to answer fundamental questions of the case may impinge upon the adequacy of the investigations³⁸³. Such quality and thoroughness requirements naturally covers all different kinds of forensic evidence, from autopsies to medical reports. With specific regards to medical examinations, for example, this implies that «when a doctor writes a report after a medical examination of a person who alleges having been ill-treated, it is extremely important that he states the degree of consistency with the allegations of ill-treatment. A conclusion

³⁷⁹ G.U. v. Turkey, cit., §§ 71-73.

³⁸⁰ See, in this sense, Y. v. Slovenia, cit., § 101-116, where a violation of the victim's Article 8 rights was found on the ground that the way in which she was cross-examined at trial overstepped the fair balance required between the victim's personal integrity and the defence's right under Art. 6.

³⁸¹ See, *Bubbins v. the United Kingdom*, cit., §§ 155-158.

³⁸² *Karabet and others v. Ukraine*, cit., § 264. See also, A. MOWBRAY, *Duties of investigation*, cit. p. 441.

³⁸³ See, in this sense, *Aydogdu v. Turkey*, no. 40448/06, 30 August 2016, §§ 99-100; *Petrovic v. Serbia*, cit., §§ 85-86; *Jaloud v. the Netherlands [GC]*, cit., § 213; *Tanli v. Turkey*, no. 26129/95, 10 April 2001, § 150; *Scavuzzo-Hager and others v. Switzerland*, cit., § 83. *A contrario* see, *Mustafa Tunc and Fecire Tunc [GC]*, § 188; *Giuliani and Gaggio v. Italy [GC]*, cit., §§ 317-319.

indicating the degree of support for the allegations of ill-treatment should be based on a discussion of possible differential diagnoses»³⁸⁴. Moreover, where the medical examinations are performed while the person is in custody or detention, then additional care is required: these must be carried out by properly qualified doctors and outside the presence of the police³⁸⁵.

With regards to autopsies, furthermore, it has been held that these should provide «a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death³⁸⁶» and should possibly be also accompanied by photographs³⁸⁷. Finally, the adequacy of a forensic examination also means that the authorities should seek to solve any contradictions existing among several reports on the same issue³⁸⁸. In such cases, it has been held that «only a detailed and scientifically substantiated report containing reasons for the contradictions between the lower institutes' opinions and answers to the questions put by the prosecuting authorities and the applicants would have been capable of inspiring public confidence in the administration of justice and assisting the judicial authorities in discharging their duties»³⁸⁹.

i. Duty to resort to international cooperation

The mentioned duty to take all the reasonable steps to secure the relevant evidence does not necessarily stop at a State's border. To the contrary, the Court has made crystal clear that such obligation extends to any evidence, «whether or not it is located in the territory of the investigating State»³⁹⁰. Yet, according to a rule of customary international law, the execution of investigative acts by a foreign authority in the territory of a foreign State would be an infringement of its sovereignty³⁹¹. Therefore States have to agree to afford each other assistance in cross-border evidence gathering, and this can be done either through letters of rogatory, whose execution is dependent on the requested State's will, or by subscribing Mutual Legal Assistance Treaties that provide for the duty to afford the requested assistance³⁹².

³⁸⁴ Karabet and others v. Ukraine, cit., § 267; Davitidze v. Russia, no. 8810/05, 30 May 2013, § 115. See also, Chmil v. Ukraine, cit., § 90.

³⁸⁵ See, Daslik v. Turkey, no. 38305/07, 13 June 2017, § 63.

³⁸⁶ Tanli v. Turkey, cit., § 149.

³⁸⁷ See, Jaloud v. the Netherlands [GC], cit., §§ 212-216; Mustafa Tunc and Fecire Tunc [GC], cit., § 188; Giuliani and Gaggio v. Italy [GC], cit., §§ 317-319; Petrovic v. Serbia, cit., § 86.

³⁸⁸ See, Petrovic v. Serbia, cit., § 96.

³⁸⁹ Ionita v. Romania, cit., § 82; Baldovin v. Romania, no. 11385/05, 7 June 2011, § 23.

³⁹⁰ Rantsev v. Cyprus and Russia, cit., § 240.

³⁹¹ See, in this sense, A. KLIP, *European Criminal Law*, cit., p. 399.

³⁹² On this topic see, J. VERVAELE, *Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality*, in ID., *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Trento, 2014, p. 140.

Since normally there is no legal obligation to subscribe to such treaties or to execute the cooperation requests, it is of pivotal importance that the case-law on the procedural obligations to effectively investigate and punish human right offences has to the contrary elaborated a duty enjoining States to cooperate with each other in the gathering of evidence abroad in a transnational context³⁹³. The rationale put forward in support of this additional obligation to offer and engage in international cooperation is that «otherwise those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens³⁹⁴». In particular, the Court has found that:

«States are also subject to a duty in cross-border cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories»³⁹⁵;

and, at the same time, that:

«the corollary of the obligation to secure the evidence located in other jurisdictions is a duty on the State where the evidence is located to render any assistance within its competence and means sought under a legal assistance request»³⁹⁶.

Yet, clearly, the nature and scope of the cooperation required and what measures are to be adopted to this end will depend on the particular circumstances of each case³⁹⁷. The Court will not therefore indicate which measures should be taken to comply with their obligations most effectively, nor will it review whether the States have complied with their international obligations under mutual assistance treaties. It will only examine whether the

³⁹³ See, *Guzelyurtlu and others v. Cyprus and Turkey*, no. 36925/07, 4 April 2017, § 284-287. According to J. VERVAELE, *Mutual Legal Assistance in Criminal Matters.*, cit., p. 140, Mutual Legal Assistance obligations can be derived from positive duties under international human rights law, «certainly when it comes to the duty to investigate, prosecute, adjudicate and punish core international crimes». See also, J. VERVAELE, *Extraordinary rendition e sparizione forzata transnazionale*, cit., p. 157-159. A similar duty has been developed also in the case-law of the IACtHR, see judgment *La Cantuta v. Peru*, 29 November 2006, § 160.

³⁹⁴ *O’Loughlin and others v. the United Kingdom (dec.)*, no. 23274/04, 25 August 2005, § 2, where the applicants complained that the United Kingdom had failed to secure evidence and arrest the suspects who were present in its territory in relation to a bombing occurred in Ireland.

³⁹⁵ *Ranstev v. Cyprus and Russia*, cit., § 288; *M. and others v. Italy and Bulgaria*, cit., § 167.

³⁹⁶ *Id.*, § 244.

³⁹⁷ See, *Guzelyurtlu and others v. Cyprus and Turkey*, cit., § 287; *O’Loughlin and others v. the United Kingdom (dec.)*, cit., § 2.

authorities have done all that could be reasonably expected of them and, when faced with a partial or total failure to act, it will determine to what extent a minimum effort was possible and should have been made³⁹⁸.

In other words, under the procedural obligations to investigate, States have a twofold duty, on one side, to invest efforts in seeking cooperation from other States in order to obtain evidence or the surrender of suspects located abroad and, on the other, to provide any assistance requested by another State, where possible. It does not appear however that these duties have yet been further interpreted in the sense that States are bound to subscribe Mutual Legal Assistance Treaties and therefore could be held liable for failing to having done so. To the contrary, the Court has expressly maintained that where the international treaty in force excludes the possibility to extradite a person to the requesting State, the investigating State cannot be held liable for the standstill caused in the criminal proceedings at issue³⁹⁹.

The duty to resort to and to provide legal assistance and cooperation thus appears to be limited to the legal framework currently in force: where a Mutual Legal Assistance or Extradition Treaty exists, then the authorities' failure to submit such a request would encroach the adequacy of the whole investigation⁴⁰⁰; to the contrary, in the absence of any such treaty, a State is not necessarily required to make legal assistance requests devoid of any reasonable prospects of success⁴⁰¹. Correspondingly, the requesting State is also bound to provide the legal assistance required when that is feasible⁴⁰².

Lastly, it should be mentioned also that the duty to resort to international legal assistance is informed also by the requirement of promptness: not only will the Court verify whether

³⁹⁸ See, *Guzelyurtlu and others v. Cyprus and Turkey*, cit., § 289.

³⁹⁹ See, *Palic v. Bosnia and Herzegovina*, cit., § 65.

⁴⁰⁰ See, *Ransteve v. Cyprus and Russia*, cit., § 288; and *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016, § 270 for failure to submit a request for extradition, albeit the existence of an extradition treaty. For a case in which the authorities have resorted to international cooperation see, *Ghedir and others v. France*, no. 20579/12, 16 July 2015, § 133; *M. and others v. Italy and Bulgaria*, cit., § 169.

⁴⁰¹ See, *J. and others v. Austria*, cit., § 117, where owing to the absence of any mutual assistance treaty with Saudi Arabia and the fact that in the past legal assistance requests had often been refused by it, the Court took the view that a request for legal assistance, although available in theory, was not required in the present case as it did not have any reasonable prospects of success. See also, *V. STOYANOVA, J. and others v. Austria and the strengthening of States' obligation*, cit. See also, *Zoltai v. Hungary and Ireland*, cit., in relation to legal obstacles to the surrender of a suspect within EU member States. However, there are other cases in which the Court blamed the investigators for not having attempted to cooperate with foreign authorities, without lingering on whether such request would have or not any prospects of success, see *L.E. v. Greece*, cit., § 85; *Bakanova v. Lithuania*, cit., § 74.

⁴⁰² See, *Guzelyurtlu and others v. Cyprus and Turkey*, cit., § 292, in which, although both Cyprus and Turkey are parties to the European Convention on Extradition of 1957, the extradition requests made by the Cypriot Government were ignored by the Turkish authorities, who simply remained silent on the matter.

the authorities have made use of the measures available, but it will also assess their diligence and whether they have done it timely or with undue delays⁴⁰³.

C. The assessment of the evidence and the risks of “fourth instance”

The demand of thoroughness touches not only upon the scope of the proceedings and the collection of all the relevant evidence, but has a bearing also on the assessment and evaluation made by the domestic authorities of the elements collected, and on the motivation supporting it. Indeed, it has been constantly repeated that:

«the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements⁴⁰⁴.»

In particular, the investigating authorities should avoid any selective or inconsistent approach in the assessment of the evidence, whereby different standards of evaluation are applied to, for instance, testimonies of the victim and the testimonies of the police, which are addressed in a more deferential manner⁴⁰⁵.

In order to verify compliance with such demand, it is inevitable that the Court engages in a review of the decision-making process undertaken at national level, overseeing the factual and legal analysis carried out by domestic courts. However, the Court is mindful of its limited role in this field, which must be kept distinct from that of an appellate court: it is not, indeed, a supranational court of fourth instance. Curiously enough, this so-called “fourth instance doctrine” elaborated in relation to the scrutiny over the fairness of criminal proceedings under Article 6⁴⁰⁶, is apparently followed also when addressing the decision-making process of national authorities under the procedural obligation to effectively investigate and punish. Also in this context, indeed, the Court frequently maintains that «it is not the task of this Court to deal with errors of fact or law allegedly committed by domestic courts, unless and in so far as such errors may have infringed rights and freedoms

⁴⁰³ For cases in which the promptness of the request of legal assistance was at issue see, *Bakanova v. Lithuania*, cit., § 74; *W. v. Slovenia*, cit., § 67.

⁴⁰⁴ *Armani da Silva v. the United Kingdom [GC]*, cit., § 234; *Salin and Karsin v. Turkey*, cit., § 80.

⁴⁰⁵ See, *Nadrosov v. Russia*, cit., § 44 where the Court criticizes the prosecutor’s «selective and somewhat inconsistent approach to the assessment of the evidence» and «his deferential attitude to the police officers» involved. See also, *Petrovic v. Serbia*, cit., § 96; *Timus and Taurus v. the Republic of Moldova*, cit., § 55; *Nalbandyan v. Azerbaijan*, cit., § 123; *Bouyid v. Belgium [GC]*, cit., § 130; *Yusiv v. Lithuania*, cit., § 73. See also, A. SEIBERT-FOHR, *Prosecuting serious human rights offences*, cit., p. 136.

⁴⁰⁶ For more on the fourth instance doctrine see, R. GOSS, *Criminal fair trial rights*, cit., p. 42-58; HARRIS, O’BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 17-18.

protected by the Convention⁴⁰⁷», and that «aware of its subsidiary role, the Court is mindful of it being prevented from substituting its own assessment of the facts for that of the national authorities⁴⁰⁸». In this sense, «when it comes to establishing the facts, and sensitive to the subsidiary nature of its role, (the Court) must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case⁴⁰⁹».

Put another way, the Court should be prevented from conducting and “appellate-style review”, that is a review of factual or legal analysis or conclusions of domestic decisions⁴¹⁰. However, at the same time, it must be able oversee the effectiveness requirements of a criminal proceedings, in particular the one discussed here on whether the national authorities have thoroughly and carefully assessed all the relevant evidence. In the Court’s own words, notwithstanding the limits of its role, «the Court has to apply a particularly thorough scrutiny where allegations have been made under Article 3 [...]. In other words, in such a context the Court is prepared to conduct a thorough examination of the findings of the national courts. In examining them it may take account of the quality of the domestic proceedings and any possible flaws in the decision-making process⁴¹¹».

This ostensible tension inherent in the Court’s role is resolved, in the context of the duty to investigate, in favour of the exceptions to the fourth instance doctrine even to a greater extent than what occurs under Article 6⁴¹²: the engagement by the Court in an appellate-style review of the national decision, in fact, appears to have become the rule. Indeed, though maintaining that it is prevented from substituting itself to the domestic authorities in the assessment of the evidence and in drawing conclusions on the basis of such assessment, the Court does in fact do so⁴¹³. It could be argued that, as purported in many

⁴⁰⁷ See, *Gedrimas v. Lithuania*, cit., § 63.

⁴⁰⁸ See, *Balazs v. Hungary*, cit., § 75.

⁴⁰⁹ *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 182.

⁴¹⁰ For such a definition reference is made to R. GOSS, *Criminal fair trial rights*, cit., p. 47, who also refers to how the Court itself understands such concept. See in particular, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, 15 February 2015, §§ 61-63, where it is stated that the Court should not review the findings of national courts unless there are arbitrary or manifestly unreasonable, which occurs, for instance, when they have made «an error that no reasonable court could ever had made» or took a decision that «has no legal basis in domestic law and no connection with the established facts».

⁴¹¹ See, *Gedrimas v. Lithuania*, cit., § 63.

⁴¹² For a criticism of the fourth instance doctrine under Article 6, see R. GOSS, *Criminal fair trial rights*, cit., p. 47-58, who argues that the exceptions to it have ostensibly become the rule.

⁴¹³ See, among many, *Kaverzin v. Ukraine*, cit., § 111: «although it is in the first place for the national authorities, in this case for the prosecutor, to assess the relevant evidence and to draw conclusions on the basis of such assessment, the Court cannot disregard the fact that the prosecutor’s findings lack important details and relevant substantiation». See also, *Gedrimas v. Lithuania*, cit., § 68: «while the Court is mindful of its limited role in assessing the findings of fact by domestic authorities [...], it considers that in the specific circumstances of the present case there are serious reasons to question some of those findings». See also, *Balazs v. Hungary*, cit., § 75: «Aware of its subsidiary

judgements, such an appellate-style review is undertaken only when there are elements demonstrating that the authorities' conclusions are arbitrary or have manifestly ignored some relevant facts⁴¹⁴. As stated by the Court, indeed:

«Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts⁴¹⁵».

But, in fact, in order to verify whether that has occurred, a preliminary review on the decision-making process is implicitly required in every case.

In substance, the Court does always engage in overseeing the national authorities decision-making process, but it will substitute its own assessment of the facts and correspondingly find a breach of the thoroughness requirement only in those cases where the domestic conclusions are arbitrary, in the sense that they are irreconcilable with the evidence available and the facts established in the proceedings⁴¹⁶.

D. The duty to provide reasons for decisions concluding the proceedings

Another aspect strictly linked to the one just mentioned is the reasoning of the domestic decisions concluding the criminal proceedings. Indeed, the requirement of thoroughness,

role, the Court is mindful of it being prevented from substituting its own assessment of the facts for that of the national authorities. Nevertheless, it cannot but note that the prosecuting authorities' insistence on identifying an exclusive racist motive, their reluctance to link Mr E.D.'s posts to the incident despite remarkable concordances and, lastly, their failure to identify the racist motive in the face of powerful hate crime indicators such as the posts resulted from a manifestly unreasonable assessment of the circumstances of the case».

⁴¹⁴ See, *Seidova v. Bulgaria*, cit., § 57: «*en l'absence d'éléments indiquant que les conclusions des autorités internes étaient arbitraires ou ont manifestement ignorés des faits pertinents, [...] la Cour ne saurait substituer son appréciation à celle des autorités internes*». See also, *Baliuciai v. Lithuania* (dec.), no. 29056/15, 20 October 2015, § 46.

⁴¹⁵ *Mustafa Tunc and Fecire Tunc [GC]*, § 182; *Giuliani and Gaggio v. Italy [GC]*, cit., § 180.

⁴¹⁶ See, *Mikhail Nikolayev v. Russia*, cit., §100, in which the national conclusions were at odds with the results of a forensic medical report; *Pomylyayko v. Russia*, cit., § 56, where the domestic findings were not supported by any evidence, all of it pointing in the different sense; *Gedrimas v. Lithuania*, cit., §§ 68-74 where the findings of the authorities were not corresponding to the evidence collected; *Balazs v. Hungary*, cit., § 75; *Chinez v. Romania*, cit., §§ 49-50, where the findings were not corroborated by any evidence; *Mocanu and others v. Romania [GC]*, cit., § 347, where the national conclusions sat ill with the facts established during the proceedings; *Denis Vasilyev v. Russia*, cit., § 128, where also the findings were irreconcilable with the facts as established in the proceedings. For the opposite outcome see, *Mustafic-Mujic and others v. the Netherlands* (dec.), cit., §§ 124-130.

in this last sense discussed above, also supposes that the authorities give reasons for their decisions: it is only through the motivation that it is possible to verify whether or not the assessment of the evidence collected has been carried out diligently and thoroughly and whether the authorities have subjected the facts to the careful scrutiny required by the procedural obligations⁴¹⁷. A reasoned decision, besides, is essential also to ensure public scrutiny over the administration of justice and to enable the victim to use any legal challenge available against it⁴¹⁸.

Although never expressly acknowledged by the Court, a true duty for criminal enforcement authorities to adequately motivate their decisions has thus been implicitly derived from the thoroughness requirement, which, although from a different perspective, overlaps to a certain extent with the accused's right to a reasoned judgement under Article 6⁴¹⁹.

More precisely, under the procedural obligation to investigate, a proper reasoning is mandated for all decisions concluding the criminal proceedings: firstly, for decisions not to prosecute or to close the investigations taken by public prosecutors or other competent authorities⁴²⁰, as well as for the eventual subsequent judicial rulings upholding them in the event a judicial review is provided for in the national legal system⁴²¹, and also, where the investigations actually led to a trial, for the courts' final judgements and second-instance judgments⁴²². In this connection, it is worth noting that the flaws of an initial decision not to prosecute or to acquit the defendants could in principle be remedied by the higher instance ruling, but only to the extent that the latter specifically addresses the previous deficiencies and answers the relevant arguments submitted by the appealing parties⁴²³. In the opposite case, the shortcomings in the first decision's motivation will not be redressed.

As to the substance of the duty to give reasons, the Court has specified that the authorities must:

⁴¹⁷ On the duty to motivate decisions see also, E. BREMS, *Procedural protection*, cit., p. 152; J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings*, cit., p. 125.

⁴¹⁸ See, *Kelly and others v. the United Kingdom*, cit., § 117. See also, *infra* ...

⁴¹⁹ On the accused right to a reasoned judgement under Article 6 see, S. TRECHSEL, *Human Rights in Criminal Proceedings*, cit., p. 102-110; HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. 430; P. ROBERTS, *Does Art. 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?*, in *Human Rights Law Review*, 2011, 2, p. 213.

⁴²⁰ See, among many, *Bouyid v. Belgium* [GC], cit., § 130; *Mocanu and others v. Romania* [GC], cit., § 345; *Kelly and others v. the United Kingdom*, cit., § 117; *Petrovic v. Serbia*, cit., § 96; *Gedrimas v. Lithuania*, cit., § 68-74; *Nalbandyan v. Azerbaijan*, cit., § 123; *Smaltini v. Italy* (dec.), cit., § 56.

⁴²¹ See, *Bouyid v. Belgium* [GC], cit., § 130; *Petrovic v. Serbia*, cit., § 96; *Chinez v. Romania*, cit., § 50; *Dalakov v. Russia*, no. 35152/09, 16 February 2016, § 73; *M.C. v. Poland*, cit., § 108.

⁴²² See, *Gramada v. Romania*, cit., § 74.

⁴²³ See, *Denis Vasilyev v. Russia*, cit., § 128; *Nalbandyan v. Azerbaijan*, cit., § 128; *Chinez v. Romania*, cit., § 50; *Petrovic v. Serbia*, cit., § 96.

«deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts»⁴²⁴

and that:

«where controversial incidents are concerned, and especially those which potentially engage the responsibility of the State, a reasoned decision setting out in writing the evidence, as well as the finding once the investigation has been completed, should be provided [...]. Otherwise, a lack of transparency might not ensure public confidence in the State's adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.»⁴²⁵

Whilst providing very little guidance on how the adequacy of the reasons is determined and on what is the general standard of review to apply in evaluating the reasons provided, the Court nonetheless ostensibly engages in extensive review of the quality of national decisions' motivations. From what it will be discussed below, it appears that what is mandated is that the domestic authorities set out in a sufficiently clear and comprehensive manner the factual and legal grounds on which they base their findings, with reference to all the evidence collected, so as to allow not only the victims, but also the general public to understand how the facts and the evidence were assessed⁴²⁶. Indeed, the obligation to motivate is not complied with not only where the domestic authorities fail to provide any reasons whatsoever for their decisions⁴²⁷, but also where the motivation given proves to be insufficient in light of the circumstances of the case⁴²⁸.

From a review of the case-law, it emerges that a motivation is generally regarded as insufficient, in particular, where it disregards completely certain important pieces of

⁴²⁴ Balazs v. Hungary, cit., § 52.

⁴²⁵ Petrovic v. Serbia, cit., § 92. See also Mocanu and others v. Romania [GC], cit., § 345 where the Court blamed the public prosecutor for failing to «indicate what evidence had been used with a view to establishing the facts».

⁴²⁶ For an example of duly motivated decision see, Smaltini v. Italy (dec.), cit., §§ 56-59 and the comments of D. VOZZA, *Obblighi di tutela penale del diritto alla vita*, cit.

⁴²⁷ See, Bouyid v. Belgium [GC], cit., § 130; and, Alpar v. Turkey, cit., § 49 where the authorities decided not to prosecute on account of the insufficiency of the evidence, yet failing to explain why the evidence collected was insufficient.

⁴²⁸ Also for the right to a reasoned judgement under Article 6 «the question whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the particular circumstances of the case», see Salov v. Ukraine, no. 65518/01, 6 September 2005, § 89. According to, R. GOSS, *Criminal fair trial rights*, cit., p. 48, however, «determining a case on the facts of a particular case should not disguise the need for the Court to identify a general standard against which it measures the adequacy of reasons».

evidence that had been collected⁴²⁹, where it does not address and explain the contradictions existing between the evidence⁴³⁰, or where it fails to elucidate on why a person's account of the events is to be considered credible, whereas the opposite one is not⁴³¹. This last issue is highly critical especially where the decision relies strongly on the police officers' account of the events without any perceivable justification, to the detriment of the victim's version: it has already been mentioned above, indeed, that a strict scrutiny of the credibility of the agents' involved is an element to take into consideration also when assessing the practical independence of the investigators⁴³².

Lastly, it is worth mentioning that a reasoning is expected from the criminal law enforcement authorities also when dismissing particular evidence requests submitted by the victims in the course of the proceedings, as it will be examined more in depth hereinafter⁴³³.

6. Public scrutiny and the right to truth

In order for an investigation into human rights offences to be credible and effective, the Court has also held that:

«there must be a sufficient element of public scrutiny of the investigation or its results⁴³⁴».

A form of publicity and transparency of the proceedings or their outcome, indeed, serves towards the purpose of ensuring accountability of the authorities and their actions in the

⁴²⁹ See, *Bouyid v. Belgium* [GC], cit., § 130; *Salin and Karsin v. Turkey*, cit., § 80; *M.C. v. Poland*, cit., § 107; *Chinez v. Romania*, cit., §§ 49-50; *Petrovic v. Serbia*, cit., § 96.

⁴³⁰ See, *M.C. v. Poland*, cit., § 107; *Mikahil Nikolayev v. Russia*, cit., § 100; *Petrovic v. Serbia*, cit., § 96; *Gedrimas v. Lithuania*, cit., § 74; *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, cit., § 146; *Aydan v. Turkey*, cit., § 115. See, for an opposite positive outcome, *Y. v. Slovenia*, cit., § 98. It should be reminded that national authorities are under the duty to seek solving any contradiction in the evidence collected, see *supra*...

⁴³¹ See, *G.U. v. Turkey*, cit., § 71; *Miclea v. Romania*, cit., § 42; *Mikahil Nikolayev v. Russia*, cit., § 100.

⁴³² See *supra*. See also, *Petrovic v. Serbia*, cit., § 96 where the domestic court appeared to accept the police agents' version of the events to such an extent that it was prepared to omit to take into account any relevant evidence which did not corroborate it. See also, *Timus and Taurus v. the Republic of Moldova*, cit., § 55; *Nalbandyan v. Azerbaijan*, cit., § 123; *Bouyid v. Belgium* [GC], cit., § 130; *Yusiv v. Lithuania*, cit., § 73.

⁴³³ See, *infra*.

⁴³⁴ See, *Anguelova v. Bulgaria*, no. 38361/97, 13 June 2002, § 140; *Hugh Jordan v. the United Kingdom*, cit., § 109; *Mustafa and Fecire Tunc v. Turkey* [GC], cit., § 179; *Paul and Audrey Edwards v. the United Kingdom*, cit., § 73.

conduct of the investigations in practice and in theory and, thereby, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts⁴³⁵. The role played by the requirement of public scrutiny, therefore, mirrors, although from the perspective of the victim, that of the principle of publicity of criminal proceedings within the meaning of the right to a fair trial under Article 6, which protects the defendant against the administration of justice in secret⁴³⁶.

However, it has been accepted that «the degree of public scrutiny required may well vary from case to case⁴³⁷»: the widest public exposure is thus called for where great public interest is attached to the events at stake owing to the gravity and importance of the issues involved. In this sense, a particular intense public scrutiny of the investigations was required, for instance, in a case concerning the death of a vulnerable individual in prison⁴³⁸ and in another concerning an episode of extraordinary renditions, where it has been found that the public has a «legitimate interest» in being informed of the investigations and their results⁴³⁹.

Prior to discussing what is exactly meant by public scrutiny of the proceedings, it is worth noting that such element is strictly interlaced to the additional requirement of involvement of the victims in the investigations, which will be analysed hereinafter⁴⁴⁰. It often occurs, indeed, that compliance with these two criteria is assessed simultaneously, in the sense that an adequate involvement of the victims in the proceedings is regarded as sufficient also to ensure the requisite public scrutiny, no other additional measure being necessary to that end. It is only very rarely, in fact, that the element of public scrutiny is considered by the Court separately by itself and therefore it becomes more difficult to define what specific obligations are imposed under such head.

From an analysis of the case-law, public scrutiny in a strict sense essentially means disclosure and access to the victims and/or the general public of information concerning the progress of the investigations and their results⁴⁴¹. In this connection, it is important to stress that the element of public scrutiny of the investigations has recently been linked to

⁴³⁵ *Id.*

⁴³⁶ On this issue see, S. MIRANDOLA, *Un'altra camera di consiglio destinata a schiudersi?*, in *Cassazione Penale*, 2013, no. 10, p. 3580.

⁴³⁷ *Id.*

⁴³⁸ See, *Paul and Audrey Edwards v. the United Kingdom*, cit., § 83.

⁴³⁹ See, *Al Nashiri v. Poland*, cit., § 497.

⁴⁴⁰ See *infra*.

⁴⁴¹ See, *Al Nashiri v. Poland*, cit., § 497, where the Court held that the general public has «a legitimate interest in being informed of the investigations and its results». See also *Association "21 December 1989" and others v. Romania*, cit., § 141 where the Court held that the public interest in there existing a public scrutiny of the investigations was not protected on the ground that essential information for the investigation, previously classified as "secret", was made accessible only twenty years after the events.

the internationally emerging right to truth⁴⁴². In particular, the Court, first only with a timid allusion⁴⁴³ and then more openly, has suggested that where allegations of serious human rights violations are involved in the investigations «the right to truth regarding the relevant circumstances of the case» has a place in the context of the procedural obligations to investigate, in which it is broadly implicit, and belongs «not solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened»⁴⁴⁴. It is apparent, indeed, that an inadequate investigation may have a negative impact on the right of victims and of the general public of being informed of what happened through the ascertainment and establishment of true facts, which seems to be ultimately the main purpose and *raison d'être* of the procedural obligations to investigate⁴⁴⁵.

Nonetheless, it is accepted that the requisite access of the public or the victims may be provided for in other stages of the proceedings, and not necessarily during the strict investigation phase⁴⁴⁶. Accordingly, publication or disclosure of police reports and investigative materials cannot be regarded as an automatic requirement on the ground that it may involve sensitive issues with possible prejudicial effects on private individuals or

⁴⁴² The right to truth is codified as a private and societal right in Art. 24 (2) of the International Convention for the Protection of all Persons from Enforced Disappearance and in Resolution 68/165 of the UN General Assembly of 18 December 2013; it has also been widely acknowledged in the jurisprudence of many human rights bodies, included the Inter American Court of Human Rights (judgement *Velasquez Rodriguez v. Honduras*, 29 July 1988). On the origins and evolution of the right to truth in international law see, O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, cit., p. 152; NAQVI, *The Right to Truth in International Law: Fact or Fiction?*, in *International Review of the Red Cross*, 2006, 88, p. 245; J.E. MÉNDEZ, F.J. BARIFFI, *Right to Truth in International Law*, in *Max Planck Encyclopaedia of Public International Law*, 2011.

⁴⁴³ Reference is made to the judgment *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], cit., § 191, in which the Court adopted a narrow interpretation of the right to truth as a victim-based procedural aspect of a core right. The right to truth is implied in the right to an effective investigations according to O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, cit., p. 157; C. MELONI, *Extraordinary renditions della CIA e responsabilità europee*, cit., p.; F. FABBRINI, *The European Court of Human Rights, Extraordinary Renditions and the Right to Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism*, in *Human Rights Law Review*, 2014, 14, p. 85-106; T. SCOVAZZI, *Segreto di Stato e diritti umani: il sipario nero sul caso Abu Omar*, in *Diritti Umani e Diritto Internazionale*, 2016, 1, p. 166; see also the joint concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller to the judgement *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], cit.

⁴⁴⁴ *Al Nashiri v. Poland*, cit., § 495. The double dimension of the right to truth, a private and a societal one, has thus been confirmed by the Court, despite the initial cautiousness mirrored also in a joint concurring opinion of Judges Casadevall and López Guerra to the judgement *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], cit., § 191, in which it was held that the right to truth could have as sole beneficiary the victim of the crime and not the public at large. In this sense also, O. CHERNISHOVA, *Right to truth in the case-law of the European Court of Human Rights*, cit., p. 160.

⁴⁴⁵ See *supra*. According to M. TARUFFO, *Verità e giustizia di transizione*, in *Criminalia*, 2015, p. 21, the establishment of true facts is, more in general, the prerequisite for an effective legal system.

⁴⁴⁶ *Mustafa and Fecire Tunc v. Turkey* [GC], cit., § 179; *Giuliani and Gaggio v. Italy* [GC], cit., § 304.

other investigations⁴⁴⁷. This brings about the issue of the existence of possible limits to the disclosure and publication of information concerning criminal investigations. Whilst many of these will be discussed hereinafter in relation to the requisite involvement of victims owing to the fact that they are more strictly related to the rights of victims in criminal proceedings, one interest highly relevant in this connection and possibly limiting the authorities' duty to disclose information regarding investigations into human rights offences is national security. In this regard, the Court has held that national security concerns «do not give the investigating authorities complete discretion in refusing disclosure of material to the victim or public»; to the contrary, «even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests»⁴⁴⁸. In other words, it falls to the authorities to find a solution which, without unacceptably compromising national security, secures a sufficient degree of public scrutiny over the investigations.

Coming back to the implications of public scrutiny and its limits, it has been found moreover that the obligation to ensure public scrutiny of the proceedings does not go as far to require the holding of public hearings⁴⁴⁹, nor that all proceedings following an inquiry be public⁴⁵⁰. Such possibility left open for the holding of private hearings in the context of the procedural obligation to investigate mirrors the existence of similar exceptions also to the respective accused's right to a public hearing and to the principle of publicity of criminal proceedings under Article 6⁴⁵¹. Furthermore, it is not expected that all decisions be made public either, at least as long as the victims have been provided with a reasoned decision and allowed full access to the case file: under such circumstances, indeed, the victims could make the decision public themselves and the risk of improper cover up or concealment of evidence by the authorities involved is hence obviated⁴⁵². What thus seems to be necessary for a sufficient degree of public scrutiny to be secured in the case of non-prosecution is surely

⁴⁴⁷ *Armani da Silva v. the United Kingdom* [GC], cit., § 236. See *infra*.

⁴⁴⁸ *Al Nashiri v. Poland*, cit., § 494.

⁴⁴⁹ See, *Giuliani and Gaggio v. Italy* [GC], cit., § 320, where the Court concluded that proceedings may therefore be discontinued at the preliminary investigations stage.

⁴⁵⁰ See, *Ramsahai v. the Netherlands* [GC], cit., § 353, in respect to the proceedings before the Court of Appeal.

⁴⁵¹ See, *Jussila v. Finland* [GC], cit., § 41-43; *Belashev v. Russia*, no. 28617/03, 4 December 2008, § 83. On the right to a public hearing under Article 6 see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. ?; S. MIRANDOLA, *Un'altra camera di consiglio destinata a schiudersi?*, cit., p. 3580.

⁴⁵² See, *Ramsahai v. the Netherlands* [GC], cit., § 353, in respect to a Court of Appeal's decision.

a reasoned decision, in order to reassure public that the rule of law has been respected⁴⁵³. Once again, such limitation equates the scope of the respective accused right to the public pronouncement of the judgement under Article 6, which is ensured even in the absence of an oral reading out of the judgment in open court where sufficient publicity is achieved by other means⁴⁵⁴.

7. The involvement of the victim in the criminal proceedings

The requirement of public scrutiny, as mentioned earlier, is strictly connected to the one of involvement of the victim or its next-of-kin in the criminal proceedings. Both elements, indeed, serve towards the common aim of ensuring public accountability of the authorities and public scrutiny of their actions in the conduct of the investigations⁴⁵⁵. Admittedly, the Court has held that, although the degree of public scrutiny may vary from case to case,

«in all cases the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests⁴⁵⁶.»

Accordingly, whereas information to the general public on the progress and results of the investigations is not always called for, the involvement of the victim in the criminal proceedings must be ensured in all cases⁴⁵⁷, as a general requirement under the procedural aspect of the State's obligation to protect the right to life and the other rights mentioned earlier⁴⁵⁸. In this sense, the victim is seen as the subject through which the general interest

⁴⁵³ See, *Kelly and others v. the United Kingdom*, cit., §§ 117-118, in relation to a killing resulting from the use of lethal force by State agents.

⁴⁵⁴ See, *Pretto and others v. Italy*, no. 7984/77, 8 December 1983, § 27-28. On the right to a public hearing under Article 6 see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p. ?.

⁴⁵⁵ *Perevedentsev v. Russia*, cit., § 118. According to J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate*, cit., p. 267, the publicity requirement is aimed at providing a balance between victims' and suspects' opportunity to influence the investigations.

⁴⁵⁶ *Hugh Jordan v. the United Kingdom*, cit., no. 24746/94, § 109, 4 May 2001, and *McKerr v. the United Kingdom*, cit., §115.

⁴⁵⁷ It must be borne in mind, however, that the scope of the victims' involvement rights is however limited by the notion of "criminal proceedings" within the meaning of Article 6, which refers strictly to proceedings for the determination of a criminal charge and does not cover, for instance, ancillary proceedings such as those for the execution of a European Arrest Warrant, in respect of which victims cannot claim any participatory right. See in this sense, *Zoltai v. Hungary and Ireland*, cit., § 32. For the non-applicability in general of Art. 6 under its criminal limb to such proceedings see, *Monedero Angora v. Spain* (dec.), 7 October 2008.

⁴⁵⁸ In this sense, see also J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings*, cit., p. 124, who stresses the importance of the acknowledgement that victims have legitimate interests in the criminal proceedings for human rights violations.

in having a form of public scrutiny on the proceedings is ensured. Its participation to the proceedings, therefore, has a twofold function: it serves not only the victim's private and legitimate interests, which are based «on their close and personal concern with the subject matter of the inquiry»⁴⁵⁹, but also at the same time the interest of society at large in the publicity of criminal proceedings.

It should be assessed, however, how the Court has interpreted this principle of necessary involvement of the victims in criminal proceedings and what are the legitimate interests of victims that must be ensured, in order to understand exactly which specific rights are implicitly guaranteed to victims along the investigations and trial. This is particularly interesting if one considers that victims of crime do not benefit from the guarantees of the right to a fair criminal trial under Article 6, unless and in so far as they have joined the proceedings as civil party, which results in Article 6 becoming applicable to their claim under its civil limb⁴⁶⁰; therefore, the acknowledgement to victims of crime of some rights that, as it will be discussed below, are very similar to the fair trial rights of Article 6 irrespective of the bringing of a civil claim represents a great step forward in strengthening the role of victims in criminal proceedings, although only in the very specific and limited field of serious human rights offences⁴⁶¹.

Before exploring the specific rights that the Court has implicitly ensured to victims, some general features of the requisite victim's involvement in the procedure should be addressed. First of all, it should be stressed that their involvement in criminal proceedings should be automatic: just as the authorities are required to start an investigation on their own motion, likewise they must also involve the victims in the proceedings automatically, and not subject their participation to the lodging of a formal criminal complaint and to an application on their part to join the proceedings as a civil party⁴⁶².

⁴⁵⁹ Paul and Audrey Edwards v. the United Kingdom, cit., § 46 and 75.

⁴⁶⁰ See, M. CHIAVARIO, *Il "diritto al processo" delle vittime dei reati e la Corte europea dei diritti dell'uomo*, in *Rivista di diritto processuale*, 2001, n. 4, p. 938; S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea*, in S. ALLEGREZZA, H. BELLUTA, M. GIALUZ, L. LUPARIA (eds.), *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Giappichelli, 2012, p. 20; M. SIMONATO, *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, cit., p. 49.

⁴⁶¹ In this sense also, M. GIALUZ, *La protezione della vittima tra Corte EDU e Corte di Giustizia*, cit., p. 29. According to M. SIMONATO, *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, cit., p. 45, the Court protects the interests of the victims only indirectly, through the lens of the duties to criminalize and effectively investigate serious human rights offences.

⁴⁶² See, *Slimani v. France*, cit., § 47-48, where the Court concluded that the victim should have been allowed to take part in the inquest without having to lodge a criminal complaint beforehand; it also observed that French legislation had been recently amended on that point accordingly. See also J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate*, cit., p. 267.

Secondly, the involvement of the victims must in any case be prompt, and preferably ensured immediately after the opening of the investigations⁴⁶³. In *Anusca v. Moldova*⁴⁶⁴, the Court has stated that there should not be any significant delays before the victim's family is involved in the proceedings, and that they should be involved regardless of whether it has already been concluded that a crime has been committed or not.

However, it appears that the authorities do not have a duty to search on their own initiative for relatives of the victim with a view to informing them of the institution of investigations or their procedural rights in this respect. This principle was established in *Gray v. Germany*⁴⁶⁵, a case where the victim was a foreigner and the events at issue occurred abroad. It is unclear whether the same conclusion could be reached in other situations where for examples the victims are residing in the respondent State and complying with such an obligation would not be as burdensome for the authorities.

Finally, as to the temporal limits of these victims' rights, the requisite involvement of the victims in the procedure is not limited to the strict investigation phase, but extends to the whole criminal proceedings, including to the subsequent trial and sentencing phase⁴⁶⁶.

A. The right to be informed of the progress of the proceedings

Once having been identified, victims have first of all «the right be kept informed on the progress and developments of the investigations»⁴⁶⁷ promptly and without unreasonable delays. Although it is not clear what it is exactly meant by information on the progress of the investigations, and though it seems that such requirement is interpreted less rigorously when it touches upon a case of medical negligence where a criminal remedy is not required rather than upon a killing by State agents⁴⁶⁸, in any case the authorities are obviously not expected to consult or inform the victims of every step taken in the courts of the criminal proceedings⁴⁶⁹, and victims have no right, for instance, to be informed of the defendant's release on parole from freedom or transfer to house arrest⁴⁷⁰. They also do not have a right to be informed beforehand of the decision to proceed through a summary proceedings,

⁴⁶³ Mikayil Mammadov v. Azerbaijan, no. 4762/05, § 132, 17 December 2009; Vasilca v. the Republic of Moldova, no. 69527/10, § 34, 11 February 2014; and Association "21 December 1989" and Others v. Romania, cit., §140-141.

⁴⁶⁴ *Anusca v. Moldova*, cit., § 44.

⁴⁶⁵ *Gray v. Germany*, no. 49278/09, § 88, 22 May 2014

⁴⁶⁶ See, *Basenko v. Ukraine*, cit., § 69-71.

⁴⁶⁷ *Mocanu and Others v. Romania [GC]*, cit., § 349; and *Perevedentsevy v. Russia*, cit., § 120.

⁴⁶⁸ See, *Gray v. Germany*, cit., § 86-90, where the Court upheld the authorities' failure to inform the victims of the initiation of the criminal proceedings and of the issuing of a penal order against the perpetrator.

⁴⁶⁹ See, *Cakicisoy and others v. Cyprus (dec.)*, § 45.

⁴⁷⁰ See, *Rumor v. Italy*, § 72.

such as a penal order, where the facts have been already sufficiently established and the holding of a public hearing would not further contribute to the trial court's assessment of the case⁴⁷¹.

The objective scope of the right to information, in particular, extends first and foremost to all «judicial decisions concerning the investigations⁴⁷²», a notion which includes not only the decisions concluding the investigations, being it a decision not to prosecute⁴⁷³ or a decision to commit for trial⁴⁷⁴, but also more interlocutory measures such as the suspension or the resuming of the investigations⁴⁷⁵. Moreover, information should be provided also on the eventual following phases: victims should be made aware of the dates in which the trial will take place and of its outcome⁴⁷⁶.

As it is understandable, a major role is played in this sense by the domestic authorities' duty to timely inform the victims of a decision not to prosecute, and of providing the reasons supporting it with reference to the evidence collected and the findings reached, in order for them to use any legal challenge against it⁴⁷⁷. In several cases, indeed, the Court has found a breach of the procedural obligation to investigate when the victims had only been informed of judicial decisions not to prosecute with considerable delay and no information on the reasons for those decisions was provided, given that such a situation was likely to prevent the possibility of any effective challenge on their part⁴⁷⁸. Accordingly, victims not only have the right to be informed promptly of a decision discontinuing the investigation, but also to know the reasons supporting it⁴⁷⁹. To this effect, the authorities' duty to motivate their decision, which, as discussed before, is imposed also under the requirement of thoroughness of the investigation, is further strengthened.

⁴⁷¹ See, *Gray v. Germany*, § 91.

⁴⁷² See, *Mustafa Tunc and Fecire Tunc v. Turkey*, § 210.

⁴⁷³ See, *Abakarova v. Russia*, § 96; *Gulec v. Turkey*, § 82; *Ogur v. Turkey*, § 92; *Slimani v. France*, § 44; *Hilal Mammadov v. Azerbaijan*, § 97; *Dalakov v. Russia*, § 67.

⁴⁷⁴ See, *Basenko v. Ukraine*, § 62.

⁴⁷⁵ See, *Mudayev v. Russia*, § 104; *Perevedentsevy v. Russia*, § 122; *Khamila Isayeva v. Russia*, § 132; *Zinovchik v. Russia*, no. 27217/06, 9 February 2012, § 63.

⁴⁷⁶ See, *Basenko v. Ukraine*, cit., § 69-70; *Ugur v. Turkey*, cit., § 107.

⁴⁷⁷ See, *Hugh Jordan v. the United Kingdom*, cit., § 124, and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cit., § 210-216.

⁴⁷⁸ *Ogur v. Turkey*, cit., § 92; *Trufin v. Romania*, no. 3990/04, 20 October 2009, § 52; *Velcea and Mazăre v. Romania*, no. 64301/01, 1 December 2009, § 114; *Anik and Others v. Turkey*, no. 63758/00, 5 June 2007, § 76-77; *Rantsev v. Cyprus and Russia*, cit., § 239; and *Association "21 December 1989" and Others*, cit., §140-141.

⁴⁷⁹ See, *Kelly and others v. the United Kingdom*, cit., § 117, where the Court states that «[the lack of reasons for such a decision] denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision». See also, *Velcea and Mazare v. Romania*, cit., § 114.

Aside from that, other information that domestic authorities might be expected to provide concern, for instance, the possibilities of accessing to legal assistance and the different remedies open to them⁴⁸⁰.

B. The right to effective participation and legal assistance

As the Convention in general protects rights that are effective, not illusory, also the involvement of the victims in the criminal proceedings must be of such nature. This implies that it is not sufficient for national legislation to afford certain powers to victims, but it is also necessary that the latter are able to exercise those rights *in concreto*, without in the facts being prevented from doing it⁴⁸¹.

Accordingly, the requirement of effective involvement entails that domestic authorities have a positive obligation to adopt special measures of protection and assistance towards victims that are, owing to their personal circumstances, are particularly vulnerable and who, without such measures, would be prevented to effectively participate in the proceedings. This issue has been addressed, for example, in relation to a victim who was an orphan and a minor and was not appointed a legal guardian nor a representative that could assist her especially while being heard by the authorities⁴⁸², but also in relation to an adult victim with a severe handicap who could not move unaided and required permanent psychological assistance⁴⁸³. It is arguable, therefore, that the victims's right of effective participation is protected in equal manner to that of the defence under Article 6, whereby also the adoption of positive measure in order to enable the accused to effectively participate in the proceedings may be required⁴⁸⁴.

Among the possible measures of protection to ensure effective participation of the victim in the criminal proceedings, an important role is clearly played by the entitlement of victims to free legal representation and assistance. Whereas the accused enjoys under Article 6 § 3 a right to free legal assistance, such a right, under more limited conditions, is conferred also under other ECHR provisions to persons who do not have such status, even in the context of civil proceedings. In such cases, the common rationale underpinning the entitlement of a right to free legal assistance to persons other than the accused seems to

⁴⁸⁰ Rantsev v. Cyprus and Russia, cit., § 240.

⁴⁸¹ Giuliani and Gaggio v. Italy [GC], cit., § 312-313.

⁴⁸² See, Abakarova v. Russia, cit., § 96-97.

⁴⁸³ See, Savitskiy v. Ukraine, no. 38773/05, 26 July 2012, § 115.

⁴⁸⁴ See, Timergaliyev v. Russia, no. 40631/02, 14 October 2008, § 51; T. v. the United Kingdom, no. 2472/94, 16 December 1999, §§ 79-89; Stanford v. the United Kingdom, 23 February 1994, § 26. For more on this topic see, HARRIS, O'BOYLE, WARBRICK (eds.), *Law of the European Convention on Human Rights*, cit., p.??.

be need to ensure the effectiveness of their judicial protection. Therefore, also in the context of the right of victims to participate to criminal proceedings the Court has applied such standard, finding that «in certain circumstances the State’s procedural obligations to ensure the effective participation of the victims in the investigation of their complaints of ill-treatment may extend to the issues of providing effective access to free legal representation⁴⁸⁵». In other words, victims of crime are not entitled to an absolute and general right of legal aid in criminal proceedings concerning serious human rights offence, but only where, in view of their personal circumstances, failure to grant them legal assistance would prevent them from effectively participate in the proceedings in order to protect their legitimate interests.

C. The right to provide evidence and to be heard

From a review of the case-law it is clear that the requirement of effective participation also confers to victims the right to be involved in the criminal proceedings also by being afforded the possibility to submit relevant evidence to the competent authorities and to request additional investigative measures⁴⁸⁶. In line with the general principle according to which the admissibility of evidence is a matter for national law provision, however, no stand has ever been taken in the case-law on what weight should be accorded to the evidence provided by the victim.

Such rights has been, moreover, subject to a very reasonable limit: domestic authorities do not have the duty «to satisfy every request for a particular investigative measure made by a relative in the course of the investigations»⁴⁸⁷, especially where the evidence requested is superfluous and would not contribute to the establishment of the facts⁴⁸⁸.

Nonetheless, it can be argued that in case of refusal, the investigative authorities have a true duty to at least address the request made by the victim and to provide reasons for refusing to carry out the specific measure or to collect the particular evidence desired⁴⁸⁹, especially – though not only – where such evidence seems highly relevant for the

⁴⁸⁵ See, *Balsan v. Romania*, cit., § 67; and also, *Savitsky v. Ukraine*, cit., § 117.

⁴⁸⁶ In this sense also, J. FIALA-BUTORA, *Disabling Torture: the obligation to investigate*, cit., p. 250.

⁴⁸⁷ *Ramsahai and Others v. the Netherlands [GC]*, cit., § 348; and *Giuliani and Gaggio v. Italy [GC]*, cit., § 304.

⁴⁸⁸ See, *Mustafic-Mujic v. the Netherlands (dec.)*, cit., § 118-119, where the Court noted that the refusal of the victim’s request to question the suspect was justified on the ground that the details of their involvement in the facts has already been established and the victims had failed to indicate what additional benefit the hearing of the suspects would have brought about. See also, *Istratiu v. Romania (dec.)*, § 78.

⁴⁸⁹ See, *Hilal Mammadov v. Azerbaijan*, § 96; *Dinu v. Romania*, § 83; *Istratiu v. Romania (dec.)*, no. 56556/10, 27 October 2015, § 78; *Kalicki v. Poland*, no. 46797/08, 8 December 2015, § 56; *Smaltini v. Italy (dec.)*, cit., § 59.

establishment of the facts⁴⁹⁰. The Court will indeed criticize the authorities for failing to even address the victim's evidence request⁴⁹¹, for failure to provide reasons to dismiss it or for providing only arbitrary ones⁴⁹². Similar considerations apply also to other kind of submissions and arguments that victims may make in relation to the proceedings, other than requesting the gathering of specific evidence: the authorities nonetheless have the duty to address and reply to the victim's submissions⁴⁹³.

There is nonetheless one particular means of evidence that should normally always be undertaken by the authorities when requested, which is the hearing of the victims. It is apparent indeed, that victims have the right to be heard, which means the right to have an opportunity to give their version of the events, already in the investigation stage, which must be mentioned in the final decision to show that it has been considered⁴⁹⁴. Admittedly, a timely and prompt questioning of the victim by the investigating authorities is one of the main elements taken into account by the Court in assessing whether the former was effectively involved in the proceedings⁴⁹⁵.

The questioning of the victim, as discussed previously, is relevant not only as a mean of involving this subject in the proceedings but also with regards to the duty of the authorities to carry out a thorough investigation and to collect all the available evidence⁴⁹⁶.

Where the victim is particularly vulnerable, in light of its personal circumstances or of the offence that was committed, both requirements – though from different perspectives – suggest to carry out the questioning by adopting specific measures of protection that take into account and counter its probable unwillingness and reluctance to provide an account of the events: these measures are needed not only to obtain a more detailed and reliable statement, but also to allow a genuine and effective involvement of the victim in the proceedings, that is respectful of its dignity. Such measures include, for instance, the

⁴⁹⁰ See, *Dolek v. Turkey*, cit., § 81.

⁴⁹¹ See, *Miclea v. Romania* (dec.), cit., § 46; *Hilal Mammadov v. Azerbaijan*, cit., § 96; *Cangoz and others v. Turkey*, cit., § 147.

⁴⁹² See, *Dolek v. Turkey*, cit., § 81. *A contrario*, *Giuliani and Gaggio v. Italy* [GC], cit., § 313, in which the Court held that the judge's refusal to carry out a further investigative measure was not arbitrary.

⁴⁹³ See, *Denis Vasilyev v. Russia*, cit., § 126, and *M.C. and A.C. v. Romania*, cit., § 123, in relation to a detailed and reasoned request of the victim to the prosecutor to give a different legal classification to the offence.

⁴⁹⁴ In this sense see also, J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings*, cit., p. 131; A. SEIBERT-FOHR, *Prosecuting serious human rights offences*, cit., p. 139.

⁴⁹⁵ *Mocanu and others v. Romania* [GC], cit., § 350; *Slimani v. France*, cit., § 44; *Enver Aydemir v. Turkey*, no. 26012/11, 7 June 2016; *Muhacir Cicek v. Turkey*, cit., § 75; *Salgın v. Turkey*, no. 46748/99, 20 February 2007, § 89; and *Perevedentsev v. Russia*, cit., §120; *Basenko v. Ukraine*, cit., § 62. It is worth mentioning that the hearing of the victim's family may also be of impact in relation to the other standard of adequacy and thoroughness of the investigations, see for instance *Gul v. Turkey*, no. 22676/93, 14 December 2000, § 93.

⁴⁹⁶ See, *supra*.

presence of a psychologist during the questioning, that the interviewer is a specialized agent, that the interview is conducted in private and not in a public hearing⁴⁹⁷.

The right to provide evidence may translate finally, though in very limited terms, in the opportunity for victims to participate to the gathering of evidence, when that is possible, according to a principle of equality of arms. In *Perevedentsevy v. Russia*⁴⁹⁸, for instance, the Court reproached the fact that the victims were never informed or consulted about any proposed evidence, so they could not take part in giving evidence to the experts.

From the review of the case-law, however, it is not clear in which terms such right is actually guaranteed. In *Giuliani and Gaggio v. Italy*⁴⁹⁹, for instance, the applicants complained that they had been informed of the decision to carry out an autopsy with such brief delay that it was in practice impossible for them to appoint an expert of their choosing who would take part in the forensic examination during the investigation stage. The Court, however, found that the requirement of effective involvement of victims in the proceedings did not go as far as to confer them that power to participate to the forensic examinations through an expert of their choosing. Likewise, in *Cakicisoy and others v. Cyprus*, the Court made clear that there is no «obligation for the victims' relatives to be treated as parties in the investigations as such»⁵⁰⁰.

To the contrary, in *Ugur v. Turkey*, the Court criticized the national authorities for having failed to notify the victim about the date of the trial hearing, in that it «denied the applicants and their lawyers the opportunity to confront and put questions to the police chief, but also displayed a lack of respect for the principle of equality of arms⁵⁰¹». By the same token, in *Basenko v. Ukraine*, the Court concluded that the national authorities had failed to ensure effective access of the victim to the procedure in that he was not summoned nor notified of the trial hearings and thus «he was precluded from effectively participating in the domestic proceedings at the trial and sentencing phase and was therefore prevented from challenging S.'s sentence which he found inadequate»⁵⁰². Similar findings were reached also in respect to the peculiar context of Coroner's inquests in Northern Ireland, where the Court found that the legitimate interests of the victims were not sufficiently ensured on the ground that they were not able to attend the hearings of the inquiry and, as a result, were not able to put any questions to the witnesses⁵⁰³.

⁴⁹⁷ See, *G.U. v. Turkey*, cit., § 71-73.

⁴⁹⁸ *Perevedentsevy v. Russia*, cit., § 120.

⁴⁹⁹ *Giuliani and Gaggio v. Italy* [GC], cit., § 314-315.

⁵⁰⁰ *Cakicisoy and others v. Cyprus* (dec.), no. 6523/12, 23 September 2014, § 45.

⁵⁰¹ *Ugur v. Turkey*, cit., § 107.

⁵⁰² *Basenko v. Ukraine*, cit., § 70-71.

⁵⁰³ See, *Paul and Audrey Edwards v. the United Kingdom*, cit., § 84. See also, *Kelly and others v. the United Kingdom*, cit., § 128, where the victims were placed at a disadvantage in terms of

In light of these cases, it could be argued that participation of victims in the collection of the evidence in accordance with the principles of an adversarial hearing and of equality of arms is not ensured in absolute terms under the procedural obligation to effectively investigate and punish human rights offences, but it is subject to a different degree of protection depending on the different stages of the criminal proceedings⁵⁰⁴. While the right to participate in the collection of evidence is almost not ensured at all during the strict investigation phase, where the authorities enjoy a wide discretion in deciding whether to involve the victims or not, during the trial stage victims must to the contrary be afforded the opportunity to be present and to effectively participate in the taking of the evidence. As mentioned previously, indeed, the involvement of victims is not confined to the investigation stage but may be exercised also in the subsequent trial phase. This conclusion, which draws a difference according to the procedural phase of the criminal proceedings, is supported also by the Court's finding in relation to the right of victims to access the case file, which will be discussed in detail below.

D. The right of access to the case file

A crucial role in ensuring that victims may effectively participate in the proceedings is played by their possibility to access the materials of the case-file: only where victims are aware of the evidence collected and of their results, it is then possible for them to point out any potential omissions and further lines of inquiry to be pursued by the authorities; in the opposite case, their ability to influence the conduct of the proceedings and to offer their contribution would instead only remain illusory and theoretical. Therefore, another element that the Court takes into consideration when assessing the requisite victim's involvement in the proceedings is the right of access to the case-file.

It is no surprise, however, that making the materials of the investigations accessible to victims may conflict with other relevant interests, such as the respect of the rights of others or the interests of justice that often imply the need to preserve the secrecy of the data possessed in order not to hamper the effective continuation of the investigations⁵⁰⁵.

participation to the witnesses' questioning because they were denied previous access to the case-file.

⁵⁰⁴ Also, M. MONTAGNA, *I diritti minimi della vittima*, in A. GAITO (ed.), *I principi europei del processo penale*, cit., p. 324, concludes that national criminal procedures should develop a method of establishing of the facts that includes the victim.

⁵⁰⁵ For such considerations see, Oleksiy Mykhaylovykh Zakharkin v. Ukraine, no. 1727/04, 24 June 2010, § 71-74.

Moreover, it has even been held that in certain cases granting such access could even have negative repercussions on the presumption of innocence⁵⁰⁶.

Therefore, the victim's right of access to the case file during the investigations is not guaranteed in absolute terms, but it is subject to important limitations.

Admittedly, the Court has found that:

«disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure⁵⁰⁷».

Upon this consideration, it is only in very rare situations that a complaint about the failure to access the case file during the strict investigation stage would lead the Court to conclude that the victims had not been sufficiently involved in the proceedings. This was the case, for instance, in *Oleksiy Mykhaylovych Zakharkin v. Ukraine*⁵⁰⁸, where the applicants were granted access to the file only after the completion of the investigation and the Court held that, despite the existence of legitimate interests warranting restrictions to such access during the pre-trial stage, a fair balance should be struck between those interests and the victim's right to effective participation in the proceedings. It thus found that such a balance is not struck where the law, as in that specific case, does not provide any special procedure for granting access to the file in the pre-trial stage, indicating «the grounds for refusing and granting the access, the extent to which a claimant may be given access, the time-limits for consideration of the relevant requests and providing the access».

To the contrary, granting victims access to the case-file after the notification of a decision not to prosecute concluding the investigations is in most cases accepted by the Court to be compatible with the requirement of effective involvement of the victims in the proceedings⁵⁰⁹; whereas, a breach of the procedural obligation is found when the case file was not accessible to victims neither after the closing of the investigation, given that such

⁵⁰⁶ See, *Gürtekin and others v. Cyprus (dec.)*, cit., § 29. See also, *Žerajić and Gojković v. Bosnia and Herzegovina (dec.)*, no. 16503/08 and 67588/09, 13 November 2014, where the Court upheld the national authorities' refusal to disclose to the applicants the names of the potential suspects against whom insufficient evidence had been gathered for prosecution.

⁵⁰⁷ *Armani da Silva v. the United Kingdom [GC]*, cit., § 236; *McKerr v. the United Kingdom*, cit., § 129; *Giuliani and Gaggio [GC]*, cit., § 304; and *Ramsahai and others v. the Netherlands [GC]*, cit., § 347. See also, J. C. OCHOA S., *The Rights of Victims in Criminal Justice Proceedings*, cit., p. 124.

⁵⁰⁸ *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, cit., § 71-74. For a similar finding see also *Zinovchik v. Russia*, cit., § 62.

⁵⁰⁹ See, *Khamila Isayeva v. Russia*, cit., § 133; *Seidova and others v. Bulgaria*, cit., § 59-61; *Anik and others v. Turkey*, cit., § 76-77; *Cangoz and others v. Turkey*, cit., § 142-146.

limitation would substantially frustrate any possibility to bring an effective challenge against such decision⁵¹⁰.

Furthermore, access to the materials of the case should be granted to victims also where the investigations have been suspended for failure to identify the suspect and thus remain adjourned over years, although with the possibility of exception of specific documents classified confidential or secret⁵¹¹.

Finally, although the Court has not so far been confronted with the issue of a refusal to grant to the victim access to the case-file during trial, from what it has been discussed above about the reasons that may justify restrictions to such access only before the conclusion of the investigations and the need to ensure it once the investigations have instead been completed, it could be argued that such a refusal would be at odds with the requisite victims' involvement in the proceedings in as much as it prevents them to defend their interests in the procedure, which are to be identified with clarifying the facts surrounding the offence. This interpretation is supported also by the findings of the Court in *Kelly and others v. the United Kingdom*⁵¹², where the victim's inability to have access to the witnesses' statements given during the police inquiry before the appearance of the witness at the hearing before the Coroner was criticized since it placed them at significant disadvantage in terms of preparation and ability to participate in the questioning. By contrast, in *Bubbins v. the United Kingdom*, the non-disclosure of certain documents to the victims was accepted by the Court as, in light of all the other evidence they had at their disposal, the decision to withhold such documents did not undermine the fact-finding role of the inquest or denied the family an active participation in the proceedings⁵¹³.

To conclude, from the analysis of the case-law it results that victims have the right to access the materials collected during the investigation; however this right is not absolute, but may be subject to restrictions while the inquiries are ongoing, in order to satisfy other legitimate interests that cease to be relevant following the closing of the pre-trial stage,

⁵¹⁰ See, *Mustafa Tunc and Fecire Tunc v. Turkey* [GC], cit., § 213-214; *Ramsahai and others v. the Netherlands* [GC], cit., § 349; and *Gürtekin and others v. Cyprus* (dec.), cit., § 29; *Jaloud v. the Netherlands* [GC], cit., § 224; *Savitsky v. Ukraine*, cit., § 114, where the law allowed access to the case file to victims only upon closing of the investigations and provided that the case was sent to trial.

⁵¹¹ See, *Aslakhanova and others v. Russia*, cit., § 236.

⁵¹² *Kelly and others v. the United Kingdom*, cit., § 128.

⁵¹³ *Bubbins v. the United Kingdom*, cit., § 161.

when therefore materials must be made accessible to victims in order for them to effectively exercise any challenge available or to effectively participate to the trial stage⁵¹⁴.

Such conclusion it all the more interesting when compared to the respective right of the accused to access the case file during the preliminary investigation under Article 6, which it arguably almost equivalent to the victim's standpoint. Indeed, in the recent case *A.T. v. Luxembourg*⁵¹⁵, the Court found that the right to a fair trial under Article 6 does not require full access to the case file by the defendant during the investigation stage. Conversely, as it happens with regards to victims, it remains possible to limit such access by the accused when the interest of justice related to the effectiveness of the investigations require it⁵¹⁶. In that particular case the Court upheld the authorities' decision not to grant the suspect access to the case file in advance of questioning before the investigating judge.

E. No right to judicial review of a decision not to prosecute

The stress put by the Court on the ability of the victims to effectively challenge a decision not to prosecute when addressing the issue of their right of access to the case-file would lead one to reasonably expect that the possibility to appeal against an unsatisfactory conclusion of the investigations must be granted automatically in the national legal systems if a sufficient level of victim's involvement in the criminal proceedings is to be ensured.

By contrast, in the judgment in the case *Armani da Silva v. the United Kingdom [GC]*⁵¹⁷, in which the applicant complained of the limited scope that characterizes in England judicial review of a decision not to prosecute, the Court seems to have reached a different conclusion. Indeed, it upheld the previous ruling in the case *Gürtekin and others v. Cyprus (dec.)*, where it found that the procedural obligation in Article 2 does not necessarily require that there should be judicial review of investigative decisions as such, even though where such review exists, it is doubtless a re-assuring safeguard of accountability and transparency⁵¹⁸. To the same effect, also in *Mustafa Tunc and Fecire Tunc v. Turkey [GC]*, even though not under the perspective of the victim's involvement in the proceedings but

⁵¹⁴ See also, S. MIRANDOLA, *The involvement of the deceased victim's next of kin in criminal investigations: an analysis of the ECHR standards under Article 2 and of the Directive 2012/29/EU on the rights of victims of crime*, cit., p. 179 – 187.

⁵¹⁵ *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015, § 79-81.

⁵¹⁶ Similar limitations on the accused right of access to the file are possible also under Article 5 § 4, which confers on the accused a right of access to file in order to effectively challenge lawfulness of arrest and detention on remand, see *Podeschi v. San Marino*, no. 66357/14, 13 April 2017, § 170-193.

⁵¹⁷ *Armani da Silva v. the United Kingdom [GC]*, cit., § 277-281.

⁵¹⁸ See *Gurtekin and others v. Cyprus (dec.)*, cit., § 28. See also to the same effects, *Petrović v. Serbia*, cit., § 93.

when addressing the requirement of independence of the authorities, the Court had ruled that the intervention of a court or a judge at the closing of the investigation is not an automatic requirement, but only «in certain cases, given the nature of the facts in issue and the particular context in which they occurred, the intervention of a review body may prove necessary»⁵¹⁹. In light of these considerations, the Court therefore concluded that where such opportunity of judicial review is provided it will be taken into consideration as an additional means to ensure the victim's involvement in the proceedings⁵²⁰, but it held also that there is nothing to suggest that the scope of the review could not be confined to address only alleged errors of law, and not also the merits of the decision⁵²¹.

As matters currently stand, therefore, the right to judicial review of a decision not to prosecute is not an absolute requirement for the victims to be sufficiently involved in the proceedings, although a door has been left open for a different solution under specific circumstances; even where such a review is provided for under national law, its scope may be restricted to questions of law without thereby breaching the procedural obligation to investigate.

8. Effective punishment

The procedural obligation to investigate and punish human rights offences, as mentioned in the beginning, is not limited to the strict investigation phase, but it extends also to the following stages of the criminal proceedings, including the phases of imposition and execution of the sentence⁵²². Indeed, the outcome of the criminal proceedings and the sanction imposed do play a decisive role⁵²³. The last requirement against which the effectiveness of the criminal proceedings is measured, admittedly, concerns precisely the adequacy of the sanction that is imposed on the perpetrators and its actual enforcement. Once again, it is the principle of effectiveness expressed in the well-known formula “rights that are practical and effective and not theoretical and illusory⁵²⁴”, which justifies this last standard: the obligation to ensure criminal law protection of the most fundamental human rights through the provision and enactment of criminal provision and the subsequent criminal investigations would remain only a dead letter if those found to be responsible

⁵¹⁹ Mustafa Tunc and Fecire Tunc v. Turkey [GC], cit., § 232-233.

⁵²⁰ See also Castro and Lavenia v. Italy (dec.), no. 46190/13, 31 May 2016, § 77, where the Court's conclusion that the victims had been sufficiently involved in the proceedings was mainly based on the fact that they had challenged the decision not to prosecute which resulted in a reopening of the investigations.

⁵²¹ Armani da Silva v. the United Kingdom [GC], cit., § 277-281.

⁵²² See, Yesil and Sevim v. Turkey, cit., §37.

⁵²³ See, Cestaro and others v. Italy, cit., § 205; Gafgen v. Germany [GC], cit., § 121.

⁵²⁴ See, Airey v. Ireland, cit., § 24.

were not adequately and effectively punished.⁵²⁵ This perspective recalls the thought of Cesare Beccaria, according to whom «a certain punishment, though mild, will make more impression than the fear of a more terrible one, coupled with the hope of impunity⁵²⁶».

Once found that an effective preliminary investigation that fully met all the procedural requirements has indeed taken place, the Court therefore goes on to consider whether the judicial authorities «actually showed determination to punish those responsible⁵²⁷».

In order to scrutinize the willingness of the national authorities not to leave unpunished the offences that have been ascertained through effective investigations, the Court takes into consideration, on one side, the adequacy of the sanction imposed and its enforcement, and on the other, the presence of any «legal techniques» that may form an obstacle to the imposition or the execution of the sentence⁵²⁸.

A. Adequate sanction

It is known that the procedural obligation to investigate does not entail any obligation for a conviction to result in a particular sentence. Yet, in order to determine whether the State has discharged its international law obligation under the Convention to protect the right at stake by effectively punishing those found to be responsible of its infringement, the Court must have regard to the national courts' considerations while convicting those responsible and to the punishment imposed as a result⁵²⁹, to see whether they have submitted the case to the careful scrutiny required so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined. Nevertheless, in light of its role, which as recalled previously is not that of a «fourth instance», the Court accepts that determining the degree of guilt and the appropriate sentence are matters within the jurisdiction of national criminal court and therefore normally «grants substantial deference to the national courts in the choice of the appropriate sanctions to be imposed» for ill-treatment, killings or other very serious human right offences⁵³⁰. However, if the positive obligation to effectively investigate and punish is not to lose much of its meaning and the rights to remain only theoretical and illusory, the

⁵²⁵ See, F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 587.

⁵²⁶ C. BECCARIA, *Dei delitti e delle pene*, 1764.

⁵²⁷ *Okkali v. Turkey*, no. 52067/99, 17 October 2006, § 68; *Ali and Ayse Duran v. Turkey*, no. 42942/02, 8 April 2008, § 66. See also, *Oneryildiz v. Turkey* [GC], cit., § 115.

⁵²⁸ See, F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 587.

⁵²⁹ See, *Ali and Ayse Duran v. Turkey*, cit., § 66.

⁵³⁰ See, *Nikolova and Velichkova v. Bulgaria*, cit., § 62. See also, *Gafgen v. Germany* [GC], cit., § 123; *Ali and Ayse Duran v. Turkey*, cit., § 66; *Darraj v. France*, cit., § 48.

Court must retain its supervisory function and «exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed⁵³¹».

In other words, when it comes to appraising the punishment imposed on the perpetrators as a result of the criminal proceedings undertaken on a very serious human right offence, the Court does not normally put into question the adequacy of the sanction chosen by the national authorities, unless it is manifestly disproportionate to the gravity of the act at stake. This approach reflects, to a certain extent, the reasoning followed by the Court in the opposite and parallel situation: where the defendant complains that sentence imposed is excessively severe in relation to the gravity of the facts. Here also, indeed, the Court holds that a grossly disproportionate sentence would amount to an inhuman treatment in violation of Article 3, but this test is particularly high and would be met only in rare and unique occasions⁵³².

In the case the sentence imposed appears to be excessively lenient, therefore, the Court will review the reasons adduced by the national courts to support the choice of a very low penalty, in order to assess whether they submitted the case to the careful scrutiny required, correctly appreciating the seriousness of the act or whether they «used their power of discretion to lessen the consequences of a serious criminal act rather than to show that such act could in no way be tolerated⁵³³», for instance by giving arbitrary and manifestly unfounded reasons for such a reduction of the sentence. In such latter case, where national provisions are used *de facto* to avoid an effective punishment, the sanction imposed cannot be regarded as adequate and effective and the Court will find a violation of the procedural obligation to ensure criminal protection to the Convention right at stake on that account. Clearly, the adequacy of the sanction depends on the specific circumstances of each case⁵³⁴.

For instance, in *Okkali v. Turkey*, the Court censured the national court's decision to sentence the perpetrators to the minimum sanction provided by law on the ground that, in doing so, they overlooked completely a number of aggravating factors, such as the particular nature of the offence and the gravity of the damages caused, which should have

⁵³¹ *Ibidem*. See also, *Cestaro v. Italy*, cit., § 207. According to J. ALIX, *Les obligations positives de pénalisation et de punition*, cit., p. 230-31, this is a control on the proportionality of the sanction, which is «relatively narrow» and leads to a condemnation of punishment that are very modest or fictitious. In the view of A. BALSAMO, *L'art. 3 della CEDU e il sistema italiano – The statute of limitation in the Italian system requires to be amended*, in *Cassazione Penale*, 2014, 11, p. 3925, this proportionality control present elements of retributivism and utilitarianism.

⁵³² See, *Vinter and others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, 9 July 2013, § 102.

⁵³³ *Okkali v. Turkey*, § 68. J. ALIX, *Les obligations positives de pénalisation et de punition*, cit., p. 230-31, suggests that it is the bad faith of the authorities which is being sanctioned.

⁵³⁴ See, *Cestaro and others v. Italy*, cit., § 208.

taken into account according to Turkish law⁵³⁵. Likewise, in *Zynep Ozcan v. Turkey*, the Court criticized that the culprits benefitted of attenuating circumstances on account of their behaviour in the course of the proceedings, despite the fact that they never had attended any hearing⁵³⁶. On the contrary, in *Leparkiene v. Lithuania*, notwithstanding the low penalty imposed on the defendants, the Court found that the national judges had sufficient regard to the extremely serious consequences of the incident and gave substantial reasoning for imposing the medium term allowed by law and for opting to suspend it⁵³⁷.

In principle, however, the imposition of a very lenient sentence or of a derisory pecuniary fine, that corresponds to the minimum penalty allowed by law, and whose execution is also suspended is deemed to be manifestly disproportionate and devoid of the necessary deterrent effect. Indeed, in the Court's view, the suspension of a sentence is «comparable to a partial amnesty and is a measure which cannot be considered permissible under its jurisprudence since, consequently, the convicted officers enjoyed virtual impunity despite their conviction⁵³⁸». There are very few cases, however, in which the suspension of the sentence imposed on account of serious acts of ill-treatment or killing has been accepted by the Court and found to be compatible with the procedural obligation to effectively investigate and punish those acts⁵³⁹.

B. Unacceptable obstacles to the imposition or execution of the sentence

The Court is, how it has been held, at the very least «suspicious» of «any legal techniques which, in extreme cases, form an obstacle to prosecution or trial or which, in less extreme cases, lead to some kind of relaxation of the sentences imposed or executed⁵⁴⁰». Not surprisingly, this approach taken by the Court has been defined as «*la jurisprudence de la main pénale lourde*⁵⁴¹». These measures that hinder in practice any effective punishment

⁵³⁵ *Okkali v. Turkey*, cit., § 73. For similar circumstances see also, *Valeriu and Nicolae Rosca v. the Republic of Moldova*, no. 41704/02, 20 October 2009, § 73.

⁵³⁶ *Zynep Ozcan v. Turkey*, no. 45906/99, 20 February 2007, § 43.

⁵³⁷ *Leparskiene v. Lithuania*, no. Leparskiene, 7 July 2009, § 53. See also, for a similar reasoning, *Cestaro and others v. Italy*, cit., § 224, where the imposition of the minimum penalty provided by law was justified by the fact that the whole police operation was ordered by the Head of Police and therefore the agents had acted under such psychological pressure.

⁵³⁸ *Ali and Ayse Duran v. Turkey*, cit., § 69. See also, *Saba v. Italy*, cit., § 80; *Gafgen v. Germany [GC]*, cit., § 123. See also, A. BALSAMO, *L'art. 3 della CEDU e il sistema italiano – The statute of limitation in the Italian system*, cit., p. 3925.

⁵³⁹ See, *Rasman and Veliscek v. Italy (dec.)*, no. 55744/09, 26 January 2016; *Dolek v. Turkey*, § 79.

⁵⁴⁰ See, F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 587.

⁵⁴¹ See, F. TULKENS, S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l'homme*, cit., p. 132.

and that result in a form of “pardon” of the offence which therefore are, in principle, not tolerated; they include both measures that preclude the imposition of a sentence and others that hinder its execution.

i. Statute of limitation periods

The first measure that may pose an insurmountable obstacle in practice to an effective punishment of those responsible of a human rights violation is the expiration of limitation periods which have the effect of precluding the pronouncement of a decision on the merits of the charges when the offence has become time-barred. Statute of limitations rules, admittedly, prescribe the maximum period within which a criminal action can be brought against a particular crime⁵⁴², and may therefore constitute obstacles in the prosecution of offences for they typically include also the investigation and prosecution phase and, as a consequence, the proceedings may end due to the limitation period even if charges had been brought⁵⁴³.

The Court has found that the application of limitation periods falls within those measures that are «inadmissible» according to its case-law on the procedural obligations under Article 3 «because it has the effect of precluding a conviction⁵⁴⁴». In particular, it held that:

«in cases concerning torture or ill- treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period. (...) Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions⁵⁴⁵».

Accordingly, discontinuation of the proceedings solely on the grounds that time-limit has expired is contrary to the procedural obligations under Article 2 and 3 where State agents are involved as suspects. In other words, those proceedings should always lead to a decision on the merits of the case, establishing the criminal liability or not of the defendants,

⁵⁴² See, G. FLETCHER, *Basic concepts of criminal law*, Oxford University Press, 1998, p. 7.

⁵⁴³ In this sense also, J. PRADEL, *Droit pénal comparé*, Dalloz, 2016, p. 427.

⁵⁴⁴ See, *Alikaj and others v. Italy*, cit., § 108. See also, A. A. BALSAMO, *L'art. 3 della CEDU e il sistema italiano – The statute of limitation in the Italian system*, cit., p. 3925. According to V. GREVI, *Prescrizione del reato ed effettività del processo tra sistema delle impugnazioni e prospettive di riforma*, in *Sistema sanzionatorio: effettività e certezza della pena. In ricordo di Adolfo Beria Argentine*, Giuffrè, 2002, p. 189, statute of limitation periods are a cause of ineffectiveness of the criminal proceedings («*causa impeditiva dell'effettività del processo*») which bring about a sort of «denial of justice».

⁵⁴⁵ *Mocanu and others v. Romania* [GC], cit., § 326; *Cestaro and others v. Italy*, cit., § 208; *Turan Cakir v. Belgium*, no. 44256/06, 10 March 2009, § 69.

and not be terminated by a procedural decision discontinuing the case on the ground of the offence being statute-barred⁵⁴⁶. The Court indeed considers that, even many years after the events the public interest in obtaining the prosecution and conviction of perpetrators of unlawful killings or ill-treatments is firmly recognized, particularly in the context of war crimes or crimes against humanity⁵⁴⁷.

A very significant case in this sense is *Cestaro and others v. Italy*⁵⁴⁸, concerning the ill-treatment and torture inflicted by police agents on occasion of the G8 in Genova in 2001. Due to the absence of a specific offence criminalizing torture in the Italian legal order⁵⁴⁹, the suspects were tried at national level on less severe charges, such as grievously body harm, which were subject to shorter limitation periods. Notwithstanding the diligence of the prosecuting authorities and of the courts assessed in light of the particular complexity of the case, the offences had become statute-barred before a final decision could be adopted. The Court thus found that it was the Italian legislation which, by failing to criminalize torture and by laying down inflexible and too short limitation periods for the other crimes which could cover those acts, is structurally flawed as it prevents in practice any possibility of punishing the persons responsible for committing torture and inhuman or degrading treatments, albeit all the efforts undertaken by the judicial authorities⁵⁵⁰.

The principle according to which inflexible limitation periods are never compatible with the procedural obligation to investigate, however, is currently confined to offences committed by law enforcement authorities and has not yet been extended also to crimes committed by other private individuals. This different treatment may be rooted in the higher gravity of the offences committed by representatives of the State in comparison to those at the hands of other private individuals, which corresponds also to a stronger public interest in the

⁵⁴⁶ In this sense, A. BALSAMO, *L'art. 3 della CEDU e il sistema italiano – The statute of limitation in the Italian system*, cit., p. 3925.

⁵⁴⁷ See, *Aslakhanova and others v. Russia*, cit., § 237.

⁵⁴⁸ *Cestaro and others v. Italy*, cit. See comments by F. VIGANÒ, *La difficile battaglia contro l'impunità dei responsabili di tortura: la sentenza della Corte di Strasburgo sui fatti della scuola Diaz e i tormenti del legislatore italiano*, in *dirittopenalecontemporaneo.it*, 9 April 2015; F. CASSIBBA, *Violato il divieto di tortura: condannata l'Italia per i fatti della scuola 'Diaz-Pertini'*, *ivi*, 27 April 2015.

⁵⁴⁹ For more on this topic see, A. PUGIOTTO, *Repressione penale della tortura e Costituzione: anatomia di un reato che non c'è*, in *Rivista Trimestrale Diritto Penale Contemporaneo*, 2014, 2, p. 129. See also, A. VALENTINO, *Le violenze del G8 di Genova sono tortura ai sensi della CEDU: ragioni della pronuncia e ripercussioni sull'ordinamento*, in *Osservatorio Costituzionale*, 2015, 7, p. 1.

⁵⁵⁰ *Cestaro and others v. Italy*, cit., § 241. That the limitation periods laid down in the Italian legislation were a structural shortcoming at variance with the positive obligation to effectively punish infringements of Article 3 was already held by A. BALSAMO, *L'art. 3 della CEDU e il sistema italiano – The statute of limitation in the Italian system*, cit., p. 3925. On the opportunity of adopting flexible limitation periods, see M. CAIANIELLO, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?*, in *dirittopenalecontemporaneo.it*, 24 February 2017.

punishment of those conducts that cannot be confined within a specific time-limit. Therefore, when discussing the issue of statute of limitation periods and their compatibility with the procedural obligations to investigate and punish, a fundamental distinction should be drawn. The discontinuation of criminal proceedings without any examination of the merits owing to the expiration of limitation periods is never, at any event, compatible with such obligations where the defendants are State agents; conversely, where the suspects are private individuals, such outcome is not tolerated to a much more limited degree, namely only where it has been caused by the inactivity of the authorities and therefore is linked to a lack of diligence in dealing with the case, in violation of the promptness and reasonable expedition requirement⁵⁵¹.

ii. Other clemency measures

Besides the discontinuation of criminal proceedings owing to the expiration of limitation periods, there are other measures which can be regarded as expression of State's "criminal clemency⁵⁵²" and which preclude the execution of the penalty imposed that should not be tolerated in the context of the procedural obligation to effectively investigate and punish serious human rights violations. The general principle to be found in the case-law in this respect is:

«in cases concerning torture or ill- treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and also that amnesties and pardons should not be tolerated in such cases⁵⁵³»

The first of these unacceptable "clemency measures" is the general or partial remission of the sentence, which results in a reduction or a total cancellation by law of the sanction imposed⁵⁵⁴.

⁵⁵¹ See, *supra* §...

⁵⁵² In this sense, F. TULKENS, S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l'homme*, cit., p. 130.

⁵⁵³ *Mocanu and others v. Romania* [GC], cit., § 326; *Margus v. Croatia* [GC], cit., § 126.

⁵⁵⁴ For an example, see *Cestaro and others v. Italy*, cit., § 221, where some offenders benefitted from a law of partial remission of the sentence which resulted in a reduction of the penalty imposed on them. For the statement of principle see, *Nasr and Ghali v. Italy*, cit., § 265.

Secondly, also individual pardon, granted for instance by the Head of State following a conviction, is regarded as a measure that is not reconcilable with the procedural obligations at hand⁵⁵⁵.

The last “clemency measures” censured by the Court in this context are amnesty laws. In particular, the Court held that «granting an amnesty would run counter the State’s obligations under Articles 2 and 3 of the Convention since it would hamper the investigations of such acts and necessarily lead to impunity for those responsible⁵⁵⁶». The approach taken by the Court in this respect is in line with the general tendency in international law to consider amnesties as unacceptable in connection with grave breaches of fundamental human rights⁵⁵⁷, especially where these are intended to shield offenders from accountability. However, a door has been left in principle open with respect to the sole case of the granting of amnesties under some particular circumstances, such as a reconciliation process and/or a form of compensation of the victims, where there is the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country’s determination to promote reconciliation in society⁵⁵⁸.

iii. State secret privilege

Among the measures capable of precluding the examination of the merits of the case and the imposition of the sentence there is also the so-called “State secret privilege”, a doctrine according to which certain evidence is to be excluded from the cognisance of the judge on the ground that it constitutes a State secret, since its knowledge would jeopardize national security. Admittedly, such doctrine prevents the courts from using that evidence with the

⁵⁵⁵ For an example see, *Nasr and Ghali v. Italy*, cit., § 271, in which the convicted C.I.A. agents were then pardoned by the Head of State. See also, T. SCOVAZZI, *Segreto di Stato e diritti umani*, cit., p. 179.

⁵⁵⁶ *Margus v. Croatia [GC]*, cit., § 127. See also *Ould Dah v. France*. On the issue of amnesty see, F. TULKENS, S. VAN DROOGHENBROECK, *La clémence pénale et les droits de l’homme*, cit., p. 134.

⁵⁵⁷ See, A. PETROPOULOU, *Les mesures d’amnistie, le principe ne bis in idem et l’évolution du droit international*, in *Revue Trimestrielle des Droits de l’Homme*, 2015, 102, p. 437; G. DELLA MORTE, *Le amnistie nel diritto internazionale*, Cedam, 2011.

⁵⁵⁸ See, *Margus v. Croatia*, § 139 and *Ould Dah v. France* (dec.), no. 13113/03, 17 March 2009; and, *Dujardin and others v. France* (dec.), 2 September 1991, § 243-244. According to A. PETROPOULOU, *Les mesures d’amnistie, le principe ne bis in idem et l’évolution du droit international*, cit., p. 457, this is to be interpreted to the effect that only the abusive application of amnesties is prohibited. The Author also complains about the failure of the Court to indicate more precise criteria of compatibility of the amnesties with the obligations to prosecute and punish. See also, A. SEIBERT-FOHR, *Prosecuting serious human rights offences*, cit., p. 142, according to whom providing for reconciliation is a legitimate aim which justifies certain restrictions regarding the punishment of the offenders.

consequence that, where the evidence is decisive, this leads to the impossibility of establishing the facts and punishing those responsible of the offences under trial.

By contrast to the jurisprudence of the Inter-American Court of Human Rights, which has expressly stated that in case of human rights violations the authorities cannot rely on the State secret privilege in order to withhold evidence from the investigating authorities⁵⁵⁹, the Court of Strasbourg has never expressly found that the State secret privilege is incompatible with the procedural obligation to effectively investigate and punish.

The issue was address for the first time, indeed, only in the recent case *Nasr and Ghali v. Italy*⁵⁶⁰, which according to some authors has been «a missed opportunity» for the Court in that sense⁵⁶¹. The case concerned the extraordinary rendition to Egypt of the imam of Milan, carried out by C.I.A. agents and Italian intelligence officers. The investigating authorities and the national courts were particularly diligent and efficient in gathering all the necessary evidence, in establishing the facts and identifying those responsible, however the conviction of the secret service agents involved was ultimately annulled by the Supreme Court following the Prime Minister's decision, upheld by the Constitutional Court, to invoke the State secret privilege in respect of certain evidence which was decisive for the establishment of the facts and could not anymore be validly used for the finding of guilt of the perpetrators⁵⁶². However, the Court observed that the State secret privilege was

⁵⁵⁹ See, Inter-American Court of Human Rights, *Tiu Tojin v. Guatemala*, judgment of 26 November 2008, § 77.

⁵⁶⁰ *Nasr and Ghali v. Italy*, cit., commented by T. SCOVAZZI, *Segreto di Stato e diritti umani*, cit., p. 164; P. BONETTI, *Il caso Abu Omar a Strasburgo: l'obbligo di punire e le extraordinary renditions*, in *Quaderni Costituzionali*, 2016, 2, p. 390. For a reconstruction of the case see also, C. DANISI, *State Secrets, Impunity and Human Rights Violations: Restrictions of Evidence in the Abu Omar Case*, in *Essex Human Right Law Review*, 2011, 8, p.1; F. MESSINEO, *Extraordinary Renditions and State obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy*, in *Journal of International Criminal Justice*, 2009, 7, p. 1023.

⁵⁶¹ See, T. SCOVAZZI, *Segreto di Stato e diritti umani*, cit., p. 164.

⁵⁶² In the Italian system, the State secret privilege is regulated under Law no. 124 of 2007 which provides that the Prime Minister is the only authority entitled to invoke such privilege on information «whose knowledge or circulation could damage the integrity of the Republic», that is national security, and that the classification of those information «inhibits judicial inquiry», in the sense that judicial authorities are prevented to use it as evidence. However, where a judge is dissatisfied with the classification, it may formally request the Prime Minister to remove the privilege, failing which it may then bring a claim before the Constitutional Court for an allocation of powers. The Constitutional Court, however, does not carry out a judicial review of the decision to invoke the State secret privilege, rather it merely verifies whether the conditions that justify the invocation of such privilege were met, without being entitled to judge on the merits of the reasons of such decision (see Constitutional Court, judgment no. 106 of 11 March 2009, § 12). For more on this topic see, G. ILLUMINATI (ed.), *Nuovi profili del segreto di stato e dell'attività di intelligence*, Giappichelli, 2010; C. BONZANO, *Il segreto di Stato nel processo penale*, Cedam, 2010; F. FABBRINI, *Extraordinary renditions and the State secret privilege: Italy and the United States compared*, in *Italian Journal of Public Law*, 2011, 2, p. 255; G. ARCONZO, I. PELLIZZONE, *Il segreto di stato nella giurisprudenza della Corte Costituzionale e della Corte europea dei diritti dell'uomo*, in *Rivista dell'Associazione Italiana dei Costituzionalisti*, 2012, 1, p. 1; A. VEDASCHI, *Aracana Imperii and Salus*

invoked by the Italian executive only very late in the proceedings, when the information subsequently classified had already been reported in the press and was in the public domain, so that the invocation of the State secret privilege could no more be justified by the need to preserve its confidentiality. The Court concluded therefore that «the legitimate principle of State secret has been clearly applied in order to prevent those responsible from answering of their acts», with the consequence that «the investigations, albeit effective and thorough, and the trial, which has led to the identification of those responsible and to the conviction of some of them, have not attained their natural outcome, which, in the present case, was the punishment of those responsible⁵⁶³».

What the Court seems to criticize, admittedly, is not the State secret privilege *per se*, which is defined as a «legitimate principle», but the distorted use of that doctrine made by the Italian executive in the present case, amounting to a sort of «abuse of the right⁵⁶⁴»: due to its late assertion, the classification of the evidence could not be meant anymore to protect the confidentiality of the information, but its only purpose was ensuring the impunity of the offenders⁵⁶⁵.

In view of this finding, it is arguable that the State secret privilege is not incompatible in absolute terms with the procedural obligation to effectively investigate and punish under Article 2 and the other relevant Convention provisions. However, the Court seems to require, and correspondingly scrutinizes, the necessity and proportionality of the choice to recur to such instrument, which undoubtedly reduces the possibility to effectively prosecute and punish authors of serious human rights violations. In cases like the one at hand, were the legitimate aim which it pursued - i.e. the confidentiality of information which could pose a risk for national security - could not be attained by invoking the State secret privilege, as the information was already public, the interference it entailed on the procedural obligation to effectively prosecute and punish cannot be justified.

This interpretation of the relationship between the procedural obligations to investigate and the State secret privilege is supported also by the Court's case-law on the issue of State secret privileges in other fields, which may be nonetheless relevant also for the

Rei Publicae: *state secret privilege and the Italian legal framework*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds.), *Secrecy, national security and the vindication of constitutional law*, Edward Elgar Publishing, 2013, p. 95.

⁵⁶³ See, Nasr and Ghali v. Italy, cit., § 272.

⁵⁶⁴ In this sense also, T. SCOVAZZI, *Segreto di Stato e diritti umani*, cit., p. 164.

⁵⁶⁵ G. ARCONZO, I. PELLIZZONE, *Il segreto di stato nella giurisprudenza della Corte Costituzionale e della Corte europea*, cit., p. 12, also noted that the Italian Constitutional Court's decision to allow the effects of a late invocation of the State secret on evidence that was already collected posed delicate problems to the effect that it could not prevent the publication of that information by the media and thus it would raise the question of whether State secret is invoked only to ensure impunity.

interpretation of the obligations at hand, on account of the partly parallel problems that are to be addressed owing to their common procedural nature.

In particular, in the context of the right of access to a court under Article 6 with reference to civil proceedings involving acts or documents covered by State secret which are conclusive for the determination of the rights at stake, it has been held that «it is true that legitimate national security considerations may justify limitations on the rights enshrined in Article 6 § 1 of the Convention, but [at the same time] they should not have the effect of preventing a judicial determination of the merits of applicants' complaints, thus amounting to a disproportionate restriction on their right of access to a court⁵⁶⁶». In such cases, the Court considered that it should be assessed whether there existed «a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had had on the applicant's right of access to a court⁵⁶⁷». Where the assertion of State secret on those acts entailed that there could be no independent judicial scrutiny whatsoever on the plaintiff's claim and therefore a judicial determination on the merits of the applicant's claims was prevented, the Court concluded that the restriction on the right of access to a court was disproportionate and accordingly in violation of Article 6.

A very similar approach is adopted also in relation to the procedural safeguards required under Article 8 for interferences with the right to respect of private and family life, such as expulsions of individuals on grounds of national security. In such context the Court held that «even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information⁵⁶⁸. However, it found that where the applicant and the courts are completely prevented from knowing the reasons why the individual poses a risks to national security on the ground that the supporting documents are classified as secret, judicial review is not effective and the individual does not enjoy the minimum degree of protection against arbitrariness on the part of the authorities⁵⁶⁹.

⁵⁶⁶ *Miryana Petrova v. Bulgaria*, no. 57148/08, 21 July 2016, § 41; *Devenney v. the United Kingdom*, no. 24265/94, 19 March 2002, § 26; *Tinnelly & Sons Ltd and others v. the United Kingdom*, no. 20390/92, 10 July 1998, § 76.

⁵⁶⁷ *Id.*

⁵⁶⁸ See, *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002, § 123; *C.G. and others v. Bulgaria*, no. 1365/07, 24 April 2008, § 40.

⁵⁶⁹ *Id.*

In conclusion, the analysis of these two straws of case-law shows that in any event State secret cannot bar completely an individual's access to justice in order to assert his rights⁵⁷⁰. This proportionality test could therefore easily be transposed by analogy to the procedural obligations to investigate, given that also in that context the State secret privilege may entail the same effect of preventing any judicial determination whatsoever on the merits of the case, only in that case a criminal one⁵⁷¹.

It is argued therefore that the State secret privilege is a measure that may be compatible with the procedural obligations to effectively investigate and punish under Articles 2 and 3 only in so far as its use is necessary and proportionate to the legitimate aim pursued. Such proportionality is excluded when it prevents completely the examinations of the merits of the cases and leads to the discontinuation of the proceedings on that ground.

C. Timely enforcement of the sentence

As discussed above, the actual execution of the sentence imposed is relevant in determining whether the State has discharged its obligation to effectively punish serious human rights violations. Aside from the cases in which the national authorities adopted measures that hamper the execution of the sentence such as the one previously discussed, the effectiveness of the punishment is also tainted when the sentence is not promptly executed for whatever reason.

In the case *Kitanovska Stanojkovic and others v. the former Yugoslav Republic of Macedonia*, the Court held that:

«The requirement of effectiveness of the criminal investigation under Article 2 of the Convention can be also interpreted as imposing a duty on States to execute their final judgments without undue delay. It is so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this Article⁵⁷²».

In that case, which is the only one addressing this specific issue so far, the delays in the enforcement of the sentence amounted to a period of 18 months from the date in which

⁵⁷⁰ In this sense also, G. ARCONZO, I. PELLIZZONE, *Il segreto di stato nella giurisprudenza della Corte Costituzionale e della Corte europea*, cit., p. 22.

⁵⁷¹ For a similar conclusion see also, F. FABBRINI, *Extraordinary renditions and the State secret privilege*, cit., p. 299.

⁵⁷² *Kitanovska Stanojkovic and others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016, § 32.

the conviction became final, and were entirely attributable to the lack of diligence of the authorities.

9. Implications of a non-effective punishment: limits to the *ne bis in idem* principle?

In the previous section it has been discussed that the procedural obligations to investigate and punish serious human rights violations mandate also an effective punishment, where warranted, and that in this connection there are several measures, such as for instance amnesties and the discontinuation of the proceedings for expiration of statute of limitation periods, that are incompatible with those obligations in that they prevent an effective punishment and, to the contrary, bring about a situation of impunity.

It is necessary, therefore, to assess if and what implications a non-effective punishment in violation of the procedural obligations under Article 2 and 3 may have on other Convention rights relating to criminal proceedings. In particular, the right not to be prosecuted or punished twice for the same facts under Article 4 of Protocol 7 comes into play, as its guarantees are triggered when a person «has been finally acquitted or convicted in accordance with the law and penal procedure of that State».

The question that needs to be answered therefore is the following: does a final decision taken in violation of the obligations to effectively punish serious human rights offences trigger the protection of the *ne bis in idem* principle or not?

The issue was dealt with for the first time in the case *Margus v. Croatia*⁵⁷³, in which the applicant, an army officer, complained that his conviction on charges of war crimes against the civilian population in spite of the fact that ten years before he had, for the same facts, benefitted of a general amnesty law, was in violation of Article 4 of Protocol 7.

The Court, recalling its jurisprudence according to which amnesties are a measure that is incompatible with the State's duty to effectively investigate and punish gross human rights violations, adopted its interpretative practice of «harmonious interpretation⁵⁷⁴» whereby the Convention's provisions «must be read as a whole», meaning that the right to *ne bis in idem* should be read in the light also of the procedural obligations under Articles 2 and 3. Therefore, noting also that there is a growing tendency in international law in general in excluding the admissibility of the grant of amnesties for acts which constitute grave breaches of fundamental human rights⁵⁷⁵, it held that the amnesty granted to the applicant

⁵⁷³ *Margus v. Croatia* [GC], cit., commented by A. PETROPOULOU, *Les mesures d'amnistie, le principe ne bis in idem et l'évolution du droit international*, cit., p. 437.

⁵⁷⁴ See, L. LAVRYSENS, *Human rights in a positive State*, cit., p. 16.

⁵⁷⁵ See *supra* ... Such tendency is reflected also in Article 20 of the Statute of the International Criminal Court, which lays down an exception to the *ne bis in idem* principle where a person has

in that case was unacceptable from the viewpoint of Articles 2 and 3 and that, accordingly, «by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population, the Croatian authorities acted in compliance with the requirements of Articles 2 and 3 of the Convention and in a manner consistent with the requirements⁵⁷⁶». It thus concluded that Article 4 of Protocol 7 is not applicable in such circumstances.

In other words, the Court has clearly ruled that non-compliance with the procedural obligations of effective punishment under Articles 2 and 3 of the Convention due to the granting of an amnesty for serious human rights offences constitutes a limit to the scope of the *ne bis in idem* guarantee, which cannot be invoked any longer.⁵⁷⁷ To the contrary, in such cases the reopening of the proceedings seems to be not only a viable possibility for the State that does not amount to a breach of the defendant's rights, but a true and genuine duty stemming from the procedural obligations under Articles 2 and 3.

The question remains open, however, as to whether forms of non-effective punishment other than amnesties, such as for example the discontinuation of the proceedings owing to expiration of the statute of limitation periods, may also entail such a limiting effect on the *ne bis in idem* principle. A positive answer seems to be most likely, if one considers that in the case-law analysed above no distinction is ever made between the different cases of non-effective punishment, which are all equally considered inadmissible⁵⁷⁸.

already been acquitted if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the International Criminal Court.

⁵⁷⁶ *Margus v. Croatia* [GC], cit., § 140.

⁵⁷⁷ According to the Italian Constitutional Court, in judgment no. 200 of 31 May 2016, such limitation of the *ne bis in idem* principle in view of substantive reasons relating to the duties of criminal protection testifies that the guarantee afforded to the principle is a relative rather than absolute one, see § 6.

⁵⁷⁸ In this sense see also, G. DELLA MONICA, *Ne bis in idem*, in A. GAITO (ed.) *I principi europei del processo penale*, cit., p. 340-341.

CHAPTER III

THE EU LEGAL FRAMEWORK IN CRIMINAL MATTERS: VALUABLE TOOLS FOR ATTAINING THE OBJECTIVE OF EFFECTIVE CRIMINAL PROCEEDINGS INTO SERIOUS HUMAN RIGHTS OFFENCES

5. Positive obligations of criminal law enforcement in EU law

The concept of positive obligations of criminal protection is not by any means unknown to the EU legal framework⁵⁷⁹. Admittedly, positive duties obliging Member States to make use of their criminal law systems in order to protect different EU interests are to be found both at the level of primary law and of secondary legislation, and surprisingly they are not confined to the areas in which the European Union has a criminal law competence, but rather arise also in other fields thanks to the general principles of EU law. The peculiarity of such obligations, similarly to those arising under the ECHR, is that they encompass not only the duty to criminalise specific conducts, but also an obligation to prosecute and effectively punish.

This chapter will analyse the Member State's duties to recur to criminal law flowing from the EU legal framework, focusing mainly on those aspects that touch upon procedural issues and not much to the related substantive obligations to criminalize⁵⁸⁰. The purpose is to understand when and how EU law seeks to ensure the objective of effective criminal proceedings, in particular what constraints it places on national criminal procedures and through what legal techniques these have been developed, in order to assess if there are any similarities with the doctrine of effective investigations elaborated under the ECHR and whether these obligations under EU law could constitute a useful tool to enhance the protection of the right to effective investigations under the ECHR.

To this end, this Chapter will assess primarily on the general obligation resting upon Member States to enforce EU law descending from the Treaties and the general principles of EU law (Paragraph A) and then it will focus more specifically on duties to effectively investigate and punish serious human rights violations that can be found in secondary legislation (Paragraph B).

⁵⁷⁹ For an overview of the topic see P. ASP, *European criminal law and national criminal law*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, 2016, p. 315.

⁵⁸⁰ On this topic see, C. PAONESSA, *Gli obblighi di tutela penale: la discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari*, cit., p. 193 ff.; J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème? Le point de vue de l'Union Européenne*, in S. MANACORDA, J. TRICOT (eds.) «*Devoir de punir*»? , cit., p. 113 ff.

A. The primary obligation to enforce EU law: The Member States' duty to establish an effective criminal law system

Even before the European Communities were conferred an explicit competence in criminal law⁵⁸¹, the dynamics of European integration had a significant impact on the Member States' discretion in shaping their national criminal law systems. The absence in the original Treaties of any provision regarding the enforcement of Community legislation in the field of internal market in case of violation meant that Community law enforcement was only indirect and completely left to the autonomy and discretion of the Member States⁵⁸². This could not, however, mean that Member States were free to leave violations of EC law without any negative consequence for the offender, nor that they enjoyed an unfettered discretion when deciding what sanctions to apply.

Admittedly, in order to fill the so-called «enforcement gap⁵⁸³», the European Court of Justice found that the principle of sincere cooperation under Article 10 EC Treaty (now Article 4 par. 3 TFUE⁵⁸⁴) entailed a true obligation for Member States to enforce Community law. In its leading «*Greek maize case*», the Court established that:

«where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations or administrative provisions, Article 5 of the Treaty requires the Member States to take all necessary measures to guarantee the application and effectiveness of Community law.⁵⁸⁵»

⁵⁸¹ The EC were firstly formally conferred a limited competence in criminal law by the Maastricht Treaty in 1992, thanks to the compromise of the so-called «Three Pillar Structure». The Third Pillar, concerning the field of cooperation in the area of justice and home affairs was however based on a semi-intergovernmental method.

⁵⁸² See, R. SICURELLA, *EU competence in criminal matters*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds.), *Research Handbook on EU Criminal Law*, cit., p. 49

⁵⁸³ See, J. VERVAELE, *The European Union and Harmonization of the Criminal Law Enforcement of Union Policies: in search of a Criminal Law Policy?*, in ID., *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, cit., p. 11.

⁵⁸⁴ Art. 4 par. 3 TUE: «Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives».

⁵⁸⁵ CJEU, Case C-68/88 *Commission v. Greece*, 21 September 1989, par. 23, with comment by L. SALAZAR, *Diritto penale e diritto comunitario: la strana coppia*, in *Cassazione Penale*, 1992, p. 1654.

In that case, furthermore, albeit acknowledging that the choice of penalties to be imposed remains within the Member States' discretion, the Court at the same time set forth the requirements that Member States' enforcement should respect in order to be considered adequate to guarantee the effectiveness of EC law, together with the standards against which their efforts will be measured.

The first criterion that enforcement of EC law must comply with is the «principle of assimilation or equivalence»⁵⁸⁶, according to which:

«[Member States] must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance⁵⁸⁷».

In other words, when penalizing infringements of EC law, Member States must use the same means of legislation – be it administrative or criminal – that they use with regard to similar violations of national law⁵⁸⁸. Therefore, in a situation where for instance national law criminalizes frauds, the provision of solely an administrative fine for EU frauds would be at variance with the assimilation principle which would require the provision of a criminal offence also for EU frauds.

Such equivalence or assimilation, moreover, is not limited to the substantive provisions of criminal or administrative law (else said, the law-in-books), but clearly extends also to the procedural ones and must be taken into account when investigating and prosecuting cases⁵⁸⁹: this means that, for instance, the prosecution of a EC law infringement cannot be subject to the bringing of a formal complaint where such procedural condition is not set forth for a similar infringement of national law.

In this connection, and with regards specifically to the procedural aspects of enforcement, the Court established also the «same diligence principle», according to which:

⁵⁸⁶ See, A. KLIP, *European Criminal Law*, cit., p. 75-76; R. SICURELLA, *EU competence in criminal matters*, cit., p. 49; M. DOUGAN, *From the Velvet Glove to the Iron Fist: Sanctions and Penalties for the Enforcement of Community Law*, in M. CREMONA (ed.), *Compliance and the Enforcement of EU Law*, Oxford University Press, 2012, p. 79-80.

⁵⁸⁷ CJEU, Case C-68/88 *Commission v. Greece*, 21 September 1989, par. 24.

⁵⁸⁸ According to J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème?*, cit., p. 119 this obligation therefore is not yet a «*devoir de punir tout court*» but only a «*devoir de punir comme*».

⁵⁸⁹ See, A. KLIP, *European Criminal Law*, cit., p. 75-76; P. ASP, *European criminal law and national criminal law*, cit., p. 317-318.

«national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws⁵⁹⁰».

Accordingly, national authorities are expected to take the same efforts in investigating and prosecuting infringements of EU law to those undertaken to bring to justice offenders of merely national provisions. For instance, such principle would not be complied with in a situation where the prosecution decides to end the proceedings without carrying out further investigations for these would involve difficult and lengthy international assistance requests⁵⁹¹.

Thirdly, and most importantly, the Court elaborated a final general requirement whereby in any event penalties set forth by national laws against infringements of EC law must be «effective, proportionate and dissuasive⁵⁹²». Such formula has thereupon proven so successful, to the point that it was subsequently codified not only in several legislative instruments⁵⁹³, but also in the Treaties⁵⁹⁴.

While the proportionality requirement refers to a relationship between the gravity of the offence and the sanction provided, the criterion of dissuasiveness must be interpreted as having the potential to deter persons from committing such offences in the future⁵⁹⁵. Effectiveness, on the other hand, has been interpreted as meaning that «if infringements

⁵⁹⁰ CJEU, Case C-68/88 *Commission v. Greece*, 21 September 1989, par. 25.

⁵⁹¹ See, A. KLIP, *European Criminal Law*, cit., p. 80-81.

⁵⁹² CJEU, Case C-68/88 *Commission v. Greece*, 21 September 1989, par. 24. It has been remarked how these properties of penalties condensate all the different theories of punishment, the retributive and the utilitarian ones, M. DELMAS-MARTY, *Harmonisation des sanctions et valeurs communes: la recherche d'indicateurs de gravité et d'efficacité*, in (eds.) M. DELMAS-MARTY, G. GIUDICELLI-DÉLANGE, E. LAMBERT-ABDELGAWAD, *L'harmonisation de sanctions pénales en Europe*, Société de législation comparée, 2003, p. 585. For the development of certain theoretical parameters to implement these requirements see, M. FAURE, *Effective, proportional and dissuasive penalties in the implementation of the environmental crime and ship-source pollution directives: questions and challenges*, in *European Energy and Environmental Law Review*, 2010, p. 256.

⁵⁹³ See, *inter alia*, Article 4 of Directive 2001/36/EU on trafficking on human beings; Article 5 of Directive 2008/99/EC on the protection of the environment through criminal law; Article 7 of Directive 2014/57/EU on criminal sanctions for market abuse; Article 5 of Directive 2014/62/EU on the protection of the euro and other currencies from counterfeiting by criminal law.

⁵⁹⁴ Art. 325 TFEU stipulates that: «The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies».

⁵⁹⁵ See, A. KLIP, *European Criminal Law*, cit., p. 78-80. According to Advocate General Kokott in Case C-418/11 *Texdata Software GmbH*, 26 September 2013, par. 51-52, a penalty is dissuasive when it prevents an individual from infringing the objective pursued and the rules laid down by Union law.

occur, the system is capable of responding to it⁵⁹⁶» or similarly that «rules laying down penalties are effective where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for⁵⁹⁷», or also that infringements of EU law «should not be subject to penalties in theory alone», but «the system of penalties must rather be framed in such a way as to ensure that anyone (...) fears, in fact also, that penalties will be imposed on him⁵⁹⁸». The requirement of effectiveness therefore relates primarily to the enactment and enforcement of substantive criminal law provisions through effective criminal proceedings, for it implies not a mere abstract assessment of the sanction provided but also of the likelihood of its actual imposition. In other words, it becomes the source of an obligation to concretely punish⁵⁹⁹. It becomes thus clear that the obligation to enforce EU law constitutes a true obligation of result, defined by the Court of Justice as «a precise obligation as to the result to be achieved⁶⁰⁰», whose attainment has to be assessed in relation to the mentioned standards and in respect of which Member States enjoy procedural autonomy in deciding how to comply with it: what is relevant are not the abstract legal provisions *per se* but rather their practical and effective application⁶⁰¹.

It is apparent, thus, how the traditional principle of the Member States' procedural autonomy⁶⁰², all the more in criminal matters, is significantly restrained by the general obligation to enforce EU law and its conditions of equivalence and effectiveness, and this even before the EU acquired competence for the harmonisation of criminal procedures thanks to the Treaty of Lisbon. Such deep implications of EU law were acknowledged also by the Court of Justice, which noted that «although in principle criminal law and the laws of criminal procedure are matters for which the Member States are responsible, it does not follow that this branch of the law cannot be affected by Community law⁶⁰³».

⁵⁹⁶ A. KLIP, *European Criminal Law*, cit., p. 76.

⁵⁹⁷ Opinion of Advocate General Kokott of 14 October 2004 in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and others*, par. 88.

⁵⁹⁸ Opinion of Advocate General Kokott of 30 April 2015 in Case C-105/14 *Taricco*, par. 88

⁵⁹⁹ See, J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème?*, cit., p. 120-21.

⁶⁰⁰ CJEU, 8 September 2015, Case C-105/14 *Taricco*, par. 51.

⁶⁰¹ In this sense see, L. PICOTTI, *Riflessioni sul caso Taricco. Dalla "virtuosa indignazione" al rilancio del diritto penale europeo*, in *Dirittopenalecontemporaneo.it*, 24 October 2016, p. 3. According to R. SICURELLA, *EU competence in criminal matters*, cit., p. 51, the Court of Justice adopts a «result-oriented approach». See also, C. PAONESSA, *Gli obblighi di tutela penale: la discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari*, cit., p. 204.

⁶⁰² See, CJEU, Case C-33/76 *Rewe*, judgment of 16 December 1976, par. 5.

⁶⁰³ CJEU, Case C-226/97 *Lemmens*, judgment of 16 June 1998, par. 19. See also, CJEU Case C-61/11 PPU *El Dridi*, judgment of 28 April 2011, par. 53. See also, J. VERVAELE, *The European Union and Harmonization of the Criminal Law Enforcement of Union Policies*, cit., p. 14.

The general EU law enforcement obligation, therefore, unmistakably establishes requirements which national criminal procedure must fulfil if it is the tool chosen to enforce EU law, and these include several aspects which are scarcely foreseeable in advance, but become relevant on a case by case basis, such as for instance the exercise of prosecutorial discretion in deciding whether to dismiss a case that is relevant from a EU perspective.

An interesting case with respect to the existence of an obligation to prosecute EC law infringements is the «French strawberries case⁶⁰⁴», which concerned the French authorities' failure to investigate and prosecute on repetitive episodes of blockades of Spanish fruits and vegetables through France despite the fact that criminal offences had been committed. The Court in that case took the view that although under the general obligation to enforce EU law Member States enjoy a margin of discretion in determining what are the necessary and appropriate measures to counter such infringement of the free movement of goods, the French authorities had in the instant case «manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism⁶⁰⁵». The Court pointed in particular to the circumstance that, even though it was undisputed that such acts of vandalism took place as they were filmed by cameras and the authors were known to the police, «only a very small number of the persons who participated in those serious breaches of public order has been identified and prosecuted⁶⁰⁶». Even if only implicitly, the Court thus made clear that Member States cannot just remain passive in front of infringements of EU law, but have an obligation to make a serious effort in investigating and then prosecuting, where warranted according to the same criteria used for deciding whether to prosecute or not in other national cases⁶⁰⁷.

Another case in which the general obligation to effectively enforce EU law has revealed the significant repercussions it can exert on national criminal procedures, and in particular on statute of limitation periods, is the recent and famous *Taricco* case⁶⁰⁸. The case concerned

⁶⁰⁴ CJEU, Case C-265/95 *Commission v. France*, judgment of 9 December 1997.

⁶⁰⁵ *Ibidem*, par. 32-34 and 65.

⁶⁰⁶ *Ibidem*, par. 49-50.

⁶⁰⁷ In this sense, A. KLIP, *European Criminal Law*, cit., p. 304-306. See also the Opinion of the Advocate General Lenz of July 1997 in that case, par. 76, who stated that «the French authorities failed to prosecute those offences with the necessary vigour». See also, CJUE, Case-189/07 *Commission v. Spain*, 22 December 2008, concerning the lack of effectiveness of the Spanish system of control and inspection of fisheries, where Spain was found to have disregarded its obligations as «*ne veillant pas avec la fermeté nécessaire à l'adoption et à l'exécution des mesures appropriées à l'encontre des responsables d'infractions à la réglementation communautaire relative à la pêche, principalement par l'ouverture de procédures administratives ou pénales et l'infliction de sanctions dissuasives à ces responsables*».

⁶⁰⁸ CJEU, Case C-105/14 *Taricco*, judgment of 8 September 2015, with comment, among many, by M. CAIANIELLO, *Dum Romae (et Brucsellae) Consolitur... Some Considerations on the Taricco*

criminal proceedings brought on charges of serious VAT frauds, which have been found to affect the financial interests of the EU since VAT revenue forms part of the Union's own resources⁶⁰⁹.

The Court, for what is relevant for our purposes, firstly found that, notwithstanding the freedom that Member States in principle enjoy when choosing the penalties applicable to VAT frauds, «criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner⁶¹⁰». Thereby, the Court made clear that the two «*Greek maize*» criteria can independently oblige Member States to provide for criminal sanctions, even without necessarily relying on the assimilation principle⁶¹¹.

Furthermore, it took the view that if the application of a rule which lays down an absolute limitation period has the effect that the imposition of the sanction, given the complexity and duration of criminal proceedings, becomes impossible in a considerable number of cases since the offences will usually be time-barred before the criminal penalty can be imposed by a final judicial decision, then it cannot be said that the measures laid down in national law to combat frauds are effective nor dissuasive. Accordingly, the application of such a national rule on the statute of limitation would be incompatible with the obligation to provide for effective and dissuasive sanctions against infringements of EU law⁶¹², and a national court would be obliged to give full effect to such EU law obligation by setting aside the contrasting provision. It should be noted, however, that it is not the application of a limitation period as such that is incompatible with the requirement of effective enforcement of criminal sanctions, but rather only an absolute period, which does not allow for flexible application in so far as it lead to a *de facto* impunity⁶¹³.

It is therefore on the basis of the obligation arising from Article 325 TFUE in conjunction with the principle of sincere cooperation under Article 4 par. 3 TUE, which have been defined as «two coexisting duties with the same content⁶¹⁴», namely to provide for effective criminal sanctions of EU law infringements, that the Court has placed a restraint on the Member States' procedural autonomy in shaping their criminal justice system.

Judgement and its Consequences at National and European Level, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, 1, p. 1-17.

⁶⁰⁹ See, CJEU, Case C-617/10 *Akerberg Fransson*, judgment of 26 February 2013, par. 26-27.

⁶¹⁰ CJEU, Case C-105/14 *Taricco*, judgment of 8 September 2015, par. 39.

⁶¹¹ In this sense, M. TIMMERMAN, *Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco*, in *Common Market Law Review*, 2016, 3, p. 788.

⁶¹² *Ibidem*, par. 47.

⁶¹³ In this sense also, A. KLIP, *European Criminal Law*, cit., p. 77-78; M. CAIANIELLO, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?*, cit., p. 11.

⁶¹⁴ M. TIMMERMAN, *Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco*, cit., p. 789.

In conclusion, also the EU legal framework, just like the doctrine of the positive obligation to effectively investigate serious human rights offences under the ECHR, imposes certain duties of effectiveness on national criminal procedures in order to ensure the protection of its own interests. This occurs in particular thanks to the assimilation principle in relation to procedural conditions, the same diligence principle and, above all, the obligation to provide for effective penalties which is to be read as a duty to concretely punish.

It becomes thus apparent that, though the protected interests are not the same, in both contexts, as if they were variations on the same theme, the aspiration for their effectiveness has become the source of several restraints on the procedural autonomy of national criminal procedure⁶¹⁵.

In the EU legal framework, however, such obligation has even deeper and amplified practical repercussions in that, as seen above, thanks to the essential attributes of the EU legal order such as the principle of *primauté*, its judicial enforceability is stronger and may thus lead to the duty for national courts to set aside national provisions which, on a case by case basis, represent an obstacle to the effectiveness of the criminal law's enforcement in pending proceedings⁶¹⁶.

a. Duties to effectively investigate and punish serious human rights offences in EU law: Article 83 TFUE and the Charter of Fundamental Rights of the EU

The duties to effectively punish which are to be found in the EU legal framework do not always rest on the thirst for safeguarding a fundamental right, but rather on the objective of ensuring the effectiveness of the law of the Union in general. However, nothing rules out the possibility that the interest of effectively protecting a fundamental right might activate the same mechanisms. Admittedly, the link human rights-effectiveness of the criminal justice system is not at all unfamiliar in EU law, where certain specific duties to punish human rights violations are also present and, similarly to the parallel ones under the ECHR, they bear upon procedural aspects of the criminal law enforcement rather than focusing only on the abstract incrimination of the prohibited conducts. Yet their scope is narrower, and limited to certain very specific aspects.

⁶¹⁵ In this sense also, M. CAIANIELLO, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?*, cit., p. 11

⁶¹⁶ On the stronger enforceability of EU duties to punish see also, J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème?*, cit., p. 117 and 130-134.

Preliminarily, account should be given of Articles 83 TFUE, which sets forth the criminal law competence of the Union⁶¹⁷. In particular, paragraph 1 of that provision states that the Union may, by means of Directives, «establish minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension. Such areas of crime are: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime». Yet, this list is not exhaustive as it is also provided that other types of offences may be added «on the basis of developments in crime». Secondly, paragraph 2 introduces the so-called «annexed competence⁶¹⁸» by stating that minimum rules on the definition of offences and criminal sanction may be provided if they are essential for ensuring the effectiveness of an harmonized Union policy.

These provisions, thus, form the legal basis for the adoption of EU secondary legislation containing the obligation for Member States to criminalize and punish the respective crimes through the transposition of the minimum rules contained in it in the national systems. As to the relationship between such criminal law competence of the EU and human rights, it is interesting to note firstly that some of the «Euro crimes», such as trafficking in human beings and sexual exploitation of women and children, represent human rights offences which under the ECHR give rise to similar duties to criminalize and punish. Therefore, criminal law instruments at EU level in this context are a source of positive obligations of criminal protection of human rights for Member States. Furthermore, and from a partly different perspective, it has been suggested that these provisions of primary law, especially the annexed competence of Article 83 (2) TFUE might be read as implying also positive obligations weighing on the Union's itself to adopt criminal law instruments and to effectively punish which flow specifically from fundamental rights⁶¹⁹.

This possibility seems less unlikely especially if taking into consideration the existence of the Charter of Fundamental Rights of the Union, which protects the same rights of ECHR,

⁶¹⁷ It is nevertheless an «indirect competence», in the sense that EU provision always required transposition in the national legal systems, without which a provision from a Directive may not form the basis on which criminal liability is founded. For more on this topic see, P. ASP, *The substantive criminal law competence of the EU, Towards an area of Freedom, Security and Justice*, Stockholm Universitet, 2012, p. 70-139; R. SICURELLA, *EU competence in criminal matters*, cit., p. ?; A. KLIP, *European Criminal Law*, cit., p. 180-185; , C. PAONESSA, *Gli obblighi di tutela penale: la discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari*, cit., p. 237-242.

⁶¹⁸ On this notion see, A. BERNARDI, *L'harmonisation pénale accessoire*, in G. GIUDICELLI-DELAGE, C. LAZERGER (eds.), *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne*, Société de législation comparée, 2012, p. 153-183.

⁶¹⁹ In this sense, J. VERVAELE, *The European Union and Harmonization of the Criminal Law Enforcement of Union Policies: in search of a Criminal Law Policy?*, cit., p. 41.

though expressed in more modern terms and much less negatively phrased⁶²⁰. The adoption of the Charter, in this connection, should lead to envisaging the perspective of positive obligations of criminal protection of human rights resting upon the Member States but also upon the Union⁶²¹.

In favour of such reading comes also Article 52(3) of the Charter, for it provides that the meaning and scope of Charter rights shall be the same as those of the corresponding rights laid down in the ECHR. In this sense, where the ECHR rights imply a positive obligation to effectively investigate and punish their infringements, it could be arguable that a parallel duty should also arise from the correspondent right under the Charter.

On the other hand, however, Article 51(2) of the Charter introduces a significant limit to the scope of Charter rights, casting some doubts over whether there is room for developing such positive obligations on the basis of the Charter⁶²². Indeed, it provides that «this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaty», thus reflecting the content of Article 6(1) TUE stating that «The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties».

Nonetheless, the European Court of Justice has started to formulate positive obligations of protection of human rights, even of procedural nature, under EU law resting on EU institutions⁶²³ and Member States⁶²⁴, though not yet of criminal protection. Admittedly, in so far as these are developed in a context in which the EU enjoys formal competence, the assertion of such positive obligations of protection of fundamental rights, even of criminal nature, would not run counter the limitations laid down in Article 51 of the Charter as the principle of attributed powers will be respected.

⁶²⁰ See, M. BEIJER, *Positive obligations to protect fundamental rights: any role to be played by the European Court of Justice?*, in *strasbourgobservers.com*, 10 October 2016.

⁶²¹ In this sense, J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème?*, cit., p. 127-128.

⁶²² See also, J. TRICOT, *Les obligations internationales de protection pénale du droit à la vie. Variations sur un meme thème?*, cit., p. 129; M. BEIJER, *Positive obligations to protect fundamental rights: any role to be played by the European Court of Justice?*, cit.

⁶²³ See, CJEU, C-362/14 *Schrems*, judgment of 6 October 2015, where the Court found that the Commission must engage in a periodical monitoring of the compliance of the right to privacy and protection of personal data in the United States in the context of an agreement of the international transfer of personal data (so-called Safe Harbour Decision), see M. BEIJER, *Positive obligations to protect fundamental rights: any role to be played by the European Court of Justice?*, cit..

⁶²⁴ See, M. BEIJER, *Active guidance of fundamental rights protection by the Court of Justice of the European Union: exploring the possibilities of a positive obligations doctrine*, in *Review of European Administrative Law*, 2015, no. 2, p. 127-150. Specifically on positive procedural obligations flowing from the principle of effective judicial protection see, P. VAN CLEYNENBREUGEL, *The confusing constitutional status of positive procedural obligations in EU law*, in *ivi*, 2012, no. 1, p. 91-114.

- i. (...) and in secondary legislation: *The Trafficking Directive, the Children Abuse Directive, the Framework Decision against Racism and Xenophobia and the Terrorism Directive*

The development of positive obligations to effectively investigate and punish human rights violations under the provisions of the Charter, however, represents only a theoretical possibility that might be deployed in the future. For the moment, most part of such obligations in EU law are instead to be found in secondary legislation.

Indeed, the Directives adopted pursuant to Article 82 TFUE demonstrate that the establishment of minimum rules to harmonize national criminal laws is not limited to the mere definition of offences and sanctions but that these may go beyond providing for the mere abstract duty to incriminate, by regulating also other procedural aspects linked to jurisdiction, investigation and prosecution, inasmuch as they are an essential part for the effective application of those legal provisions⁶²⁵.

Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA («Trafficking Directive») is the first directive that has been adopted under Article 83 TFUE⁶²⁶, and establishes a duty to criminalize trafficking, which is qualified as a serious crime and a gross violation of fundamental rights⁶²⁷. It may thus be regarded as a source of positive obligations of criminal protection of human rights.

In addition to the minimum rules concerning the definition of the offences and the sanctions to be imposed⁶²⁸, the Directive also contains provisions that touch upon the investigations and criminal proceedings, with a view of ensuring the effectiveness of the fight against trafficking offences, to the extent that reinforcing prosecution of such offences seems to be the main focus of the instrument⁶²⁹.

⁶²⁵ See in particular the Commission's Communication «Towards an EU Criminal Policy – Ensuring the effective implementation of EU policies through criminal law» (COM(2011)573) of September 2011; see also, J. VERVAELE, *The European Union and Harmonization of the Criminal Law Enforcement of Union Policies*, cit., p. 42 and 53-54.

⁶²⁶ The Trafficking Directive has a double legal basis under Articles 83(1) and 82(2), which shows it includes not only substantive criminal provisions, but also procedural ones. See also, R. LETSCHERT, C. RIJKEN, *Rights of victims of crime: tensions between an integrated approach and a limited legal basis for harmonisation*, in *New Journal of European Criminal Law*, 2013, no. 3, p. 249.

⁶²⁷ Recital 1 of Directive 2011/36/EU. In this sense also, F. SPIEZIA, M. SIMONATO, *La prima direttiva UE di diritto penale sulla tratta di esseri umani*, in *Cassazione Penale*, 2011, no. 9, p. 3197.

⁶²⁸ Articles 2, 3, 4 of Directive 2011/36/EU.

⁶²⁹ See, A. BOSMA, C. RIJKEN, *Key challenges in the combat of human trafficking. Evaluating the EU trafficking strategy and the EU trafficking directive*, in *New Journal of European Criminal Law*, 2016, no. 3, p. 317.

In particular, Article 9 on «Investigation and prosecution» contains a number of provisions enhancing criminal prosecution mechanisms. Firstly, it sets the principle of *ex officio* initiation of the criminal proceedings, by stating that investigation into or prosecution of trafficking offences shall not be dependent on reporting or accusation by the victim and that criminal proceedings may continue even if the victim has withdrawn its consent⁶³⁰. Such provision not only is in line with the case-law of the ECtHR on the requirement of *ex officio* initiation of criminal investigations under Article 4 ECHR discussed previously⁶³¹, but it appears to reinforce it even further by excluding any effect of the victim's non-consent on the fate of the proceedings.

Secondly, paragraph 2 of that provision also confines the discretion of Member State in setting limitation periods for the prosecution of trafficking offences against minors, by stating that these should take all the necessary measures to enable the prosecution of such offences for a sufficient period of time after the victim has reached the age of majority. Here again, the EU rules address another issue which constitutes a reason restricting a State's right to prosecute⁶³² and therefore, as seen, is relevant also for the Strasbourg's case-law on effective investigations, namely the existence of adequate statute of limitation periods⁶³³. Such rule, in particular, lead to an extension of the period during which a prosecution can proceed.

Finally, paragraph 3 and 4 state that the investigating and prosecuting authorities should be adequately trained and be able to recur to the same «effective investigations tools» used for organized crime or other serious crimes. According to Recital 15 these could include interception of communications, covert surveillance including electronic surveillance, monitoring of bank account or other financial investigations⁶³⁴. Moreover, according to Recital 5, cross-border cooperation among the law enforcement authorities of the Member States should be facilitated, through the exchange of information and the coordination of investigations and prosecutions. The objective pursued by this provision, namely the availability of all possible investigating means, seeks to ensure what on the ECtHR's side is called the adequacy of the investigation, whereby the authorities should take all

⁶³⁰ According to E. SYMEONIDOU-KASTANIDOU, *Directive 2011/36/EU on combating trafficking of human beings. Fundamental choices and problems of implementation*, in *New Journal of European Criminal Law*, 2016, n. 4, p. 468, the *ex officio* initiation of proceedings is made compulsory under the Directive. See also, A. KLIP, *European Criminal Law*, cit., p. 301.

⁶³¹ *Supra*, par...

⁶³² A. KLIP, *European Criminal Law*, cit., p. 297.

⁶³³ *Supra*,

⁶³⁴ The importance of financial investigations is to be explained by the business-like nature of the phenomenon of trafficking, see A. BOSMA, C. RIJKEN, *Key challenges in the combat of human trafficking*, cit., p. 321. F. SPIEZIA, M. SIMONATO, *La prima direttiva UE di diritto penale sulla tratta di esseri umani*, cit., observes that the Directive fails to include other effective transnational means of investigations such as the joint investigation teams and the spontaneous exchange of information among judicial authorities which may prove very useful in this context.

reasonable efforts to collect the evidence, included by resorting to international cooperation⁶³⁵.

Article 10, furthermore, deals with aspects of jurisdiction, extending the obligation to establish extraterritorial jurisdiction in order to ensure a more effective prosecution of international crime groups⁶³⁶. Indeed, it provides that Member States shall establish their jurisdiction not only where the offence has been committed in whole or in part in their territory, but also where the offender is one of their national even if the act does not constitute a crime where it is committed or is subject to the filing of a complaint by the victim. Furthermore, although there is no obligation to do so, Member States may establish jurisdiction over extraterritorial crimes also where the victim is one of their nationals or a habitual resident in their territory or also the offence is committed for the benefit of a legal person established in their territory. These rules on extraterritorial jurisdiction represents a significant step forward compared to the findings of the ECtHR in relation to the same issue, which, as mentioned previously, has ruled out the existence of a duty on States to establish extraterritorial jurisdiction over trafficking offences⁶³⁷.

Finally, a number of provision address victim's information and participation rights in the criminal proceedings, but these will be dealt with more thoroughly hereinafter⁶³⁸.

The same pattern of the Trafficking Directive is adopted also by the Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA («Children Abuse Directive»)⁶³⁹. Admittedly, this instrument also defines sexual abuse and sexual exploitation of children as a serious violation of fundamental rights⁶⁴⁰ and serves the declared objective of seeking to ensure full respect of the fundamental rights⁶⁴¹. The duty to criminalize such conduct and to provide for effective, dissuasive and proportionate sanctions can therefore be regarded as a positive obligation to punish a specific human right offence.

As to the measures relating to the investigation and prosecution of those offences, affecting the procedural autonomy of Member States in criminal law, this Directive contains identical rules to those of the Trafficking Directive on *ex officio* opening of the proceedings, on the

⁶³⁵ *Supra*.

⁶³⁶ Recital 16 of Directive 2011/36/EU.

⁶³⁷ *Supra*.

⁶³⁸ *Infra*.

⁶³⁹ Admittedly, Recital 7 states that this instrument should be fully complementary to the Trafficking Directive.

⁶⁴⁰ Recital 1 of Directive 2011/92/EU.

⁶⁴¹ Recital 50 of Directive 2011/92/EU.

extension of statute of limitation periods and on the investigation measures to be made available⁶⁴² and to jurisdiction⁶⁴³.

By the same token, the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (“Racism Framework Decision”) is an example of the imposition of a duty of criminal protection of human rights, which is not limited to the mere criminalisation but serves towards the express purpose of allowing effective investigation, prosecution and punishments of those offences. This Framework Decision, indeed, lays down a duty on Member States to criminalize certain forms of racism and xenophobia, qualified as «direct violations of the principle of respect for human rights⁶⁴⁴», with the objective of ensuring an effective implementation of legislation combating such practices and in order to «lead to combating racism and xenophobia offences more effectively by promoting a full and effective judicial cooperation between Member States⁶⁴⁵».

The only procedural provisions therein, however, concern jurisdiction⁶⁴⁶ and the duty to launch an investigation or prosecution *ex officio* which is not dependent on an accusation made by the victim, this at least in respect of the most serious forms of cases where the offence has been committed on the territory of the State⁶⁴⁷.

Finally, obligations relating to the criminalization and effective investigation, prosecution and punishment of other forms of human rights offences are laid down by the recent Directive 2017/.../EU of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA («Terrorism Directive»). Acts of terrorism are indeed qualified as «one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms on which the Union is founded⁶⁴⁸».

Similarly to the other legal instruments discussed above, the Terrorism Directive provides for the definition of different types of terrorist offences and obliges Member States to criminalize those conducts⁶⁴⁹. In this connection, it is acknowledged that a harmonized definition of terrorist offences is necessary to facilitate the information exchange and

⁶⁴² Article 15 of Directive 2011/92/EU.

⁶⁴³ Article 17 of Directive 2011/92/EU.

⁶⁴⁴ Recital 1 of Council Framework Decision 2008/913/JHA.

⁶⁴⁵ Recital 4 and 12 of Council Framework Decision 2008/913/JHA.

⁶⁴⁶ Article 9 of Council Framework Decision 2008/913/JHA.

⁶⁴⁷ Article 8 of Council Framework Decision 2008/913/JHA. A definition of «serious cases» is not provided.

⁶⁴⁸ Recital 2 of Directive 2017/...

⁶⁴⁹ Articles 3 to 18 of Directive 2017/...

cooperation between the competent law enforcement authorities⁶⁵⁰. As a consequence, the Directive regulates also certain specific procedural aspects for the purpose of enhancing the effectiveness of criminal proceedings into such offences, pursuant to a pattern which is similar to that adopted by the Trafficking and the Children Abuse Directive, but has some peculiarities⁶⁵¹.

Firstly, Article 24 sets out the already seen principle of *ex officio* initiation of criminal proceedings into terrorist offences, but it confines it to those offences on which State have territorial jurisdiction. This might be explained by the fact that, in comparison to the other legal instruments, Article 19 of the Terrorism Directive extends significantly the Member States' duty to establish extraterritorial jurisdiction over terrorist offences. A part from the case of offences committed outside the State's territory by one of their nationals, which was already contemplated also in the Trafficking and Children Abuse Directives, it adds also the cases whereby the offence is committed for the benefit of a legal person established in its territory or against the institutions and people of the State in question or against an institution, body, office or agency of the Union based in that State, and finally, though in relation to only certain offences, where the State refuses to surrender or extradite the person suspected or convicted of such an offence to another Member State or to a third country. Beside these obligatory cases, moreover, other optional cases of extraterritorial jurisdiction are provided⁶⁵². Clearly, strong cooperation is finally mandated between the judicial authorities where, in view of these very wide criteria for the establishment of jurisdiction, more Member States could validly prosecute on the basis of the same facts. However, the failure by the Directive to establishing clear and uniform criteria to this end risks falling foul of the objective of ensuring an effective centralised prosecution of terrorist offences in a single Member State.

Thirdly, also the Terrorism Directive addresses the issue of the effective investigation measures to be made available to the authorities inquiring into terrorism offences. In addition to those already mentioned in the legal instruments previously examined, Recital 21 takes into consideration also personal searches, the taking and keeping of audio recordings in public or private vehicles and places and of visual images but only in public vehicles and places.

Finally, the Terrorism Directive, through the amendment of Framework Decision 2005/671/JHA, lays down some cooperation duties between the judicial and investigating authorities of the Member States. In particular, pursuant to Article 22(2) the information gathered in criminal proceedings concerning terrorist offences should be made available

⁶⁵⁰ Recital 3 of Directive 2017/...

⁶⁵¹ In particular, the issue of limitation periods is not addressed, probably due to the fact that terrorism offences do not necessarily affect minors.

⁶⁵² Article 19 (2) of Directive...

as soon as possible in accordance with national law to the law enforcement authorities of another Member State upon request or spontaneously where it could be useful for the prevention, detection, investigation and prosecution of terrorist offences in that Member State. However, the effectiveness of this duty is significantly affected by the provision of three ground of refusal of a possibly very wide application: the sharing of the information may be refused when it would jeopardize current investigations or the safety of an individual or would be contrary to essential interest of security.

6. Procedural requirements concerning effective criminal proceedings in EU law

After having discussed the existence in EU law of positive duties to effectively investigate and punish human rights offences but also, more generally, infringements of EU legislation, the present section will assess whether in the EU legal framework there are provisions bearing on national criminal procedures that, although being of more general application and not having any particular link with the duties to punish examined previously, nevertheless pursue the same objective of ensuring the effectiveness of criminal proceedings. In particular, the main focus will be on those specific aspects that have been identified as minimum requirements of effectiveness in the ECtHR case-law on the right to effective criminal investigations in order to assess whether EU law has assimilated those standards and whether it even provides for higher ones. If this was the case, the implication that would follow is that the requirements of effectiveness of criminal investigations developed by the ECtHR would acquire more strength thanks to the peculiar characteristics of EU law.

A. Rights of victims of crime in criminal proceedings

Following the entry into force of the Treaty of Lisbon, Article 82 TFUE confers to the EU formal competence to legislate in criminal procedural law. In particular, Article 82(2) TFUE envisages the possibility for the adoption of directives in order to establish minimum rules in specific fields, among which appear the rights of victims of crime⁶⁵³.

⁶⁵³ Article 82 (2) TFUE reads: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They

The most prominent legal instrument adopted in this field is Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and repealing Council Framework Decision 2001/220/JHA (“Victims Directive”). Such directive represents a “Bill of rights” of victims at European level, as it sets out a horizontal framework for addressing the needs of all victims of crime, irrespective of the type of crime or the circumstances or place in which it was committed⁶⁵⁴. Nonetheless, special provisions dedicated only to victims of specific crimes still exists in other legal instruments, such as the Trafficking and the Child Abuse Directive.

Despite the integrated approach adopted by the Victims Directive, aimed at improving the position of victims of crime in general and thus pursuing a twofold objective of ensuring both the support, information and protection of victims even outside criminal proceedings and their participation in criminal proceedings⁶⁵⁵, account will be given here only of those provisions relevant to procedural criminal law, namely on the information, protection and participation rights conferred to victims of crime during the criminal investigation phase. Such rights can indeed be compared to the ECtHR’s jurisprudence on the involvement of victims in criminal investigations on serious human rights violations, primarily because these from a temporal perspective become applicable from the moment when a complaint is brought or from the moment when the authorities initiate criminal investigations on their own motion⁶⁵⁶.

The rights established by the Victims Directive can be distinguished into the right to information, to interpretation, to legal assistance, to provide evidence and to be heard, and the right to a judicial review of a decision not to prosecute.

shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals”.

⁶⁵⁴ A. KLIP, *European Criminal Law*, cit., p. 333, however, notes that the need for victim’s rights in criminal proceedings is regarded as self-evident in the Directive for no explanation or rationale is given for such rights apart from it being a Union priority.

⁶⁵⁵ See, S. ALLEGREZZA, *Il ruolo della vittima nella direttiva 2012/29/EU*, in L. LUPARIA (ed.), *Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell’Unione e buone pratiche nazionali*, Wolters Kluwer, 2015, p. 5.

⁶⁵⁶ Recital 22 of Directive 2012/29/EU. The pre-trial phase is clearly the most delicate from a victim’s perspective and thus it is highly significative that the rights conferred by the Victims Directive are applicable to that phase, see S. ALLEGREZZA, *Il ruolo della vittima nella direttiva 2012/29/EU*, cit., p. 6; H. BELLUTA, *Participation of the victim in criminal investigations: the right to receive information and to investigate*, in *dirittopenalecontemporaneo.it*, 16 November 2015, p. 2.

i. The right to information

The right to information and to understand and be understood is an essential prerequisite for the effective exercise of any other right of participation or protection, as conscious decisions may be taken only when one is properly aware of the existing possibilities. Therefore, victim's information rights in the investigations phase are numerous and very detailed, as the Directive specifically sets both the timing, modalities and content of the requisite information.

Article 4 imposes a positive obligation to provide information to victims about their rights, requiring the criminal justice authorities to give extensive information proactively *ex officio* and without undue delay from their first contact with the victim. In particular, as regards specifically criminal justice, victims should be informed of: the procedures for making complaints with regard to a criminal offence; the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures; how and under what conditions they can obtain protection, including protection measures; how and under what conditions they can access legal advice, legal aid and any other sort of advice; how and under what conditions they can access compensation; how and under what conditions they are entitled to interpretation and translation; if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made; the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings; the contact details for communications about their case; the available restorative justice services; how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed. Finally they should also be informed without delay of their right to receive sufficient information in order to decide whether to seek review of a decision not to prosecute⁶⁵⁷.

Beside these general information, that are due in any case of contact between the victims and the criminal enforcement authorities, Article 5 establishes that where a formal complaint of an offence having been committed is brought to the competent authorities, the victims are also to be provided with a written acknowledgment of the formal complaint brought them, stating also the basic elements of the criminal offence concerned, such as the type of crime, the time and place, and any damage or harm caused by the crime, in order for them to be able to prove the crime has been actually reported⁶⁵⁸.

Furthermore, Article 6 confers to victims the right to be afforded information and updates

⁶⁵⁷ See Article 11 (3) of Directive 2012/29/EU.

⁶⁵⁸ See Recital 24 of Directive 2012/29/EU.

about the progress of their case, during the investigation stage and until the conclusion of the proceedings. It is stated that in all Member States, upon request of the victim, information must be given regarding any decision to end an investigation or not to prosecute along with the reasons for it or, in the alternative, the time and place of the trial and the nature of the charges brought against the offender, as well of the subsequent appeal proceedings⁶⁵⁹. Moreover, only in those Member States where the victim has a role in criminal proceedings then additional information should also be provided upon its request. In particular, they should be made aware of any final judgment in the trial, together with the reasons on which it is based, and of all other information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification⁶⁶⁰.

It appears, indeed, that the right of victims to be informed of the progress of the criminal proceedings suffers from an important limit, as Member States should not be obliged to provide information where disclosure of that information could affect the proper handling of a case or harm a given case or person, or also if they consider it contrary to the essential interests of their security⁶⁶¹.

Special attention is dedicated also to the evolution of detention measures against the offender and its *status libertatis*⁶⁶²: always upon request, victims are indeed offered the opportunity to be notified, without unnecessary delay, when the offender is released from or has escaped detention at least where there might be a danger of harm to the victim, flowing from the seriousness of the crime or the risk of retaliation. Only where there is an identified risk of harm to the offender which would result from the notification, such information could be refused, but only following a global assessment by the competent authority of all the circumstances of the case in order to adopt the most appropriate action⁶⁶³.

⁶⁵⁹ See Recital 31 of Directive 2012/29/EU.

⁶⁶⁰ The extent of information due to victims thus will vary widely depending on whether, in the national systems, these are regarded as parties to the proceedings or as mere witnesses, see H. BELLUTA, *Participation of the victim in criminal investigations: the right to receive information and to investigate*, cit., p. 4.

⁶⁶¹ See Recital 32 of Directive 2012/29/EU. G. ALVARO, A. D'ANDREA, *The impact of Directive 2012/29/EU on the Italian system for protecting victims of crime in criminal proceedings*, in S. RUGGERI (ed.), *Human Rights in European Criminal Law*, Springer, 2015, p. 312 highlight the need to balance the right to information against the investigative requirements for confidentiality especially during the preliminary investigation stage.

⁶⁶² See Article 6 (5) and (6) of Directive 2012/29/EU. See, H. BELLUTA, *Participation of the victim in criminal investigations: the right to receive information and to investigate*, cit., p. 4, remarking that in this case information to the victim is not functional to its participation to the proceedings, but rather to its protection.

⁶⁶³ See Recital 32 of Directive 2012/29/EU.

ii. The right to interpretation and translation

In order to ensure the effective information and participation of victims who do not understand the language of the criminal proceedings⁶⁶⁴, the Directive grants them, but only upon their request, a limited right to interpretation and translation⁶⁶⁵.

Firstly, pursuant to Article 5(2) of the Directive, such victims are enabled to submit the formal complaint to the competent authorities with regard to a criminal offence in a language they understand or by receiving the requisite linguistic assistance.

Secondly, under Article 7(1) of the Directive, those victims have a right to free interpretation at least during their interviews or questionings by police or judicial authorities and when it is necessary for their active participation in court hearing and to exercise their rights, according to the role granted to victims in national criminal procedure⁶⁶⁶.

As to the right of translation, under Article 7(3) and (4) this is confined to the translation of «information essential to the exercise of their rights in criminal proceedings», a notion which should include at least the decision concluding the proceedings and its reasons as well as the information regarding the time and place of the trial. However, victims may also submit a reasoned request to consider a document as essential for the purposes of its translation. In such cases, however, an oral translation or even an oral summary of the documents is deemed to be sufficient, provided that it does not prejudice the fairness of the proceedings.

iii. The right to legal aid

As to the possibility of access to a lawyer, the Victims Directive does not confer a general right to legal representation and assistance during criminal proceedings to all victims of crime. To the contrary, Article 13 lays down an obligation to grant legal aid, to be interpreted as including at least legal representation and legal advice free of charge⁶⁶⁷, only to victims that already have the status of parties to criminal proceedings and in accordance to the conditions and procedural rules determined by national law.

A very similar, though partly more generous, solution is adopted also in the Trafficking Directive and in the Child Abuse Directive, where it is expressly stated that Member States shall ensure that victims have access without delay to legal counselling and, in accordance

⁶⁶⁴ Pursuant to Article 7 (7) it is for the competent authority to assess whether the victim needs interpretation and translation, but victims should be entitled to challenge a decision refusing them such service, in accordance with the national rules.

⁶⁶⁵ See, L. LUPARIA, *Vittime dei reati e diritto all'assistenza linguistica*, in C. FALBO, M. VIEZZI (eds.), *Traduzione e interpretazione per la società e le istituzioni*, 2014, p. 97.

⁶⁶⁶ See Recital 34 of Directive 2012/29/EU.

⁶⁶⁷ See, DG Justice Guidance Document on Directive 2012/29/EU of December 2013 (http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf), p. 34.

with their role in the national justice system, to legal representation which representation shall be free of charge where the victim does not have sufficient financial resources⁶⁶⁸.

Nothing precludes the possibility, however, for Member States to ensure a higher level of protection than that and extend access to legal aid also to victims that do not have such a role in criminal proceedings.

iv. *The right to provide evidence and to be heard*

With regards to the actual participation in the proceedings, the Victims Directive appears to underpin, although in cautious terms, a right of victims to investigate⁶⁶⁹. Indeed, Article 10 establishes both the right of victims to be heard and to provide evidence. Admittedly, testimony is clearly the most important piece of evidence that a victim may offer, but not necessarily the only one.

The procedural rules under which such rights are to be exercised are however left to national laws. Thus, the scope of this right may vary significantly among Member States: it may range from very basic rights to communicate with and supply evidence to a competent authority to more extensive ones such as a right to have evidence taken into account or the right to give evidence during the trial⁶⁷⁰. However, at least for the right to be heard, it is arguable that the latter standard applies, as it has been found by the Court already before the entry into force of the Victims Directive that «it must be made possible for the victim to be permitted to give testimony which can be taken into account as evidence⁶⁷¹». In this logic of respecting the procedural autonomy of Member States, the Directive does not specify neither in which stage of the criminal proceedings these rights should be ensured, if during the investigation, at trial or in both phases, nor before which authority, whether judicial or not, nor the modalities according to which they are to be exercised⁶⁷². The only indication in this regard is provided by Recital 41, which explains that the right of victims to be heard should be considered fulfilled where they are permitted to make statements or explanations in writing. This suggests, therefore, that there is no right to an oral hearing under the Directive's provisions⁶⁷³.

⁶⁶⁸ Article 12 (2) of Trafficking Directive and Article 20(2) Child Abuse Directive.

⁶⁶⁹ In this sense also, H. BELLUTA, *Participation of the victim in criminal investigations: the right to receive information and to investigate*, cit., p. 5.

⁶⁷⁰ See also, DG Justice Guidance Document on Directive 2012/29/EU of December 2013, cit., p. 29.

⁶⁷¹ See, CJEU, Case C-404/07 Katz, 9 October 2008, interpreting the corresponding provisions of Framework Decision 2001/220/JHA.

⁶⁷² In this sense also, S. ALLEGREZZA, *Il ruolo della vittima nella direttiva 2012/29/EU*, cit., p. 14.

⁶⁷³ In this sense also, S. PEERS, *EU Justice and Home Affairs Law, Volume II: EU Criminal law, policing, and civil law*, Oxford University Press, 2016, p. ??

The hearing of the victim within criminal proceedings, while being an important form of participation in them as a means of providing evidence, at the same time also gives rise to a need of protection, in order to avoid it becoming the source of further harm. This explains not only why it is established that victims should be able to renounce to be heard, but also the provision of particular measures of protection in the Directive. In this connection, Article 20 seeks to prevent secondary victimization by establishing that, without prejudice to the rights of the defence, victims should be interviewed as early as possible during criminal investigations, while restricting the number of interviews to the minimum necessary and with the assistance of their legal representative or a person of their choice. By the same token, medical examinations of victims should also be kept to a minimum and carried out only when strictly necessary.

Moreover, according to Article 21, further specific protection measures are in principle to be adopted for the hearing of victims «with specific protection needs» due to their particular vulnerability to secondary and repeat victimisation, intimidation, and retaliation⁶⁷⁴. As to the investigation phase, these measures include the carrying out of the interview in *ad hoc* premises through specifically trained professionals and possibly by the same person. As to the trial phase, it is foreseen that in such cases visual contact between the victim and the offender should be avoided during the giving of evidence also by using appropriate means of communication technologies, which should be used also to ensure the possibility of hearing the victim without her presence in the courtrooms. Also, measures should be taken to allow a hearing without the presence of the public and to ensure that unnecessary questioning concerning the private life of the victim not related to the criminal offence is avoided.

In addition to such specific measures of protection, where the victim is a child, to whom a presumption of specific protection needs applies⁶⁷⁵, Article 24 provides that in the investigation phase all interviews may be audio visually recorded in accordance to national procedures in order for such recordings to be used as evidence at trial.

Very similar protection measures to be granted to victims in order to prevent their further victimization when being heard within criminal proceedings are provided by also in the Trafficking Directive and the Child Abuse Directive⁶⁷⁶.

⁶⁷⁴ In order to identify the specific protection needs of victims in criminal proceedings, national authorities should proceed to an individual assessment taking into account the personal characteristics of the victim, the nature and circumstances of the crime, pursuant to Article 22 of the Directive.

⁶⁷⁵ Article 22 (4) of of Directive 2012/29/EU.

⁶⁷⁶ See Article 12 (4) and 15 of the Trafficking Directive and Article 20 (3) of the Child Abuse Directive.

v. The right to a review of a decision not to prosecute

Finally, Article 11 provides for the right of victims to a review of a decision not to prosecute, which is defined as any decision ending criminal proceedings by which a prosecutor, investigating judge or other law enforcement authority to the exclusion of courts decides to withdraw the charges or to discontinue the proceedings⁶⁷⁷, apart from decisions resulting in an out-of-court settlement imposing a warning or an obligation⁶⁷⁸.

Such right, however, is not absolute but, in those national criminal justice systems where the role of victims is established only after a decision to prosecute has been taken, only the victims of «serious crimes» are entitled to it. In any case, the procedural rules according to which the right to review is to be exercised are left to national laws, the only exception being that review should be carried out by a different person or authority from the one who took the impugned decision, unless this was the highest prosecuting authority then it is enough if the same authority reviews the decision⁶⁷⁹.

Furthermore, in order for the right to review to be effective it is also established that victims have the right to receive, upon request, sufficient information in order to be able to decide whether to seek review of a decision not to prosecute. In this connection, it seems that the mere notification to the victims of the decision not to prosecute is not sufficient to fulfil such obligation, which to the contrary implies also granting victims access to the case file. Admittedly, the notification of the decision not to prosecute is already ensured by another provision of the Directive, namely Article 4, and if this obligation were to be interpreted in such narrow sense it would be deprived of any independent scope and, therefore, of any practical effect⁶⁸⁰, as in order to effectively challenge a decision it is necessary to be acquainted with the materials of the case on which it is based.

The importance of this new right⁶⁸¹ of review as a mechanism to supervise the work of a potentially inactive prosecutor⁶⁸² is apparent if one considers that its purpose is to enable the victim to verify that national rules on criminal investigations have been complied with

⁶⁷⁷ Recitals 43 and 44 of Directive 2012/29/EU.

⁶⁷⁸ Recital 45 of Directive 2012/29/EU.

⁶⁷⁹ Recital 43 of Directive 2012/29/EU.

⁶⁸⁰ See, *mutatis mutandis*, CJEU, Case C-241/15 Bob Dogy, 1 June 2016, § 47 concerning the interpretation of Article 8 (1)(c) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

⁶⁸¹ S. PEERS, *EU Justice and Home Affairs Law, Volume II: EU Criminal law, policing, and civil law*, cit., p. ??, observes that the right to a review, unlike many other rights discussed above, has been introduced for the first time in Directive 29/2012/EU, as it was not provided under the old Framework Decision 2011/220/JHA on the standing of victims in criminal proceedings.

⁶⁸² In this sense, A. NOVOKMET, *The right of a victim to a review of a decision not to prosecute as set out in Article 11 of Directive 29/2012/EU and an assessment of its transposition in Germany, Italy, France, and Croatia*, in *Utrecht Law Review*, 2016, 12, p. 87, who observes that although being motivated primarily by private interests, victims seeking review of a decision not to prosecute also realize the public interest in prosecuting the perpetrator of an offence.

and that a correct decision has been made, so that any discretion is exercised in accordance with the law⁶⁸³. However, a number of crucial issues remain open to question and limit the impact of such a breakthrough.

Firstly, as to the scope of the right, it is not clear what are the «serious crimes» for which the right to a review is to be always provided, and if that is to be regarded as an autonomous notion of EU law or may be defined by the different Member States⁶⁸⁴. In any case, it is arguable that at least the so-called “Eurocrimes” listed in Article 83 (1) TFUE and defined by that provision as «particularly serious crimes» should be included in that notion⁶⁸⁵.

Secondly, the scope of the review is not defined and arguably it is a choice left to national rules. Therefore, it might be that a review limited to issues of legality and not also on the merits would suffice⁶⁸⁶.

Lastly, the authority that should be in charge of the review is also not defined by the Directive. As a consequence, Member States could legitimately implement such right by providing for a mere review by a higher prosecuting authority rather than a judge or a court, as long as it meets the necessary requirements of objectivity and impartiality inherent in the concept of review⁶⁸⁷.

vi. Assessment of the Victims Directive in the light of the ECHR case-law

It is definitely a venture to draw a comparison between the rights guaranteed to victims in criminal investigation by the Court under its case-law on the procedural obligation to investigate and punish serious human rights violations and those conferred by the Victims Directive, given the obvious differences existing in their scope and nature. While the EU instrument contains very detailed provisions and confers specific rights, the Court adopts a less formalistic approach, whereby what is determinative is the effectiveness of the overall

⁶⁸³ In this sense, R. LETSCHERT, C. RIJKEN, *Rights of victims of crime: tensions between an integrated approach and a limited legal basis for harmonisation*, cit., p. 246.

⁶⁸⁴ According to DG Justice Guidance Document on Directive 2012/29/EU of December 2013, cit., p. 36, EU criminal law legislation and international criminal justice standards should be taken into consideration when interpreting such notion at national level.

⁶⁸⁵ Among EU secondary legislation, however, other lists of serious crimes are to be found so that it cannot be concluded that it exists a single and uniform EU notion of serious crimes (see, for instance, Article 3 (9) of Directive 2016/681/EU on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorism or serious crime, Article 3 (4) of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Article 3 (1) of Regulation 2016/794 on Europol).

⁶⁸⁶ Of the opposite view, G. ALVARO, A. D’ANDREA, *The impact of Directive 2012/29/EU on the Italian system for protecting victims of crime in criminal proceedings*, cit., p. 313, for whom a right to review refers to «a procedure designed to reevaluate the facts and legal grounds that led to the decision».

⁶⁸⁷ In this sense also, A. NOVOKMET, *The right of a victim to a review of a decision not to prosecute as set out in Article 11 of Directive 29/2012/EU*, cit., p. 91.

involvement of the victim during the proceedings as a whole and not the single different rights of information and involvement that may have been accorded or not. Moreover, the Court's case-law is applicable only to victims of certain serious human rights offences, whereas the Directive confers rights to all victims of crime.

Nevertheless, it seems that the provisions of the Victims Directive are substantially based on the same requirements of victim's involvement in criminal proceedings developed under the procedural obligation to investigate previously discussed. Indeed, all the rights pointed out by the Court are guaranteed also by the Directive, and, what is more, to a nearly equivalent extent.

This holds true, firstly, in respect of the right to information, the only difference being that the Directive ensures a higher protection by providing also for the right of victims to be informed under specific circumstances of the release from detention of the accused, which has been expressly ruled out by the Court⁶⁸⁸, and the right conferred only to victims that according to national laws have a role in criminal proceedings to be informed of the judgment against the defendant together with the reasons supporting it.

Likewise, the right to legal aid has a very limited scope of application both under the Directive and the Court's case-law.

As to the right to provide evidence, both sources place it under wide limitations. Yet, an arguably higher protection is granted under the procedural obligations to investigate, in that thereby the authorities have a duty to address the victim's request and give reasons for their refusal to allow them. In the Directive, instead, the issue is left to the national laws of the Member States. The same holds true for the right of victims to be heard, where the Court has stressed the importance of carrying out such activity as soon as possible already in the investigation stage, whereas the Directive leaves the choice to domestic rules. Also in this regard, however, the two sources require the adoption of protection measures for the hearing of the victim that largely overlap.

The Victims Directive, nevertheless, seems to go further than the Court's case-law on the involvement of victims in criminal proceedings on serious human rights violations in that it also ensures additional rights that the former has not considered or even expressly excluded, such as the right to interpretation and translation and the right to review of a decision not to prosecute. In particular, the establishment of such last right in EU legislation, which is guaranteed in absolute terms when «serious crimes» are involved, is very significant since the Court, quite interestingly after the adoption of the Directive, has ruled out the existence of a right to a judicial review of a decision not to prosecute under the procedural obligations to investigate based on the assumption that the practices of State parties in this regard are very different⁶⁸⁹.

⁶⁸⁸ See supra ...

⁶⁸⁹ See *supra*..

In sum, notwithstanding the slight differences between the two sources, similar conclusions have in substance been reached at the ECHR and EU level. Through the acknowledgment of information and participation rights, they both converge to a rediscovery and valorisation of the role of victims in criminal proceedings.

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