

# Driving Forward Justice

Victims of Serious International Crimes in the EU

October 2014



**REDRESS**

Ending Torture, Seeking Justice for Survivors

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# **Driving Forward Justice: Victims of Serious International Crimes in the EU**

**October 2014**



**Realised with the financial support of the  
Criminal Justice Program of the European Union**

*Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings.*

DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, Article 1(1):  
Objectives

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## Introduction

Concerns over impunity and safe havens have led to increased efforts, in Europe and elsewhere, to strengthen systems to hold to account those accused of serious international crimes including genocide, crimes against humanity, war crimes, torture and enforced disappearance. As states have begun to incorporate serious international crimes into their domestic criminal laws, and strengthened their capacity to investigate and prosecute these crimes, the number of investigations and prosecutions of these acts has slowly increased. This is a positive development, and a sign that countries are slowly committing to the goal of ending impunity. However, this developing practice has not been matched by the effective exercise of victims' rights in these proceedings.

Victims of crime are entitled to be treated with dignity and respect, to have access to justice and to obtain reparation.<sup>1</sup> They have a right to be protected from reprisals, to receive information about the progress of cases that concern them and to engage with the legal process. Despite these rights, all victims – regardless of the type of crime they were subjected to - face serious hurdles to exercise their rights. These hurdles, steep as they already are, are accentuated for victims of serious international crimes. Many of those who fall within this category suffer from severe trauma, face stigmatisation in their communities, may not speak the language of the country where the investigation is taking place, frequently preventing them from accessing information about their rights, filing complaints and triggering investigations. To date, few of these victims have been able to play an active role in criminal proceedings particularly when they take place abroad; even fewer have succeeded in obtaining compensation or other forms of reparation. Overall, victims of serious international crimes have been largely excluded from the frameworks and mechanisms developed for victims of domestic offences.

At the same time, national authorities in European Union (EU) Member States tasked with investigating and prosecuting serious international crimes have faced difficulties accessing victims and potential witnesses living in EU Member States and abroad. Unsurprisingly, this limits the authorities' ability to make progress with investigations and prosecutions. Encouraging and assisting victims to come forward and participate in criminal proceedings would, therefore, improve the prospects for successful law enforcement responses to serious international crimes, as well as ultimately enhance victims' ability to access justice.

The EU first identified victims' rights as a priority for the field of Justice and Home Affairs (JHA) in 1999, leading to the adoption of the 2001 Framework Decision on the status of victims in criminal proceedings ('2001 Framework Decision').<sup>2</sup> However, transposal of this Decision into national law was weak, and victims were often unable to enforce their rights at the national level.<sup>3</sup> The Stockholm Programme and its Action Plan identified the need to further strengthen victims' rights as a matter of priority.<sup>4</sup> Accordingly, the EC developed proposals for a new

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<sup>1</sup> See for example UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN G.A. Res. A/RES/40/34, 29 November 1985 ('UN Victims' Declaration') and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN G.A. Res. 60/147, 16 December 2005 ('UN Basic Principles and Guidelines').

<sup>2</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings ("2001 Framework Decision").

<sup>3</sup> EC, Report on implementation of the 2001 Framework Decision, COM(2009) 166, 20 April 2009, p. 9. See also, Marc Groenhuijsen and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?' *European Journal of Crime, Criminal Law and Criminal Justice* 17 (2009) 43-59, pp. 47-48.

<sup>4</sup> *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, C 115, 4 May 2010, Section 2.3.4, 'Victims of crime, including terrorism'; EC, *Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, 20 April 2010.

Directive for victims of crime which were published in 2011. Using the strengthened powers available under the Lisbon Treaty, these proposals were adopted by co-decision between the European Parliament and the Council in October 2012. This allowed for the inclusion of more detailed and ambitious rules than were previously contained in the 2001 Framework Decision.<sup>5</sup>

The new EU Directive on minimum standards for the rights, support and protection of victims of crime ('the 2012 Directive' or 'the Directive'),<sup>6</sup> will help entrench these rights across the region. The coming into force of the 2012 Directive is an important opportunity to address these challenges. Member States must transpose the Directive standards into national law by 16 November 2015.<sup>7</sup> After this date, victims will be able to rely upon them within national legal systems for the first time. Member States enjoy discretion on the best manner and form of transposition within their respective legal systems, but whatever method is used, it must be effective in ensuring that victims can enforce their rights in full.<sup>8</sup> Also, the Commission and Member States will be able to bring infringement proceedings against any Member State which does not adequately implement the Directive into national law.<sup>9</sup> The Directive will also be subject to judicial review by the Court of Justice of the European Union (CJEU).<sup>10</sup> Significantly, as Directives have direct effect in EU law, victims will be able to invoke their rights before national courts even where States have failed to adequately transpose the Directive.<sup>11</sup>

The 2012 Directive does not explicitly address the situation of victims of serious international crimes as a separate category of crime victims. Nonetheless, such victims do fall within the scope of the Directive. This Report explains precisely how the Directive applies to victims of serious international crimes, in light of the wording of the Directive itself, and taking into account States' pre-existing obligations towards victims under international and human rights law.

The Report is based on research conducted between January 2013 and August 2014 with a range of stakeholders and practitioners, including national authorities such as police, prosecutors, and immigration officials; representatives of national Ministries of Justice and Foreign Affairs as well as EU institutions; civil society, academia and lawyers; and psychologists, counsellors and clinical experts specialised in assisting survivors of trauma. Research included personal interviews with these stakeholders conducted by REDRESS in Belgium, France, Germany, the Netherlands and the UK,<sup>12</sup> and draws on roundtable discussions, exchange of experiences and expert presentations during a number of events hosted by REDRESS and its partners in the margins of a two-year project financed by the European Union. These included an expert strategy meeting in London in February 2013; a seminar for practitioners and experts on the identification of victims and witnesses held in The Hague in October 2013 with the support of the EU Genocide Network Secretariat and a conference on the rights of victims in national criminal justice systems in Brussels in March 2014 which was attended by participants

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<sup>5</sup> Steve Peers, *Guidelines for transposition: the EU Directive on Victims' Rights and homophobic and transphobic crime victims*, ILGA-Europe, December 2013, pp. 3-4.

<sup>6</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ('the 2012 Directive').

<sup>7</sup> Article 27(1) of the 2012 Directive.

<sup>8</sup> EC Directorate Justice, Guidance Document related to the transposition and implementation of [the 2012 Directive], December 2013, pp. 4-6 ('EC Guidance Document'), available at:

[http://ec.europa.eu/justice/criminal/files/victims/guidance\\_victims\\_rights\\_directive\\_en.pdf](http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf).

<sup>9</sup> Articles 258-259, Treaty on the Functioning of the European Union ('TFEU'), 2012/C 326/01, 1 December 2009.

<sup>10</sup> Article 260, TFEU. See EC, *Communication on Implementation of Article 260(3) TFEU*, SEC(2010) 1371 final, 11 November 2010; Michael Kaeding and Friederike Voskamp, 'Better Implementation of EU Legislation is not just a question of taking Member States to Court', *European Institute of Public Administration* (2011), pp. 4-5.

<sup>11</sup> See Case 41/74 *Van Duyn v Home Office*, [1975] Ch 358 ECJ, para. 12.

<sup>12</sup> Research was also carried out in Hungary as one of the newer Member States where victims of serious international crimes have sought refuge.



from more than 21 countries. A number of victims were also interviewed for this Report and participated in the Brussels conference in March 2014.

The Report also draws on the experiences of REDRESS, the European Centre for Constitutional and Human Rights (ECCHR), the International Federation for Human Rights (FIDH) and TRIAL (Track Impunity Always) in working to realise victims' rights in a variety of serious international crimes cases in Europe.

The Report was researched and written by Tara O'Leary of REDRESS. We are grateful to Marios Kontos, Jeanie Kelly, Shakeel Quader, Nahir De La Silva Genes, Giada Trucco, Inga Matthes, Manveer Bhullar and Daniel Cavanillas who assisted with the research and to all those who gave their valuable time throughout the consultations. We are grateful for the support of the Criminal Justice Program of the European Union for supporting this work.



# Part I: Victims of serious international crimes in the EU

## Chapter 1: The situation of victims of serious international crimes in the EU

### A. Victims of serious international crimes within EU Member States

Thousands of persons who have experienced, suffered or witnessed serious international crimes in various parts of the world are already living within the EU. Large numbers of such persons regularly arrive in the EU from areas affected by conflict and serious human rights violations. Some 50,000 persons from Syria sought international protection within EU Member States in 2013, and Germany alone has offered to resettle 10,000 Syrian refugees in 2014. Significant numbers of asylum seekers also arrived from Afghanistan, the Democratic Republic of the Congo, Iraq, Pakistan, Somalia, Sri Lanka and elsewhere.<sup>13</sup> Victims may also enter the EU through other immigration channels, for example if they hold dual citizenship, obtain work or study permits, or if they are admitted to family reunification programmes. Germany, for example, has already issued 5,500 visas to Syrian nationals who have relatives within the country.<sup>14</sup> These new arrivals join tens of thousands of similar immigrants who arrived during earlier waves of migration, and who have subsequently established substantial diaspora communities in EU Member States. These include political exiles, refugees and economic migrants from regions as diverse as Vietnam, Pakistan, and Bangladesh in the 1960s and 70s; Chile and other Latin American states affected by military juntas in the 1970s and 80s; as well as the countries of the former Yugoslavia, the Maghreb, Russia (Chechnya), Rwanda, Sierra Leone, Afghanistan, Sri Lanka and other States in the 1990s.<sup>15</sup>

Victimisation is not confined to those who arrive in Europe: tens of thousands of EU citizens have themselves survived serious international crimes. This includes victims of crimes committed during or immediately after World War II;<sup>16</sup> under the former dictatorships of Spain, Greece and Portugal;<sup>17</sup> in regards to the 'Troubles' in Northern Ireland; in the jails and prison camps of communist regimes in Romania, Hungary, Czechoslovakia, the German Democratic Republic and the Baltic states among others;<sup>18</sup> and during the 1990s conflicts in the former Yugoslavia. Many other EU citizens have suffered torture or ill-treatment more recently, in police custody, prison or immigration detention within Member States or while living or travelling abroad.<sup>19</sup>

Member States may also be responsible for serious international crimes which have been committed by state actors abroad, particularly in the context of military operations and occupations. Although the victims of these crimes may not be located within EU territory, their

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<sup>13</sup> Eurostat, *Asylum in the EU 28 - Large increase to almost 435 000 asylum applicants registered in the EU28 in 2013*, Press Release of 24 March 2014. In 2012, 28,000 persons from Afghanistan and 24,110 persons from Syria sought international protection in the EU; European Asylum Support Office (EASO), *Annual Report on the Situation of Asylum in the EU 2012*, 8 July 2013.

<sup>14</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR welcomes Germany's decision to extend humanitarian admission programme to an additional 10,000 Syrian refugees*, Press Release of 13 June 2014.

<sup>15</sup> See for example 'Diasporas: A World of Exiles', *The Economist*, 2 January 2003.

<sup>16</sup> Criminal justice authorities of a number of Member States are still engaged in the investigation and prosecution of World War II-era crimes. For example, German authorities are currently conducting a systematic review of case files for all known alleged former guards from Auschwitz-Birkenau, Majdanek and other concentration camps. David Rising, 'German probe finds 20 former death camp guards', *Associated Press*, 20 May 2014.

<sup>17</sup> See for example James Badcock, 'UN Tells Spanish Government it Must Atone for Franco's Crimes', *Newsweek*, 21 August 2014.

<sup>18</sup> See for example Tamás Hoffman, 'Trying Communism through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials' in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013).

<sup>19</sup> See for example REDRESS, *Tortured Abroad: The UK's Obligations to British Nationals and Residents*, September 2012.

right to access justice within the courts and legal systems of Member States has been recognised by human rights courts.<sup>20</sup>

Just like the victims of ordinary criminal offences who will benefit from the 2012 Directive, victims of serious international crimes come from a broad spectrum of circumstances. Some victims are human rights defenders, political exiles or highly-educated professionals and business persons who may have been targeted precisely because of their status. Others may come from or find themselves in situations of extreme poverty; are vulnerable due to discrimination, social and economic marginalisation, illiteracy or other factors. Survivors frequently suffer from language barriers and other practical obstacles which impede their ability to access assistance and support services. Regardless of their backgrounds, many of these will suffer from trauma and related sequelae and may feel shame or humiliation about what has happened to them; victims may worry that no one will believe them if they complain. For those who are newcomers to the EU, challenges to their credibility in the asylum seeking process frequently underscore such worries. Their reluctance to engage with criminal justice authorities may also be fuelled by what are often well-founded fears, particularly of reprisals for themselves and their family members. Victims may worry about the impact of criminal complaints on their immigration status or about intimidation of family members living in the place where the crimes took place, where suspected perpetrators still wield power and influence. Despite this, most will share a wish for justice and accountability for the wrongs they have suffered.

But many of these characteristics - which are expressly recognised by the 2012 Directive as indicators of vulnerability<sup>21</sup> - negatively impact victims' ability to obtain information about opportunities to access justice, communicate with the authorities or engage with criminal justice processes for instance through filing complaints. This has left victims "experiencing [a] gap between entitlements and realities",<sup>22</sup> excluded from many of the mechanisms which are supposed to allow them to exercise and enforce their rights.

## **B. Victims of international crimes under the 2012 Directive**

Victims of serious international crimes fall within the scope of the 2012 Directive. The Directive's definition of 'victim' is sufficiently broad to include them and this interpretation is consistent with the fact that Directive rights will apply in certain circumstances to victims of crimes committed extraterritorially. This interpretation is further supported by a number of standards which Member States must consider when transposing and subsequently implementing the Directive into their national legal systems. In particular, Member States must have regard to the EU Charter when adopting national measures to implement EU law.<sup>23</sup> In addition, the CJEU increasingly relies upon the jurisprudence of the European Court of Human Rights (ECtHR) when interpreting EU instruments.<sup>24</sup> This is expected to assume additional significance when the EU

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<sup>20</sup> See ECtHR, *Al-Saadoon & Mufdhi v United Kingdom*, App. no. 61498/08, Judgment of 4 April 2010; *Al-Skeini and others v the United Kingdom*, App. No. 55721/07, 7 July 2011, para. 137. REDRESS and ECCHR, *Torture in Europe: The Law and Practice*, September 2012, pp. 13-14.

<sup>21</sup> See Article 22(1)-(3) and Recital 38 of the 2012 Directive.

<sup>22</sup> Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in the making* (Brill, 2009), 19-41, at p. 20.

<sup>23</sup> Article 51, Charter of Fundamental Rights of the European Union, 2000/C 364/01. The Charter applies to EU institutions, and to the Member States where national legislation falls within the scope of EU law: Case C-617/10 *Åkerberg Fransson*, Judgment of 26 February 2013, para. 21. The Charter became legally binding upon the entry into force of the Lisbon Treaty on 1 December 2009.

<sup>24</sup> See, e.g., Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 35: "Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration [...] from the guidelines supplied by international

completes its planned accession to the European Convention on Human Rights (ECHR). As a result, standards derived from international human rights law are being continually assimilated into EU law, so that victims' rights established in human rights law will become integrated into the EU's minimum standards in this field.

***(i) The definition of victim under the 2012 Directive***

**Article 2(a)(1):** a victim is a “natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by actors or omissions that are in violation of the criminal law of a Member State”.

This includes ‘indirect’ victims: 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 death.”

**Article 2(1)(b)** provides that family members include the spouse; a person living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis; the victims’ relatives in direct line; siblings; and dependents.

The Directive’s definition leaves it to national law to determine whether a person who has been subject to specific conduct will be classed as a victim, depending on whether the conduct is a ‘criminal offence’ under domestic law. As a result, a person’s status as victim may vary from one Member State to another.<sup>25</sup> Although most Member States have now taken steps to incorporate serious international crimes into their national criminal codes and established jurisdiction over them, there remain gaps. Some international criminal offences, such as torture and enforced disappearance, still have not been criminalised by all Member States.

The Directive underscores the importance of non-discrimination and prohibits any distinction among victims on the basis of their residence status within a Member State, citizenship or nationality.<sup>26</sup> Its provisions therefore apply without distinction to victims who are migrants, asylum seekers or refugees, and to those ordinarily resident in another EU Member State.<sup>27</sup>

***(ii) The application of the Directive to crimes committed extraterritorially***

**Recital 13 of the 2012 Directive** provides that it “applies in relation to criminal offences committed in the Union, and to criminal proceedings that take place in the Union. It confers rights on victims of extra-territorial offences only in relation to criminal proceedings that take place in the Union. Complaints made to competent authorities outside the Union, such as embassies do not trigger the obligations set out in this Directive”.

Recital 13 outlines how the 2012 Directive may have a jurisdictional reach outside the territory of the EU. National authorities have obligations towards victims of crimes which have been committed outside Europe – if those victims are participating in legal proceedings within a

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instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The [ECHR] has special significance in that respect.”

<sup>25</sup> EC Guidance Document, p. 7.

<sup>26</sup> Article 1 and Recitals 9 and 10 of the 2012 Directive.

<sup>27</sup> See Article 17 and Recitals 50-51 of the Directive.

Member State.<sup>28</sup> Based on recent practice, there are three main situations in which Directive rights will apply to victims of serious international crimes which took place outside of Europe:

- A. When the victims of a serious international crime reside within a Member State where the criminal proceedings take place. An example of this is the case of Adolfo Scilingo, who was convicted in Spain in 2005 of crimes against humanity and torture which were committed in Argentina in the 1970s and 80s. Some of the victims of his crimes were located in Spain or held Spanish nationality.<sup>29</sup>
- B. When the victims of a serious international crime reside within a Member State and criminal proceedings in relation to the crime take place within *another* Member State. An example of this is the prosecution of Joseph M, who was convicted on appeal in 2011 of crimes connected to the 1994 genocide in Rwanda, after a trial which took place in the Netherlands and involved victims living in Germany.<sup>30</sup>
- C. When the victims of a serious international crime are located *outside the EU* but take part in criminal proceedings within a Member State in relation to that crime. These victims sometimes travel to a Member State to give evidence during the investigation or trial. An example of this is the ongoing investigation into French corporation Amesys, which is accused of complicity in torture for supplying surveillance equipment to the Gaddafi regime in Libya. Victims living in Libya who are civil parties in the proceedings travelled to Paris and were heard by French investigating judges in 2013, to deliver their testimony and provide additional information.<sup>31</sup> This situation may arise even when Member States prosecute their own nationals for international crimes committed outside the EU. For example Iraqi victims and witnesses of torture and ill-treatment travelled to the UK to testify in the courts martial of seven British soldiers for crimes committed in Iraq in 2003, including the torture and unlawful killing of Baha Mousa.<sup>32</sup>

Victims in situation C have also participated in investigations or trials without leaving their countries of residence, providing evidence via video-link. Past examples have included victims testifying from the British Embassy in Kabul, Afghanistan;<sup>33</sup> from the eastern Democratic Republic of the Congo;<sup>34</sup> and during special court sessions held by a Finnish District Court in Rwanda and Tanzania while prosecuting a Rwandan genocide suspect.<sup>35</sup>

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<sup>28</sup> EC Guidance Document, pp. 7-8; see also Recital 51 of the 2012 Directive.

<sup>29</sup> See Richard J. Wilson, 'Argentine Military Officers Face Trial in Spanish Courts', *ASIL Insights*, American Society of International Law, December 2003.

<sup>30</sup> *Prosecutor v Joseph Mpambara*, Case No. 22-002613-09, Judgment of The Hague Court of Appeal, 7 July 2011; Case Nos. 09/750009-06 and 09/750007-07, Judgment of The Hague District Court, 23 March 2009.

<sup>31</sup> For more information see FIDH, *Looking back on the Amesys case*, May 2012, available at: <http://www.fidh.org/en/north-africa-middle-east/libya/Libya-Looking-back-on-the-Amesys>.

<sup>32</sup> *R v Payne and others*, 2007; see REDRESS, *UK Army in Iraq: Time to Come Clean on Civilian Torture*, October 2007.

<sup>33</sup> Faryadi Zardad was convicted in the UK of torture and hostage-taking committed in Afghanistan in the 1990s. Witnesses testified by video-link during a first trial which ended in a hung jury in 2004, and during a second trial which ended with his conviction in 2005. See REDRESS, *R v Zardad [Case Comment]*, 2005: <http://www.redress.org/downloads/news/Zardad%20Case%20Comment%2019%20July%202005.pdf>.

<sup>34</sup> The case of Ignace Murwanashyaka and Straton Musoni in Stuttgart, Germany on charges of crimes against humanity and war crimes, ongoing since May 2011. See ECCHR, *FDLR-Leadership Trial in Stuttgart*, Third Status Report of February 2014, p. 2, available at: <http://www.ecchr.de/index.php/kongo-war-crimes-trial.html>.

<sup>35</sup> *Francois Bazaramba*, Porvoo District Court (now District Court of Itä-Uusimaa), Case No. R 09/404, 11 June 2010. The judgment and press releases are available at: <http://www.internationalcrimesdatabase.org/Case/973>.

## Chapter 2: Efforts to combat impunity for international crimes in the EU

*...genocide, crimes against humanity and war crimes, must not go unpunished and [...] their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.*<sup>36</sup>

### A. Overview of current practice regarding the investigation and prosecution of international crimes in the EU

Most EU Member States have now taken steps to incorporate serious international crimes into their national criminal laws and to establish jurisdiction over such crimes. All Member States are party to the Rome Statute, and most had incorporated other international crimes into their national legal systems long before ratification of the Rome Statute. In some Member States, this codification has been matched with increased resources being dedicated to police, prosecutors and other authorities to ensure that these specialist investigations and prosecutions can occur.

#### *i) Investigations and prosecutions at the national level*

National authorities in at least 17 countries including Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden, the United Kingdom as well as Argentina, Canada, Norway, Senegal, South Africa, Switzerland and the United States of America (USA) outside the EU,<sup>37</sup> have initiated proceedings against suspects of war crimes, torture, crimes against humanity or genocide committed in other countries. Cases have been tried and reached a final verdict in at least 12 of these countries. Additional prosecutions and trials were underway in 2014, with at least two prosecutions currently scheduled to proceed to trial in 2015. These investigations and prosecutions concern crimes allegedly committed in an increasingly expanding number of countries.<sup>38</sup>

Several EU Member States have investigated and prosecuted serious international crimes committed within their own territory or by their own nationals. These concern World War II-era war crimes<sup>39</sup> and certain Communist-era crimes.<sup>40</sup> They also include courts martial for crimes committed by military while serving abroad, including unlawful killings, war crimes and torture committed against civilians and insurgents in Iraq and Afghanistan.<sup>41</sup>

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<sup>36</sup> Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, Recital 2.

<sup>37</sup> This survey includes formal investigations and prosecutions, based on monitoring of universal jurisdiction cases worldwide by REDRESS and its partner organisations since 2003.

<sup>38</sup> These countries include Afghanistan, Argentina, Chad, China and Tibet, the Republic of the Congo, DRC, El Salvador, Guatemala, Iraq, Liberia, Libya, Mauritania, Nepal, Paraguay, Rwanda, Russia (Chechnya), Sierra Leone, Spain, Sri Lanka, Syria, Tunisia, Uganda, USA, Western Sahara, Zimbabwe, the countries of the former Yugoslavia and (on charges of piracy) Somalia.

<sup>39</sup> See Centre of Human and Social Sciences, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States*, pp. 195-205, available at:

[http://ec.europa.eu/justice/fundamental-rights/files/totalitarian\\_regimes\\_final\\_study\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/totalitarian_regimes_final_study_en.pdf).

<sup>40</sup> *Vasiliauskas v. Lithuania*, App. no. 35343/05, heard before the Grand Chamber of ECtHR on 4 June 2014; 'Hungary 1956 revolt: Bela Biszku jailed for war crimes', *BBC News*, 13 May 2014; Andrew Higgins, 'In Trial, Romania Warily Revisits a Brutal Past', *New York Times*, 29 September 2013.

<sup>41</sup> See *R v Alexander Wayne Blackman, ex. Parte Secretary of State for Defence* [2014] EWCA Crim 1029, concerning the conviction of a Royal Marine Sergeant for murder in relation to the killing of a gravely wounded Taliban insurgent in Afghanistan. The judgment of the Court of Appeal refers to seven other prosecutions of 10 British, Canadian and US soldiers for violent crimes in Afghanistan, Iraq and Somalia; see paras. 56-61, judgment available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/r-v-sergeant-alexander-wayne-blackman.pdf>.

This developing practice illustrates that significant progress and achievements have been made in recent years in holding perpetrators of international crimes to account, with a growing body of case law and enhanced expertise and coordination among investigators and prosecutors. However, the statistics above cover only 'successful' cases which have resulted in the opening of investigations or prosecutions. It is therefore unknown how many victims filed 'unsuccessful' complaints which were dismissed or did not result in an investigation. Further, the EC has to date not evaluated the implementation of the 2003 Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes, which might have shed light on the extent to which Member States actively seek to investigate and prosecute serious international crimes.<sup>42</sup>

## **ii) National authorities responsible for investigation and prosecution of international crimes**

Confronting serious international crimes is already a reality for many Member States. The establishment by a number of countries of 'specialised units' to carry out investigations and/or prosecutions of such crimes has been crucial for the success of these efforts. These are units within immigration, police and/or prosecution services, designed to detect, investigate and/or prosecute individuals suspected of perpetrating serious international crimes. Set up partly in response to the numbers of suspected perpetrators with which national authorities have been confronted, these units recognise that a specialised approach is required in order to address these crimes effectively, similar to that deployed to address other complex crimes including terrorism or drug trafficking. The units concentrate expertise and allocation of resources, and as a result they are more likely to secure prosecutions. Between the late 1990s and 2010, 18 out of a total of 24 serious international crimes convictions involved investigations and prosecutions carried out by specialised units.<sup>43</sup>

Within the EU, specialised units have been established in Croatia, Belgium, France, Germany, the Netherlands, Sweden and (within the immigration authorities) the UK; they are also in place in Canada, Norway, Switzerland and the USA.<sup>44</sup> There are at least 36 investigations ongoing in France and 31 in Germany, while during 2012 Dutch authorities investigated 21 suspects; additional prosecutions and appeal proceedings were underway in these countries at the same time.<sup>45</sup> To date, specialised units in France, Belgium, Germany and the Netherlands have achieved convictions in at least 15 cases.<sup>46</sup>

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<sup>42</sup> In 2010 the EC was mandated to evaluate implementation of Council Decision 2003/335/JHA. See, EC, *Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, 20 April 2010, p. 10. The EC indicated in 2011 that it had begun preparing this report, and Member States filled out questionnaires on their implementation of both Council Decisions 2003/335/JHA and 2002/494/JHA. However no implementation report has subsequently been published. See REDRESS submission to EC, *Strengthening efforts to combat impunity within EU Member States for crimes under international law: renewed engagement in the field of Justice and Home Affairs*, December 2013, p. 4.

<sup>43</sup> REDRESS and FIDH, *The Practice of Specialised War Crimes Units: Strategies for the Effective Investigation and Prosecution of Serious International Crimes*, December 2010, ('The Practice of Specialised War Crimes Units'), p. 18.

<sup>44</sup> Based on monitoring by REDRESS and FIDH since 2003, and email correspondence or meetings with individual teams in 2013-2014. Specialised units also previously existed in Denmark and the UK. The Danish Specialised International Crimes Office (SICO) was established in 2002 and included police and prosecutors. In 2013 it was merged into a new team addressing serious international and economic crimes. In the UK, the Metropolitan Police Service had a specialised unit between 1991 and 1999 focused on World War II-era crimes. The unit was disbanded following the completion of investigations into 376 cases, which resulted in one conviction: that of Antony Sawoniuk in 1999 for the murder of Jews in Belarus in 1941-42. See <http://www.internationalcrimesdatabase.org/Case/744>; an international crimes unit continues to exist within the Home Office, identifying immigration and asylum applications made by suspected perpetrators of international crimes ('Article 1F cases').

<sup>45</sup> Ministry of Security and Justice of the Netherlands, *Rapportage brief Internationale Misdriften* ('Letter Reporting International Crimes'), 13 November 2013, p. 1-3; Interview with German federal public prosecutors, March 2014, and French prosecutors, May 2014; Email correspondence with German police, June 2014.

<sup>46</sup> REDRESS and FIDH, *The Practice of Specialised War Crimes Units*, p. 19. See also Andreas Schüller, 'The Role of National Investigations in the System of International Criminal Justice – Developments in Germany', *Security and Peace* 4 (2013) 226, p. 227, n. 9; Hilke Fischer, '14 year jail term in Germany's first Rwandan genocide trial', *Deutsche Welle*, 17 February 2014; FIDH and LDH, *Pascal Simbikangwa convicted of genocide and complicity in crimes against humanity*, Press Release of 17 March 2014. Details of all cases prosecuted by the Dutch specialised unit are available at [www.warcrimes.nl](http://www.warcrimes.nl).

Conversely, national authorities which do not have special units process fewer cases, and simply have less capacity to respond to victim complaints and conduct investigations. For example the UK is the only one of the five countries scrutinised in this Report which does not have a specialised unit within either its police or prosecution services. Rather, teams within the Metropolitan Police Service and the Crown Prosecution Service (CPS) which cover a broad range of crimes allocate resources and staff to serious international crimes cases when necessary, on a part-time basis.<sup>47</sup> Although UK immigration services and police continue to identify relatively large numbers of suspected perpetrators,<sup>48</sup> authorities structured in this way have successfully prosecuted only one perpetrator, with a case against a second suspect underway.<sup>49</sup>

Information about the treatment of victims by national authorities is fragmented and often anecdotal. This is unfortunate because cases handled by specialised units have already involved hundreds if not thousands of victims and witnesses.<sup>50</sup> Nonetheless, this Report identifies inconsistencies and shortcomings in the extent to which specialised units and their staff – investigators, prosecutors, legal assistants and others – uphold victims’ rights in their daily work.

## **B. The EU’s role in supporting the investigation and prosecution of international crimes**

The EU has adopted measures within the field of JHA which are intended to ensure that legislative and practical frameworks are in place to assist national criminal justice authorities in combating impunity. In 2002 the Council established a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (‘EU Genocide Network’).<sup>51</sup> A permanent Secretariat for the EU Genocide Network was established at Eurojust in 2011,<sup>52</sup> and now assists the rotating Presidency of the Council to convene meetings twice a year. Meetings bring together National Contact Points responsible for the investigation and prosecution of international crimes – largely drawn from prosecution authorities but also including police, investigating magistrates, National Members of Eurojust and representatives of Ministries of Justice of some Member States – to discuss common challenges and best practice, exchange information regarding ongoing investigations and enhance mutual cooperation.<sup>53</sup> To date meetings have been attended by representatives of all 28 EU Member States as well as four observer states – the US, Canada, Switzerland and Norway – and a number of civil society observers.<sup>54</sup>

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<sup>47</sup> Interview with CPS, August 2013. These arrangements have been in place since a specialised unit within the Metropolitan Police Service focused on investigating Nazi-era suspects was disbanded in 1999.

<sup>48</sup> In July 2013 police indicated that 56 cases were under investigation; ‘Nearly 100 war crimes suspects’ in UK last year’, *BBC News*, 30 July 2013; ‘UK not a refuge for war criminals’, *Press Association*, 30 July 2013.

<sup>49</sup> In 2005 Faryadi Zardad was convicted of torture committed in Afghanistan in the 1990s. In January 2013 Col. Kumar Lama was indicted on two counts of torture allegedly committed in Nepal in 2005. His trial is expected to start in 2015.

<sup>50</sup> For example approximately 120 witnesses testified in the trial of Onesphore Rwabukombe in Germany, while 120 were interviewed and 53 testified in court in the *Simbikangwa* case in France. During investigations in the case of Yvonne Basebya the Dutch court took evidence from more than 70 witnesses located in Rwanda, Belgium, France, Switzerland, Poland, Canada, the USA, South Africa, Malawi and Kenya; see *Yvonne N. [Yvonne Basebya]*, District Court of The Hague, Case No. 09/748004-09, Judgment of 1 March 2013, para. 21.

<sup>51</sup> Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.

<sup>52</sup> Article 25a of the Decision on Eurojust as amended by Council Decision 2009/426/JHA of 16 December 2008. See also Eurojust Annual Report 2013, 4 April 2014, pp. 18.

<sup>53</sup> European Parliament, Directorate-General for External Policies, *Study on Mainstreaming Support for the ICC in the EU’s Policies*, EXPO/B/DROI/2013/28, March 2014 p. 19, pp. 57-59.

<sup>54</sup> See for example civil society letter to the 16<sup>th</sup> meeting of the EU Genocide Network on Investigating and prosecuting sexual and gender-based violence as crimes under international Law, 16 May 2014; available at: [http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-\(ns\).pdf](http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-(ns).pdf).



In 2003 the EU also adopted Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes. The Decision encourages improved mutual assistance measures among Member States, and recommends establishing specialised units within national law enforcement agencies to take the lead on investigation and prosecution of international crimes. The Decision also focuses on the role of immigration authorities in combating impunity by cooperating with law enforcement agencies and informing them when there is information to suggest that suspected perpetrators have applied for, been granted or taken up residence within their jurisdiction.<sup>55</sup> A number of specialised war crimes units have subsequently been established in EU Member States and beyond and a small number of states have established specialised units concerning international crimes within their immigration services.<sup>56</sup>

Despite this progress, there is considerable scope to strengthen the EU's efforts to ensure accountability for international crimes, particularly by ensuring that efforts to combat impunity are fully consistent with victims' rights as established in EU and national law. The EU has paid relatively little attention to serious international crimes within the field of JHA arguing that its competency to do so is limited with these crimes being excluded from the list of the EU's 'core crimes'.<sup>57</sup> Rather, the EU's recent initiatives to combat impunity have been focused on supporting the ICC and other external policy initiatives.<sup>58</sup> This has been to the detriment of victims of serious international crimes within its own borders, who are not mentioned in the instruments which have been adopted within the field of JHA.<sup>59</sup>

### **C. Measures to bridge the gap between victims' rights and efforts to combat impunity within the EU**

#### ***i) Options at the EU level***

In October 2013 the EU Genocide Network proposed an EU Action Plan on combating impunity for international crimes in the EU and its Member States. This is envisaged as an instrument setting out practical, concrete steps to be taken by EU institutions, Member States, and national authorities to implement the 2003 Council Decision.<sup>60</sup> In November 2013 this proposal was discussed at GENVAL, the 'Working Party on General Matters including Evaluation' of the General Secretariat of the Council of the EU, which in turn resolved to take note of the proposal with a view to further follow up.<sup>61</sup> The EU Genocide Network subsequently established a 'Task Force' composed of five of its National Contact Points and the Network Secretariat, which is

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<sup>55</sup> See Articles 1, 3, 4 and 5 of Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.

<sup>56</sup> These units exist within the Netherlands and the UK. See Peter ten Hove, 'The role of immigration authorities in combating impunity and enhancing cooperation in the Netherlands', REDRESS, *EU Update on International Crimes*, January 2014, p. 3.

<sup>57</sup> Article 83(1) TFEU; see also European Parliament, *Study on Mainstreaming Support for the ICC*, pp. 29, 61, 77.

<sup>58</sup> See Council Decision 2011/168/CFSP on the International Criminal Court, and the Action Plan to Follow Up on the Decision on the International Criminal Court, PESC 12080/11, 12 July 2011; Updated EU guidelines on the promotion of compliance with international humanitarian law, 2009/C 303/06, 15 December 2009; Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, PESC 6129/1/12, 20 March 2012.

<sup>59</sup> Council Decisions 2003/335/JHA and 2002/494/JHA.

<sup>60</sup> See Final Conclusions of the 15<sup>th</sup> Meeting of the EU Genocide Network, 29-30 October 2013, available at <http://www.redress.org/downloads/final-conclusions-of-15th-meeting.pdf>, and Civil Society Letter to EU Genocide Network of 29 October 2013, available at <http://www.redress.org/downloads/eu-genocide-network-letter.pdf>; European Parliament, *Study on Mainstreaming Support for the ICC in the EU's Policies*, p. 58.

<sup>61</sup> See General Secretariat of the Council of the European Union, *Strengthening efforts to combat impunity within the EU and its Member States for serious international crimes*, 19.11.2013 (16340/13), available at: <http://www.redress.org/downloads/publications/GENVAL%20discussion%20paper%20by%20European%20Council.pdf>; Item 7, "Outcome of Proceedings", Working Party on General Matters Including Evaluation (GENVAL), 17164/13, GENVAL 87, 4 December 2013, available at: [http://www.redress.org/downloads/publications/\(4\)%20Outcome%20of%20Proceedings%20GENVAL%2027%20November%202013.pdf](http://www.redress.org/downloads/publications/(4)%20Outcome%20of%20Proceedings%20GENVAL%2027%20November%202013.pdf).

currently drafting a strategy on the fight against impunity within the EU, setting out a framework of measures that need to be taken at national and EU level, including the adoption of an EU Action Plan.<sup>62</sup>

The development of a new instrument along the lines of an EU Action Plan could help address common challenges from the perspective of criminal justice authorities, and implement recommendations and forms of best practice as adopted by the EU Genocide Network in its final conclusions.<sup>63</sup> However, any such instrument should also integrate and address Member States' obligations towards victims under the 2012 Directive and international law, including victims' right to information, participation and protection.

## ***ii) Enhancing coordination and cooperation at the national level***

Coordination among national authorities and among stakeholders working with victims can help to ensure that serious international crimes are effectively investigated and prosecuted. The majority of cases that have resulted in investigations or proceeded to trial in Canada, Denmark, Sweden, the Netherlands, Belgium, France, Finland, Germany and the United Kingdom involved victims, witnesses or suspects who had entered the respective countries as asylum applicants.<sup>64</sup> Civil society has also played an important role in connecting national authorities with victims and witnesses in several cases.<sup>65</sup>

A number of Member States have developed coordination mechanisms to assist this process.<sup>66</sup> In the Netherlands a 'national task force' on international justice has been established, comprising all national authorities concerned with international crimes including police, prosecutors, immigration authorities and the Ministry of Justice. The Task Force holds regular coordination meetings to improve cooperation and exchanges information on ongoing cases.<sup>67</sup> Efforts to formally establish a similar task force are currently underway in Belgium, where authorities working on international crimes cases already coordinate frequently on an ad hoc basis.<sup>68</sup> Other States including France and the UK host meetings which include national authorities as well as civil society working on international crimes issues. In the UK these are known as 'Community Involvement Panels'.<sup>69</sup> Participants exchange information on their respective work, raise issues of concern, and consult on shared or specific challenges.<sup>70</sup>

National task forces and community involvement panels are not mutually exclusive, and Member States should consider establishing both mechanisms. Authorities and civil society who have taken part in such mechanisms both indicated that they found them a useful way to inform

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<sup>62</sup> Conclusions of the 16<sup>th</sup> Meeting of the EU Genocide Network, 21-22 May 2014, available at: <http://www.redress.org/downloads/conclusions-of-16th-meeting.pdf>.

<sup>63</sup> The National Contact Points of the EU Genocide Network adopt final Conclusions following each of the Network's meetings, setting out recommendations and best practice, and highlighting areas of common concern.

<sup>64</sup> REDRESS and FIDH, *The Practice of Specialised War Crimes Units*, p. 12.

<sup>65</sup> Over 25 of the 36 cases currently under investigation by the French specialised unit are based on complaints filed by civil society working with victims; Interviews with French prosecutors, May 2014.

<sup>66</sup> Coordination among the authorities and these mechanisms have been commended in Conclusions of the EU Genocide Network following its 16<sup>th</sup> meeting, para. 9; 15<sup>th</sup> meeting, paras. 10-11; 13<sup>th</sup> meeting, para. 4; 12<sup>th</sup> meeting, para. 1.

<sup>67</sup> Interviews with Dutch Public Prosecution Office, police and immigration authorities, November 2013 and May 2014; see also Peter ten Hove, 'The role of immigration authorities in combating impunity and enhancing cooperation in the Netherlands'. The Task Force also reports regularly on its work and progress to the Parliament of the Netherlands; see Ministry of Security and Justice of the Netherlands, *Rapportage brief Internationale Misdriften*.

<sup>68</sup> Interview with officials from Belgian Ministry of Justice, September 2013.

<sup>69</sup> See Deborah Walsh, 'Enhancing cooperation on international crimes in the UK: The CPS Community Involvement Panel on War Crimes, Crimes against Humanity and Genocide' in REDRESS, *EU Update on International Crimes*, January 2014, p. 8.

<sup>70</sup> Interview with French prosecutors, May 2014, and with the CPS, August 2013.

and raise awareness and to build mutual trust.<sup>71</sup> However, these mechanisms could be further enhanced by including, either on a permanent or periodic basis, agencies and stakeholders who work directly with victims. These could include Ministry of Justice or court service staff working on victim support issues and rehabilitation centres. For example the Dutch National Task Force organised an ad hoc ‘international crimes day’, which included outreach to and discussions with a wide range of stakeholders working on victim support, healthcare, social welfare and immigration and asylum.<sup>72</sup>

### ***iii) Enhancing the rights of victims within asylum and immigration systems***

In some Member States, national immigration authorities cooperate with police and prosecutors and inform them when there is information to suggest that suspected perpetrators have applied for, been granted or taken up residence within the country, thereby triggering a duty to investigate.<sup>73</sup> These arrangements stem from the need to identify and potentially to exclude suspected perpetrators – applying the principles set out in Article 1F of the 1951 Refugee Convention.

Victims and witnesses of serious international crimes coming to EU Member States may have important information for criminal investigations in those states, yet immigration services rarely identify and pass on such information to criminal justice authorities. Asylum lawyers have raised concerns about asylum authorities sharing case files which are supposed to be confidential with other authorities, afraid that it could prejudice applicants’ claims.<sup>74</sup> Legal requirements regarding access to immigration files are unclear or inconsistent: different rules apply across Member States regarding confidentiality of immigration files and applicants’ interview transcripts, and admissibility of immigration files in criminal proceedings.<sup>75</sup> Dutch authorities introduced a pilot scheme whereby asylum applicants are asked, during their asylum interview, to indicate if they are willing to be contacted as potential witnesses in the event of a future criminal investigation concerning events in their country. However they considered this has not so far provided a useful way to identify victims and witnesses, because information is not systematised and sufficient details of what applicants have seen or experienced is not recorded.<sup>76</sup> In Germany the *Bundesamt für Migration und Flüchtlinge* (‘Federal Office for Migration and Refugees’ – BAMF) has developed a questionnaire in collaboration with the war crimes unit of the *Bundeskriminalamt* (Federal Crime Agency) asking asylum seekers from Syria to complete a form which records whether they have witnessed any war crimes and whether the applicant is able to name the person responsible, as well as other details. This information is then followed up during the individual screening interview and included in an internal immigration database.<sup>77</sup> These efforts can be supplemented by civil society or lawyers: ECCHR has assisted German investigators to take statements from Syrian refugees, which help to

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<sup>71</sup> Interviews with Dutch Public Prosecution Office, November 2013; with CPS, August 2013; with UK lawyer, May 2013; with French lawyers, May 2014.

<sup>72</sup> Interviews with Dutch Public Prosecution Office and police, November 2013.

<sup>73</sup> Cooperation mechanisms exist in Belgium, Germany, the Netherlands and the UK, amongst others and are being developed in France: interviews with immigration officials in Belgium, September 2013; France, May 2014; Germany, March 2014; the Netherlands, November 2013; the UK, June 2013. See also REDRESS and FIDH, *Extraterritorial Jurisdiction in the European Union: A Study of the Law and Practice in the 27 Member States of the European Union*, (‘Extraterritorial Jurisdiction in the EU’), December 2010, pp. 66-68, and sections on ‘national cooperation’ in country studies, Human Rights Watch, *Universal Jurisdiction in Europe: State of the Art*, June 2006.

<sup>74</sup> Interviews with Belgian immigration lawyer and civil society organisation, May 2014; French immigration lawyer, May 2014; German civil society organisation, March 2014; UK civil society organisation, September 2013.

<sup>75</sup> Interviews with immigration authorities in Belgium, September 2013.

<sup>76</sup> Interviews with Dutch immigration authorities, public prosecution office and police, November 2013.

<sup>77</sup> Interview with BAMF, March 2014.

identify potential perpetrators and are kept on file in the event of future investigations and prosecutions.<sup>78</sup>

The absence of a systematic approach to identifying relevant information also delays or potentially prevents victims' access to support and assistance. These shortcomings are particularly significant because recast EU asylum instruments, adopted as part of the Common European Asylum System (CEAS), impose duties on national authorities to identify victims of "torture, rape or other forms of serious psychological, physical or sexual violence" within the asylum system.<sup>79</sup>

Under the CEAS, Member States must individually assess applicants to determine their vulnerability and special needs;<sup>80</sup> provide them with necessary support and assistance including medical and psychological healthcare and rehabilitation; and ensure they have the legal or practical support they need to effectively access the asylum process.<sup>81</sup> Many Member States do not have procedures in place to systematically identify and record survivors of torture or other serious international crimes: some have not specified in law which authorities are responsible for screening asylum applicants for signs of trauma, which procedures should be used or when screening should take place.<sup>82</sup> As a result many victims go unidentified. Even where victims are identified, they are not informed about their right to report these crimes.

Member States' obligations under the CEAS mirror many of the duties set out in the 2012 Directive to individually assess victims and provide them with access to support, protection and legal representation.<sup>83</sup> This opens up two parallel gateways for victims within the asylum system to access their rights. Member States should consider this convergence when transposing and implementing both the CEAS and 2012 Directive into their national legal systems, with a view to ensuring that victims of international crimes are identified within their asylum systems and are also treated as victims of crime.

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<sup>78</sup> See for example Andreas Schüller, 'Germany's role in prosecuting international crimes in Europe', in REDRESS, *EU Update on International Crimes*, July 2013, p. 5.

<sup>79</sup> EU Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) ("Reception Conditions Directive"), Article 21; EU Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ("Asylum Procedures Directive"), Recital 29.

<sup>80</sup> Article 22 of the Reception Conditions Directive.

<sup>81</sup> See Articles 23(4) and 25(1) of the Reception Conditions Directive; Article 24(1)(3) and Recitals 29 and 31 of the Asylum Procedures Directive; and Articles 15, 20(3) and 30(2) of EU Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ("Qualification Directive").

<sup>82</sup> IRCT, *Recognising victims of torture in national asylum procedures: a comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, November 2013, pp. 23-28.

<sup>83</sup> See summary of the main rights in the 2012 Directive set out in Chapter 2, above. Note that the CEAS is not yet fully in force: the Reception Conditions Directive and Asylum Procedures Directive enter into force on 21 July 2015; the Qualification Directive came into force on 21 December 2013.

# Part II: Victims of International Crimes in the Criminal Justice System

## Chapter 3: Issues and challenges for victims at the earliest stages of proceedings

The 2012 Directive sets out a number of rights that are contingent upon their being ‘criminal proceedings’,<sup>84</sup> but leaves it to Member States to define the precise moment at which criminal proceedings ‘begin’. Elsewhere it recommends that the ‘beginning’ of criminal proceedings should be considered as “the moment when a complaint is made”, bringing victims’ rights into play from their first point of contact with the authorities.<sup>85</sup> As was recommended by the EC, this would ensure that victims can enjoy Directive rights from the earliest point of contact with national legal systems.<sup>86</sup>

### A. Information about victims’ rights and about criminal proceedings

Article 4 of the Directive imposes a positive obligation on criminal justice authorities to provide information to victims about their rights.<sup>87</sup> This article has been referred to as a ‘Bill of Rights’ for victims,<sup>88</sup> in that it must be applied – proactively and *ex officio* – in all cases even without the request of the victim. Its purpose is to ensure that victims are treated with respect, are able to make informed decisions about their engagement with the criminal justice process, and can access other rights to which they are entitled.<sup>89</sup> Article 4 provides a list of points on which victims should be informed.

#### ‘Article 4 information’ which must be provided to victims includes:

- Procedures for making complaints with regard to a criminal offence and victims’ role in those procedures
- How and under what conditions they can obtain protection
- How and under what conditions they can access legal advice, legal aid and any other sorts of advice
- How and under what conditions they can access compensation
- How to apply for reimbursement of expenses incurred when participating in criminal proceedings
- How and under what conditions they are entitled to interpretation and translation

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<sup>84</sup> See Articles 7 on the right to interpretation and translation; 10 on the right to be heard; 11 on rights in the event of a decision not to prosecute; 13 on right to legal aid; 14 on right to reimbursement of expenses; 15 on right to the return of property; 16 on right to decision on compensation; 21 on right to protection of privacy; 23 on right to protection of victims with specific protection needs during criminal proceedings; and 24 on right to protection of child victims during criminal proceedings.

<sup>85</sup> Recital 22 of the 2012 Directive.

<sup>86</sup> EC Guidance Document, Recommendation 5, p. 11.

<sup>87</sup> Article 4(1), Recital 22 of the 2012 Directive; EC Guidance Document, pp. 13-16, Victim Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe* (‘VSE Handbook for Implementation’) 2013, p. 9.

<sup>88</sup> EC Guidance Document, p. 13.

<sup>89</sup> Recital 26 of the 2012 Directive. This interpretation of Article 4 is supported by a number of normative standards, such as UN Basic Principles and Guidelines, Principle 24.

- The type of support they can obtain and from whom, including basic information about access to medical support and any relevant specialist support, such as psychological support or alternative accommodation
- Any special measures for victims living in Member States other than where the crime was committed
- Procedures for making complaints where their rights are not respected by the competent authorities
- Contact details for further communication about their case.

Victims also have the right to understand and to be understood. This entails that they are able to make their complaint in a language they can understand, and receive translated copies of documents related to their case free of charge, if they require.<sup>90</sup> This right goes beyond mere translation: information must be provided in an appropriate manner so that it can be effectively understood.<sup>91</sup> To do so, authorities must take an individual approach to victims, bearing in mind their linguistic abilities as well as their intellectual and emotional capacity, literacy and other characteristics.<sup>92</sup> This will be of particular importance when providing information to victims originating from or located in other countries: these victims are less likely to be familiar with the legal system of the forum state, and linguistic, social or cultural barriers may impede their understanding of relevant procedures.

National authorities have not implemented these obligations consistently for victims of serious international crimes, particularly for those who live abroad. All five countries examined in this Report have adopted policies and/or enacted legislation that oblige authorities to provide victims with information about their rights.<sup>93</sup> However, some authorities indicated that they did not always apply these rules when interviewing victims abroad,<sup>94</sup> or that they were uncertain whether these rules also applied to victims abroad,<sup>95</sup> so that such victims were seen, and treated, only as potential witnesses. Overall, authorities recognised that these individuals suffer from particular kinds of vulnerability and are in need of additional support, but largely focused on fostering victims' ability to provide useful evidence rather than enabling them to engage actively in the proceedings. Where NGOs were involved in the case these groups were sometimes presumed to have assumed responsibility for keeping victims informed. Authorities also seemed cautious about identifying victims because of potential conflicts of interest, explaining that they were concerned the defence would challenge the impartiality of witnesses who the authorities had assisted to participate, or that authorities 'could not be sure' which witnesses 'really were' victims.<sup>96</sup>

Authorities' view of victims solely as witnesses has also been reflected in limited access to translation and interpretation. Language services should be available throughout all the

<sup>90</sup> Article 3 and 5(2)-(3) and Recital 21 of the 2012 Directive.

<sup>91</sup> Recital 21 provides that information should be given "by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and accessible language. It should also be ensured that the victim can be understood during proceedings. [...] Particular account should be taken of any difficulties in understanding or communicating..."

<sup>92</sup> Articles 3, 4(1)(f), 5(2) and 7, and Recital 21 of the 2012 Directive; EC Guidance Document p. 14; VSE, *Handbook for Implementation*, p. 9 and pp. 14-15.

<sup>93</sup> See for example Article 3*bis*, Belgian Code of Criminal Procedure (CCP); Article 53-I, French CCP; Sections 171 and 406(d)-(g), German CCP; Article 51a(3) of the Netherlands CCP; UK Ministry of Justice, Code of Practice for Victims of Crime, pp. 4 and 15. See European Parliament, Policy Department C, *Standing Up for Your Right(s) in Europe: Locus Standi Country Reports*, 2012, pp. 40-41, 74, 111, 150, 275 ('*Locus Standi Country Reports*').

<sup>94</sup> Interview with German authorities, March 2014.

<sup>95</sup> Interview with French authorities, May 2014.

<sup>96</sup> Interviews carried out for this Report included the following national authorities: Belgian federal police and federal public prosecutor, May 2014; French police and prosecutors, May 2014; German federal police and federal public prosecutors, March 2014; Dutch police and public prosecution, November 2013 and May 2014; UK Crown Prosecution Service (CPS), August 2013.

proceedings for victims acting as civil parties or private prosecutors, to ensure they can participate meaningfully in the case. Wolfgang Blam, a survivor of the Rwandan genocide from Germany who was a civil party in the *Mpambara* case in the Netherlands, described how he and his wife were provided with interpreters only when testifying as witnesses:

*[O]nce we were no longer witnesses, we no longer had the right to interpretation. Even the legal decisions are in Dutch. I cannot use them because I do not speak Dutch.*<sup>97</sup>

National authorities must consider how to reconcile their legal obligations to provide information to victims with their need to maintain independence. Practical steps to this end could include providing information in a standard format to all witnesses without distinction in the course of proceedings;<sup>98</sup> routinely referring victims and witnesses to civil society organisations that work with victims; and/or establishing cooperation procedures with local authorities in the territorial state – if appropriate – to assist with referral to local victims’ organisations. National authorities should also ensure ‘Article 4 information’ is provided to civil society organisations or other groups who file complaints, as they could play an important role in relaying this information to victims. For example, in France civil society groups and victims’ associations have filed complaints in relation to more than 25 of the 36 investigations currently pending before the specialised unit, often on behalf of victims who are located abroad. These complaints have concerned both French and foreign nationals and companies, who are accused of alleged crimes committed for instance in Rwanda, Libya, Syria, the Republic of the Congo and Cambodia.<sup>99</sup>

To ensure that information is available to victims of serious international crimes who have not identified themselves to the competent authorities, authorities should make information on victims’ rights widely available to the public, and distribute leaflets to stakeholders within the forum state which work with victims, such as immigration organisations and torture rehabilitation centres.<sup>100</sup> Some authorities already have dedicated websites and information materials for victims of crime within their respective legal systems.<sup>101</sup> However for the most part these resources do not provide information or guidance for victims located outside the EU who may be involved in criminal proceedings within a Member State nor do they deal with the special needs and concerns of victims of serious international crimes.<sup>102</sup> There are several exceptions, including in the Netherlands, the USA and Canada, where leaflets and dedicated websites are in use.<sup>103</sup> These materials are designed to increase visibility of the work of specialist teams by explaining their activities – for example, making reference to past cases – and encourage victims to come forward with information or evidence. However, these materials do

<sup>97</sup> See REDRESS and FIDH, ‘*Universal Jurisdiction Trial Strategies: Focus on Victims and Witnesses*’, November 2010, p. 19.

<sup>98</sup> ICC investigators, faced with similar challenges, simply provide information about victim services and participation mechanisms to all witnesses who come into contact with the Court during investigations. Interview with staff members of Office of the Prosecutor (OTP), May 2014.

<sup>99</sup> Interviews with French police and prosecutors, May 2014. Delphine Carlens, ‘The French Specialised War Crimes Unit: First 18 Months’, REDRESS *EU Update on International Crimes*, July 2013.

<sup>100</sup> VSE, *Handbook for Implementation*, p. 15. See also Centre for European Policy Studies, *Local and regional good practices on victims’ rights*, 2011, pp. 17-18, available at: <http://cor.europa.eu/en/documentation/studies/Documents/local-regional-good-practices-victims.pdf>; European Network of Councils for the Judiciary (ENCJ), *Guidance on Victims*, 2011, p. 3, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1578-budapest2011-JThomas-1.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1578-budapest2011-JThomas-1.pdf).

<sup>101</sup> EC information portal on victims’ rights, at: [https://e-justice.europa.eu/content\\_rights\\_of\\_victims\\_of\\_crime\\_in\\_criminal\\_proceedings-171-en.do](https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do) (most factsheets on victims’ rights were correct as of January 2012). Detailed information for legal practitioners on victims’ rights in all EU Member States is also available at: <http://www.victimprotection.eu/index.php/eu-27/countrydata>.

<sup>102</sup> For example, restrictions on acting as private prosecutors or civil parties, statutes of limitation or amnesty laws.

<sup>103</sup> See for instance reference to the specialised unit in Germany on the website of the *Bundeskriminalamt*, at [http://www.bka.de/nn\\_192960/EN/TheBKA/Tasks/CentralAgency/ZBKV/zbkv\\_node.html?nnn=true](http://www.bka.de/nn_192960/EN/TheBKA/Tasks/CentralAgency/ZBKV/zbkv_node.html?nnn=true); International Crimes Team of the Dutch Public Prosecution Office, [www.warcrimes.nl](http://www.warcrimes.nl) and Dutch National Police, <http://www.politie.nl/onderwerpen/internationale-misdrijven.html>; War Crimes Program, Department of Justice of Canada, <http://www.justice.gc.ca/eng/cj-jp/wc-cdg/prog.html>; Human Rights and Specialist Prosecutions Section, US Department of Justice: general website <http://www.justice.gov/criminal/hrsp/about/> and brochures available in 10 languages: <http://www.justice.gov/criminal/hrsp/additional-resources/>.



not provide information to victims about their rights or about the role they can play in proceedings: consequently, they address victims mainly as potential witnesses rather than as rights-holders. Specialised units and other authorities working with international crimes should therefore add 'Article 4' information to their websites and/or when producing their own information materials to supplement those already available within Member States.

National authorities should distribute this information as part of wider outreach strategies to victims in territorial states and other countries which contain large diaspora communities, to inform them about ongoing cases and the outcomes of previous prosecutions. Members of the Dutch specialised unit, for example, took the opportunity while visiting Rwanda to conduct radio interviews and provide information about previous cases in which perpetrators had been convicted, with a view to encouraging further victims to join a new investigation.<sup>104</sup> During the *Zardad* investigation, British police reportedly aired television and radio spots in Afghanistan, explaining their inquiry and encouraging victims and witnesses to come forward.<sup>105</sup>

National authorities should also communicate with immigration and asylum authorities, who are now legally obliged to identify victims of torture and other forms of serious violence among asylum applicants.<sup>106</sup> They can thus play a key role in ensuring that victims of serious international crimes within asylum or migration systems are provided with 'Article 4 information' and referred to criminal justice authorities, victim support organisations and/or specialist NGOs.

## **B. Filing criminal complaints and initiating proceedings**

Procedures to submit criminal complaints vary across Member States. At a minimum, victims can provide information to law enforcement authorities, either by contacting the police or filing a complaint with the prosecutor's office ('simple complaints'). The authorities subsequently assess the evidence and decide whether to open an investigation. In some jurisdictions, victims can lodge 'private prosecutions' or trigger investigations through a civil party system,<sup>107</sup> or join ongoing criminal proceedings as civil parties to the case. The latter possibility allows them to file claims for damages resulting from the criminal act and also gives rise to other procedural rights such as submitting and viewing evidence, questioning witnesses and appealing against decisions which harm their interests.<sup>108</sup>

The 2012 Directive, while acknowledging differences among legal systems, applies to all 'victims' as defined in Article 2(1)(a), irrespective of their role in national proceedings, whether they are witnesses for the prosecution or are participating in a more independent way,<sup>109</sup> even if they are identified in the course of investigations opened *ex officio* by the authorities.<sup>110</sup> Authorities must provide victims with: (i) contact details for communications about their case, and inform them about the right to receive updates;<sup>111</sup> (ii) translation and interpretation;<sup>112</sup> (iii) a written

<sup>104</sup> Interview with Dutch Public Prosecution Office, November 2013.

<sup>105</sup> Human Rights Watch, *Universal Jurisdiction in Europe: State of the Art*, June 2006, p. 16.

<sup>106</sup> See above (Reception Conditions and Asylum Procedure Directives).

<sup>107</sup> The scope and content of such possibilities differs depending on the State.

<sup>108</sup> This mechanism is available in at least 23 Member States and many other countries worldwide. See REDRESS and FIDH, *Extra-territorial Jurisdiction in the EU*, p. 55; Amnesty International, *Universal Jurisdiction: the Scope of Universal Civil Jurisdiction*, AI Index: IOR 53/008/2007, July 2007, pp. 4-9.

<sup>109</sup> See Recital 20 of the 2012 Directive; EC Guidance Document pp. 10-11. The European Court of Justice held that all rights contained in the 2001 Framework Decision applied to victims acting as private prosecutors; Case C-404/07 *Katz* [2008] ECR I-7607, para. 41.

<sup>110</sup> As specified in Recital 22 of the 2012 Directive. This places an onus on authorities who identify victims in the course of investigations to recognise their status as early as possible and inform them about their rights from the point of first contact with the authorities.

<sup>111</sup> Articles 4(1)(i), 6(1)-(5) and Recital 26 of the 2012 Directive.

acknowledgement of their complaint, regardless of when the complaint is made or the lapse of time since the commission of the offence.<sup>113</sup>

Despite these guarantees, victims of serious international crimes face the following specific challenges when filing complaints and initiating proceedings across the EU:

- Some Member States have still not fully incorporated serious international crimes into their national law and established jurisdiction over them. As the status of ‘victim’ under the 2012 Directive is defined with reference to criminal offences within national domestic law,<sup>114</sup> this may have the effect of excluding victims of certain serious international crimes from the protection of EU law, and also means that their status may be inconsistent from country to country.
- Some states, such as Belgium,<sup>115</sup> France,<sup>116</sup> Germany,<sup>117</sup> Spain<sup>118</sup> and the UK<sup>119</sup> – have enacted legislation to restrict or remove private prosecutions (or the comparable ability for a civil party to trigger an investigation) for crimes committed outside of the jurisdiction. The effect of these provisions has been to significantly limit victims’ ability to instigate or pursue proceedings.
- Other legal and procedural barriers which prevent national authorities from opening investigations into serious international crimes in some EU Member States include amnesty laws,<sup>120</sup> statutes of limitation,<sup>121</sup> ‘nexus’ requirements which necessitate some sort of link between the forum state and perpetrator in order to open proceedings,<sup>122</sup> and the immunity of certain categories of officials from criminal jurisdiction,<sup>123</sup> among others. A number of Member States also allow authorities to exercise discretion over which international crimes cases are in the ‘public interest’ to pursue, which can be used to justify refusals to investigate.<sup>124</sup> These barriers often have the effect of striking out or dismissing complaints at the very earliest stages of proceedings. Some of these barriers are recognised as incompatible with states’ obligations to investigate and prosecute serious international crimes.<sup>125</sup>

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<sup>112</sup> Article 7 and Recitals 21 and 34 of the 2012 Directive.

<sup>113</sup> Article 5(1) and Recital 24-25 of the 2012 Directive.

<sup>114</sup> See Article 2(1)(a)(i).

<sup>115</sup> Belgian CCP, Article 6(1<sup>°bis</sup>), 10(1<sup>°bis</sup>) and 12bis (although this does not apply where the accused is Belgian or a resident of Belgium), as amended by Loi 32, 5 August 2003, Article 14.

<sup>116</sup> For crimes listed under the Rome Statute: French CCP Article 689-11, as amended by Article 8, ACT No. 2010-930 of 9 August 2010. Victims may still act as private prosecutors in complaints concerning torture. See François Picart, ACAT France, ‘Lutte contre l’impunité: la France protège-t-elle les criminels de guerre?’ (‘The Fight Against Impunity: Does France Protect War Criminals?’), *La Croix*, 11 August 2014.

<sup>117</sup> Section 153f of the German CCP provides the federal public prosecution office with a discretion to dispense with prosecuting alleged international crimes, which does not apply in respect of ‘ordinary’ domestic offences. In addition Sections 374(1) and 395(1), which set out powers of private prosecution for victims of certain crimes, do not extend to international crimes.

<sup>118</sup> Articles 23.2 and 23.4, *Ley Orgánica del Poder Judicial* (‘Organic Law of the Judicial Power’); on legislative amendments made in March 2014 see civil society letter, *Spanish Lawmakers Should Reject Proposal Aimed at Closing the Door on Justice for the Most Serious Crimes*, 10 February 2014, available at:

<http://www.redress.org/downloads/publications/Spain%20-%20universal%20jurisdiction%20civil%20society%20letter%20ENGLISH.pdf>.

<sup>119</sup> The consent of the Director of Public Prosecutions is now required to bring private prosecutions for international crimes in the UK: s153 Police and Social Responsibility Act 2011, amending s4 of the Magistrates Court Act 1980.

<sup>120</sup> Spain’s Amnesty Law (B.O.E. 1977, 24937) applies to international crimes committed before 1977.

<sup>121</sup> The majority of EU Member States have removed statutes of limitation from crimes listed in the Rome Statute but many states left them in place for other crimes such as torture. In 2010 France also passed legislation introducing a 30-year statute of limitation for war crimes.

<sup>122</sup> ‘Nexus’ requirements can include requirements that the accused is present within the state before an investigation will be opened, or that the accused must not only be present but must also be a ‘resident’ of the state. These requirements apply in various forms in states including Belgium, Denmark, France, Finland, Germany, the Netherlands, Spain, and the UK; see REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, pp. 22-24.

<sup>123</sup> For an overview see REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, pp. 33-38.

<sup>124</sup> REDRESS and FIDH, *ibid*, pp. 27-31. For example see Section 153f and 170, German CCP; in the UK Criminal Justice Act 1988, section 135; Geneva Conventions Act 1957, section 1A (3) (a); International Criminal Court Act 2001, section 53(3).

<sup>125</sup> For example, ECtHR *Margus v. Croatia*, App. No. 4455/10, 27 May 2014, paras. 126-127. For normative standards see HRC General Comment 31, para. 18; Impunity Principles, Principle 24; UN Basic Principles and Guidelines, Section 4. For states’ legal obligations see UN Convention on the

Significant delays in initiating or progressing investigations into complaints have posed problems for victims. In Belgium and France several complaints originally filed against Rwandan genocide suspects in the mid-1990s still remain under investigation.<sup>126</sup> The ECtHR has recognised that these delays violate victims' right to a fair hearing within a reasonable time. It held in 2004 that France's failure to adequately investigate allegations against Rwandan genocide suspect Wenceslas Munyeshyaka amounted to a violation of the rights of the victims who had filed complaints against him with French police in 1995.<sup>127</sup> As of 2014, the judicial investigation has still not been completed. Victims in this situation face multiple disadvantages: not only are their rights to an effective remedy manifestly compromised, but even if the case eventually proceeds to prosecution the evidence against the accused may have deteriorated, making it more difficult to prove the charges.<sup>128</sup> Victims acting as civil parties may face similar challenges in gathering evidence to substantiate civil claims for compensation.

A lack of sufficient, dedicated resources and manpower were the main factors behind these delays. These have been partly addressed in France, where the authorities have worked to clear backlogs since the establishment of a specialised war crimes unit in 2012,<sup>129</sup> and authorities in both countries indicated that a number of these delayed investigations are now almost complete.<sup>130</sup>

### C. Right to review decisions not to prosecute

Under the 2012 Directive, victims have an enforceable right to review decisions of national authorities not to prosecute. This right applies to decisions made by police, prosecutors or investigative judges, and therefore includes decisions taken by such authorities not to proceed with an investigation.<sup>131</sup> Victims already enjoy some form of right to review in many Member States, although victims' ability to review may depend on their role in the respective proceedings.<sup>132</sup>

The right to review does not entail a curtailment of discretion. To the contrary, it helps to ensure that any discretion exercised is done in accordance with the law; and is not fettered. In 2005 a Belgian court upheld the discretion of the Federal Public Prosecutor to dismiss cases under the 2003 legislation restricting the exercise of jurisdiction over serious international

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Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, U.N. Doc. A/7218 (1968), entered into force 11 November 1970; 1974 CoE Convention on lack of applicability of statutes of limitation in war crimes and crimes against humanity, entered into force 25 January 1974.

<sup>126</sup> Significant backlogs have also been identified in Spain. For instance, complaints against former Chinese officials regarding alleged crimes in Tibet were filed in 2005 but arrest warrants were not issued against the accused until February 2014; the case was later closed under new universal jurisdiction legislation in June 2014.

<sup>127</sup> ECtHR, *Mutumura v France*, App. No 46621/99, 8 June 2004, regarding violations of Articles 6(1) and 13 ECHR. See interview with Yvonne Mutimura in REDRESS, *EU Update on International Crimes*, July 2014, p. 4.

<sup>128</sup> See Martin Witteveen, 'Dealing with old evidence in core international crimes cases: the Dutch experience as a case study', in Morten Bergsmo and Cheah Wui Ling (eds.), *Old Evidence and Core International Crimes*, FICHL Publication Series No. 16 (2012).

<sup>129</sup> See, Le Parisien, *A Paris, des enquêteurs spécialisés dans les crimes de masse*, 4 February 2014; interview with French officials, May 2014. See also articles by Delphine Carlens and Nicolas le Coz in REDRESS, *EU Update on International Crimes*, July 2013 and July 2014.

<sup>130</sup> Monitoring reports by the United Nations Mechanism for International Criminal Tribunals (UNMICT) indicate that judicial investigations in the case of Wenceslas Munyeshyaka in France should be completed by late 2014; see report of April 2014, available at: [www.unmict.org/cases.html](http://www.unmict.org/cases.html). See also Anneke Verbraeken, 'Zeven personen in België mogelijk vervolgd voor Rwandese genocide' ('Seven people in Belgium possibly to be prosecuted for Gencocide'), *Mondiaal Nieuws*, 25 March 2014.

<sup>131</sup> It does not extend to decisions made by courts; see Article 11 and Recitals 43-45 of the 2012 Directive; EC Guidance Document pp. 30-31; VSE *Handbook for Implementation*, pp. 35-36.

<sup>132</sup> For an overview see REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, pp. 44-45; Center for the Study of Democracy, *Member States' legislation, national policies, practices and approaches concerning the victims of crime: Final Study*, July 2009, p. 125-126 ('Final Study on Victims of Crime') p. 45. For the countries discussed in this report see European Parliament, *Locus Standi Country Reports*, pp. 39, 71-72 and 109-110; 146-147, 272.

crimes, which significantly limited victims' subsequent ability to instigate proceedings.<sup>133</sup> In contrast, other review proceedings have seen courts overturn national authorities' refusals to investigate on the basis that the suspects were not present within the territory of the forum state.<sup>134</sup>

Review proceedings may be expensive and time-consuming. Recognising this, the EC recommends establishing a process for review which is "clear and transparent and not overly bureaucratic".<sup>135</sup> One example is the Victims Right to Review Scheme (VRR) introduced in the UK by the Crown Prosecution Service in 2013 which offers a free-of-charge, administrative procedure which allows victims to simply write to the CPS and request reconsideration of their case.<sup>136</sup> However, to date over 13% of VRR applications received have resulted in a change of decision by the CPS. This and other similar schemes would be greatly strengthened if they were also mandated to review decisions not to investigate taken by law enforcement agencies.

The right to review can only be effective if a formal decision is taken to close the case and if that decision and the reasons for it are communicated to the victim, and if the victim has been informed of his or her right to review, all of which are expressly recognised in the 2012 Directive.<sup>137</sup> Some Member States including France, Germany and the UK, have included in procedural rules the duty to inform victims.<sup>138</sup> However, these duties are not being applied consistently, particularly for victims living outside of the forum state who may face practical difficulties contacting national authorities to request information.

Problems also arise because formal decisions are not always taken to close cases even though investigations have effectively stalled or been halted, leaving the file open although no work is conducted for months or even years. The reluctance of authorities to formally close the investigation and to communicate this to victims is frustrating for victims and is unwarranted, given there may be no legal barriers to re-opening cases which have been formally closed, if new evidence later emerges or circumstances change.<sup>139</sup> For this reason the right to review decisions not to prosecute is closely linked to victims' ability to access information about progress in their case, which forms an important duty for national authorities dealing with victims.<sup>140</sup>

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<sup>133</sup> Judgment no. 62 of the Belgian *Cour d'Arbitrage* (now renamed *Cour Constitutionnelle*, 'Constitutional Court'), 23 March 2005. See Cedric Ryngaert, *Belgian Constitutional Court partially annuls downsized War Crimes Act*, case commentary for the Institute of International Law, KU Leuven, available at: <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/CR23032005.pdf>.

<sup>134</sup> This has been seen in appellate proceedings in Spain and South Africa. See Michael Lipin, 'Spanish court seeks arrest of former Chinese leaders in Tibet case', *Voice of America*, 19 November 2013. Shortly afterwards, the Spanish government introduced restrictions on universal jurisdiction legislation. In South Africa, see *National Commissioner of the South African Police Service and Another v Southern Africa Litigation Centre and Another*, 485/2012, 27 November 2013. An appeal of this decision was heard before the Constitutional Court in May 2014; judgment was reserved.

<sup>135</sup> EC Guidance Document, p. 31; Concerns have been expressed at for instance bureaucratic review procedures in Germany, rendering the right to review nearly meaningless in practice as there is no realistic prospect for success, see commentary on the criminal procedural code, 'Karlsruher Kommentar zur Strafprozessordnung,' 7. Auflage 2013, Rn1,StPO § 172.

<sup>136</sup> CPS, Victims' Rights to Review Scheme (VRR), revised version of December 2013, available at: [http://www.cps.gov.uk/victims\\_witnesses/victims\\_right\\_to\\_review/](http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/). See REDRESS submission to CPS public consultation on VRR, September 2013, pp. 2-4; however, concerns have been expressed at for instance bureaucratic review procedures in Germany, rendering the right to review nearly meaningless in practice.

<sup>137</sup> Articles 6(3) and 11(3), Recital 26 of the 2012 Directive.

<sup>138</sup> See Article 40-2, al. 2, French CCP; Section 171, German CCP; CPS Referral Guidelines, at A3.13, B5 and C4; UK Ministry of Justice, Code of Practice for Victims of Crime, October 2013, at pp. 19 and 35.

<sup>139</sup> For example, German prosecutors explained that cases closed under Section 153f of the German CCP may be later reopened if necessary; interview with REDRESS, March 2014.

<sup>140</sup> Article 6 and Recitals 26-27 of the 2012 Directive.

The '***Bahraini Prince Case***' illustrates how Directive rights and national practice should operate during early stages of proceedings. In 2012 ECCHR submitted a complaint to the UK authorities, alleging that a member of the Bahraini royal family had been involved in mistreatment of detainees in Bahrain. It was acting with the Bahrain Centre for Human Rights, on behalf of a number of victims who are still held in detention and therefore could not issue proceedings themselves. The accused travelled regularly to the UK and at the time was attending the Olympic Games. The police declined to open a full investigation into the complaint. ECCHR, together with a Bahraini victim subsequently challenged this decision by way of judicial review. The court recognised that both the victim and ECCHR had standing to bring the review, and the victim was granted legal aid to do so. In subsequent proceedings, the CPS argued that the police declined to open a full investigation on the basis of the dossier of evidence submitted to it. The ECCHR and the victim by contrast argued that the police position has been influenced by the position of the CPS that the accused benefits from immunity, that circumstances have changed since the police decision including in respect of new evidence not yet provided to the police, and that the CPS's position would have precluded the police from consenting to an arrest warrant in any event. On 7 October 2014, following two years of proceedings, the DPP accepted that the accused is not entitled to immunity from prosecution.

## Chapter 4: Victim support within the criminal justice system

*It is extremely difficult psychologically, because you thought you were finally far away from it all but you have to re-live the whole experience of genocide and everything flashes back. Even though I went to see a psychologist for post-trauma therapy it was still extremely difficult for me to take part in the investigation. Luckily the Prosecutor's team and the police conducting the investigation were very professional, supportive and they really listened to me. [...] Psychological support was available at all times, all day long.*<sup>141</sup>

*Can you imagine how I felt when the prosecutor came to greet me afterwards to say thank you, and to accompany me when I was going back? I mean I felt like a human.*<sup>142</sup>

Victims of serious international crimes often experience numerous, overlapping forms of vulnerability, which can impede their ability to come forward and participate in criminal proceedings. Support is crucial to empower victims to take part in proceedings and enable them to do so in a way which minimises the risk of further victimisation or suffering. At its core the right to support is simple: victims should not have to go through criminal proceedings alone. The necessary support measures will differ from victim to victim, and the guiding principle is that national authorities should adopt a “victim-oriented perspective” when providing support, which treats victims “with humanity and respect for their dignity and human rights”.<sup>143</sup>

### A. A new framework for victim support

The right to support is one of the baselines of the 2012 Directive, providing all victims with a right to support regardless of whether they play a role in the proceedings, whether proceedings ever take place or even whether the perpetrator is identified. The right to support for victims, and in some circumstances their families, must be confidential and free of charge.<sup>144</sup> The Directive expressly states that this right is formally separate from the status of the accused.<sup>145</sup> National authorities are under a positive obligation to facilitate victims' referral to these services “from the moment [they] are aware of the victim”,<sup>146</sup> although victims should also be able to access support services directly, without referral.

These Directive provisions build significantly upon those which have previously applied to Member States.<sup>147</sup> They also closely link the right to support to an emerging right under international law to rehabilitation for victims of serious human rights violations and international crimes, which recognises that reparation for the wrongs which victims have suffered should include access to physical and psychological care, social services and other forms of practical support.<sup>148</sup> ‘Support’ is not defined within the Directive but its provisions

<sup>141</sup> Testimony of Jacqueline Mukandanga Blam in REDRESS and FIDH, *Universal Jurisdiction Trial Strategies*, p. 22-23.

<sup>142</sup> Victim of sexual violence who testified at the ICTY, cited in Medica Mondiale, *The Trouble With Rape Trials: Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia*, December 2009, p. 62.

<sup>143</sup> See UN Basic Principles and Guidelines, Preamble and para. 10.

<sup>144</sup> Article 8(1) and Recitals 37 of the 2012 Directive.

<sup>145</sup> Article 8(5) and Recitals 19 and 40.

<sup>146</sup> Article 8(2) and Recital 40.

<sup>147</sup> For example, the 2001 Framework Decision only encouraged Member States to “promote the involvement of victim support organisations” within the criminal justice system; see Article 13.

<sup>148</sup> See Committee Against Torture, General Comment 3, paras. 11, 13 and 21-22, on rehabilitation as an element of the right to an effective remedy under Article 14 CAT; UN Basic Principles and Guidelines, para. 10 on the ‘Treatment of Victims’; UN Victims’ Declaration, para. 19, which refers to

make clear that it is intended to encompass a range of general and specialist victims' services. General victim support includes provision of information and advice about victims' rights, entitlements and legal proceedings; emotional and psychological support; and various kinds of practical assistance.<sup>149</sup> In addition, in accordance with their specific needs and the degree of harm they have suffered, victims must be able to access specialist support. This comprises measures which prevent further victimisation but can also help to repair harm suffered as a result of the crime: medical care, forensic examination, psychological counselling and trauma care, access to shelters or safe accommodation, and specific services for children, among others.<sup>150</sup>

The broad concept of 'support' set out in the Directive implies that national authorities should strive to ensure as wide a range of implementation as possible. For example, national authorities should clearly ensure their own actions are as consistent with this support framework as possible, 'humanising' the proceedings and taking victims' needs and wishes into consideration.<sup>151</sup>

This interpretation should also be used to address an apparent gap with respect to victims of crimes committed extraterritorially, who are covered by the Directive only when participating in criminal proceedings within the EU.<sup>152</sup> This is at odds with the Directive's express mandate to provide access to support for *all* victims, as it could exclude victims whose crimes were committed abroad if proceedings do not take place or they do not wish to participate. In light of the express purpose of the Directive,<sup>153</sup> a proper interpretation should consider the needs of individual victims as the primary consideration, above and beyond the place where the crime was committed. While this can be challenging in the context of serious international crimes in light of the significant number of victims involved, victims who are located within Member States should be able to avail of victim support even if their crime was committed abroad and regardless of the status of the accused.

The 2012 Directive does not directly address the needs and rights of witnesses, but many witnesses in serious international crimes cases are vulnerable and will require support. Any witnesses in criminal proceedings who qualify as victims are entitled to support, even if their crime is not part of the charges against the accused. For example the *Zardad* trial in the UK included the testimony of a witness who had been tortured by the accused, but nine other victims of torture (committed at the hands of other individuals) also testified as witnesses.<sup>154</sup> Similarly, persons who have witnessed international crimes as bystanders or eyewitnesses may meet the Directive's definition of victim<sup>155</sup> if they have suffered harm as a result of the crime, such as mental or emotional harm. In cases concerning the commission of mass crimes it is also likely that both prosecution and defence witnesses may have experienced victimisation personally or as indirect victims.

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"necessary material, medical, psychological and social assistance and support" as effective remedy for victims of 'abuse of power'. For further discussion see REDRESS, *Rehabilitation as a Form of Reparation under International Law*, December 2009.

<sup>149</sup> See Articles 8(1)-(2) and 9(1), Recitals 37 and 40 of the 2012 Directive, EC Guidance Document p. 24-28; VSE *Handbook for Implementation*, pp. 17-19.

<sup>150</sup> Article 8(3) and 9(2)-(3), Recitals 38-39 of the 2012 Directive.

<sup>151</sup> Recital 38, for example, refers to supporting victims and informing them about their rights "so they can take decisions in a supportive environment that treats them with dignity, respect and sensitivity".

<sup>152</sup> See Recital 13 of the 2012 Directive.

<sup>153</sup> See for example Article 1(1), *ibid.*

<sup>154</sup> Paul Taylor, "Only Connect", in REDRESS and FIDH, *Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture*, September 2007 ('Fostering a European Approach to Accountability'), p. 77; Tobias Kelly, *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty* (University of Pennsylvania Press, 2012) p. 126.

<sup>155</sup> Article 2(1) of the 2012 Directive.



## B. Victims versus witnesses: shortcomings in current practice

All of the national authorities interviewed were aware of the importance of victim support, particularly to mitigate the risk of re-victimisation. Authorities in each of the five countries had implemented – or tried to implement – supportive measures for victims and witnesses in their past or ongoing cases. Most authorities emphasised psychological therapy or counselling, which many of them have provided by hiring psychologists or social workers who were made available to victims during the period of the trial.<sup>156</sup> Authorities' understanding of the content of and timeframes for victim support is narrower than what is set out in the Directive and applicable international standards. For instance the Directive expressly specifies that victims have a right to access support before, during and after the proceedings,<sup>157</sup> but some national authorities indicated that as a rule they do not provide any form of psychological assistance for victims during the investigation phase,<sup>158</sup> and some authorities confirmed that they consider such support abroad to be the responsibility of the authorities of the territorial state.<sup>159</sup> When interviewed, victims whose cases had not yet reached trial did not recall being offered this kind of support.<sup>160</sup> There also appears to be a general lack of follow up with, or provision of support to, victims after the trial. Although this is partly a question of resources, it also suggests that authorities are mainly motivated by a desire to enhance the quality of witness testimony and bolster the prospects of prosecutions, as opposed to the wider well-being of victims. Such an approach carries the risk that victims will feel marginalised, unacknowledged or even exploited by the proceedings. It also fosters the risk of 'witness-fatigue' and may prevent victims from testifying in proceedings in the future.

The specialised unit within Germany's federal police has initiated a research study examining the treatment of victim witnesses during the investigation and prosecution of international crimes. The study is designed to provide guidance to investigators to prepare and conduct investigations taking into account the potential traumatisation of victims, their security concerns and lack of trust in law enforcement authorities, as well as potential cultural differences.<sup>161</sup>

The Dutch specialised unit had sought to provide victims with access to a psychologist, social worker or counsellor during questioning and again (for those who testified at trial) following the end of the prosecution. It has also adopted the practice of informing the investigative judge in advance of questioning about the victims' psychological condition; the psychologist referring victims to local support agencies, even when outside of the forum state; and with personal follow up with victims who testified at trial by members of the specialised unit.<sup>162</sup> These types of measures are important because they recognise the wider context of victims' needs. The support of a psychologist in court, for example, will be of limited value to victims who may need

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<sup>156</sup> For example, psychologists were on duty in the courthouse during the *Simbikangwa* trial in France and during some of the Rwandan trials in Belgium. They were also available to victims during investigations by the Dutch specialised unit.

<sup>157</sup> See Article 8(1).

<sup>158</sup> Interviews with French police and prosecutors, May 2014; Belgian police, May 2014; German prosecutors, March 2014.

<sup>159</sup> Interview with French police, May 2014.

<sup>160</sup> Interviews with civil party in a case under investigation in Belgium, September 2013, and with civil party in a case under investigation in France, May 2014.

<sup>161</sup> REDRESS e-mail correspondence with German official, 17 October 2014.

<sup>162</sup> In the Dutch system most witnesses testify only before the judge during the investigative stage, rather than before the court during trial. These practices were seen in the cases of Joseph Mpambara and Yvonne Basebya, who were convicted in the Netherlands in 2011 and 2013 respectively for their involvement in the 1994 Rwandan genocide, See *Prosecutor v Joseph Mpambara*, Case Nos. 09/750009-06 and 09/750007-07, Judgment of The Hague District Court, 23 March 2009; Case No. 22-002613-09, Judgment of The Hague Court of Appeal, 7 July 2011; *Yvonne N. [Yvonne Basebya]*, District Court of The Hague, Case No. 09/748004-09, Judgment of 1 March 2013, paras. 22-35. See also Witteveen, 'Dealing with old evidence in core international crimes cases: the Dutch experience as a case study' pp. 101-102. Interviews with Dutch Public Prosecution Office, November 2013 and May 2014.

long-term support, or who begin to experience emotional or mental health difficulties only in the weeks or months after testifying.

Shortcomings in institutional practice apply disproportionately to victims living outside of the forum state, who are unlikely to be able to access any support. Where national authorities do not provide any measures during the investigation stage, victims may receive no support at all if they do not travel to the forum state and testify at trial, for example if they are not chosen to act as witnesses or if they testify via video-link from their home state. Police and prosecutors cited a number of reasons for not providing victims with support abroad. This includes the logistical difficulty of arranging such services and treatment, lack of resources to pay for them, and a sense that providing support abroad did not fall within their mandate.<sup>163</sup> Some national authorities also seemed to think that this was a matter for NGOs and civil society working with victims, or that it should fall within the competence of national authorities in the state where victims are based. However without establishing a specific referral mechanism, or ensuring that NGOs have the necessary resources to provide this kind of support long term, national authorities cannot presume that such services exist, or that victims will be aware of or be able to access them.

### **C. Strengthening the capacity of national authorities to provide specialised support**

Beyond psychological support, most Member States provide broader forms of assistance for victims of 'ordinary' crimes such as advice about their rights, familiarisation with the criminal justice process, moral and emotional support or onward referral to specialised medical or psychological caregivers. This is typically carried out by victim support organisations (VSOs), which are generalist organisations which often establish referral mechanisms with law enforcement authorities to ensure all victims can access support if they need it.<sup>164</sup> The Directive framework is largely premised on national authorities delegating support services to VSOs,<sup>165</sup> but it appears these organisations have rarely if ever been involved in serious international crimes cases. In general VSOs have limited resources, depend largely on volunteer staff, and their mandates may preclude them from working with victims located outside the forum state. This can create a referral gap for national authorities but also potentially for others, such as lawyers and human rights organisations working with victims. It is important to strengthen cooperation between VSOs on the one hand and specialised units and related authorities and civil society on the other, depending on the resources and capacity of VSOs in different countries.

Specialist NGOs who work directly with victims of serious international crimes and other civil society groups working in the countries where victims are based, may have some, though limited, means to support victims before, during and after investigations and prosecutions. National authorities should therefore see such groups as a means of supplementing rather than replacing or 'outsourcing' their own obligations to provide victim support, and integrate victim support into their investigative and prosecutorial strategies from the outset of proceedings.<sup>166</sup>

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<sup>163</sup> Interviews with French police and prosecutors, May 2014; German prosecutors, March 2014; Belgian police, May 2014.

<sup>164</sup> See EC Guidance Document p. 25. Victim Support Europe provides details of VSOs in EU Member States, most of which operate on a non-profit or voluntary basis: <http://victimsupporteurope.eu/members/>. In some states victims' rights to access support through VSOs is established in law; see Section 406h(1)(5) of the German CCP.

<sup>165</sup> See Article 8(2) and (4), Recital 40 of the 2012 Directive; EC Guidance Document p. 24 and 27.

<sup>166</sup> See REDRESS, *A victim-centred prosecutorial strategy to respect victims' rights and enhance prosecutions*, July 2014.

Consultation with victims, their legal representatives and other stakeholders such as experts on the region where the crimes were committed and centres specialising in trauma care, can help to ensure that practical arrangements for investigations and trial take into account victims' needs. Appropriate resources for victim support should be allocated in the case budget and formal referral mechanisms should be agreed for victim and witness support in the forum state as well as the state where victims are based.

Authorities should also develop capacity within their own teams and units to implement victims' rights, including liaising with victims to keep them informed and ensuring adequate provision of support. The German Federal Police appointed a full-time liaison officer for victim and witness protection in Rwanda and the DRC, who was based in the region for approximately four years. The officer worked on both the *Rwabukombe* and *FDLR Leadership* trials, coordinating victim and witness protection and setting up logistical arrangements for police and prosecutors conducting investigations. The officer did not engage in investigations himself, pre-empting possible allegations that he had 'tainted' evidence in his contact with witnesses over the years.<sup>167</sup> However the officer's capacity to provide victim support was limited, and there seems to have been little provision for follow up with victims or ensuring they had continued support after their testimony.

Finally, as a matter of best practice national authorities and others stakeholders should be aware of the risks of secondary traumatisation or 'burnout' associated with prolonged and intensive work with victims and on matters related to serious international crimes.<sup>168</sup> Authorities should also identify and address these needs, and this should also be addressed in training.

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<sup>167</sup> Interview with German prosecutors and German lawyer, February and March 2014; Email correspondence with German Federal Police, June 2014.

<sup>168</sup> See Sara Sharratt, 'It Takes a Toll: Secondary Traumatisation', *Victims' Rights Working Group Bulletin*, May 2005, p. 8.

## Chapter 5: Legal advice, representation and legal aid

*I could not have done anything without the lawyers working on my case on a pro bono basis. I am deeply indebted to them, because I did not have the means to pay a lawyer.*<sup>169</sup>

Independent legal representation is essential to ensure that victims can effectively participate in proceedings. Lawyers representing victims play a fundamental role in ensuring victims can understand their rights and the conduct of proceedings, conveying victims' views and concerns, and ensuring that their interests are safeguarded throughout the proceedings. Legal advice and representation is often crucial to enable victims to access rights which flow from their participation in the proceedings, including support, protection and compensation. It also helps encourage victims to come forward with evidence and information, and to testify as witnesses.

Human rights treaties,<sup>170</sup> other instruments,<sup>171</sup> and regional human rights courts recognise a right to access legal representation and legal aid where necessary to ensure effective access to justice.<sup>172</sup> These rights have also been recognised and built upon by international criminal tribunals.

The 2012 Directive does not establish an express 'right' to legal representation, but recognises that victims may require legal representation to facilitate their role in the proceedings. It specifies that victims must enjoy access to legal aid "where they have the status of parties to criminal proceedings",<sup>173</sup> and provides them with the right to be accompanied by a legal representative when they are interviewed during investigations.<sup>174</sup> These provisions supplement pre-existing rights to access legal aid within EU law,<sup>175</sup> which have referred to legal aid for victims of crime<sup>176</sup> and in the context of cross-border civil disputes.<sup>177</sup>

The Directive only refers to legal aid for victims "where they have the status of parties to criminal proceedings".<sup>178</sup> The right to legal aid is therefore qualified in that it does not extend to situations where *it is possible* for victims to have the status of parties to proceedings.<sup>179</sup> This provision should, however, not be read so as to narrow victims' rights which have already been

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<sup>169</sup> Thérèse, civil party in the *Munyeshyaka* case in France, cited in REDRESS and African Rights, *Survivors and Post-Genocide Justice in Rwanda*, November 2008, p. 80.

<sup>170</sup> The right to legal representation and, where necessary, legal aid has been derived from provisions including Articles 6(1), and 13 ECHR; Articles 8 and 25 ACHR; Articles 2(3)(a) and 14(3) ICCPR; and Articles 7(3) and 14 CAT.

<sup>171</sup> The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Guidelines on Legal Aid'), October 2012 expressly apply to victims and witnesses participating in criminal proceedings; see Introduction, para. 8; Principle 4 and Guideline 7. See also Principles 11(a) and 12(c) and (d) of the UN Basic Principles and Guidelines; para. 5 of the UN Victims' Declaration; para. 1 of the UN Basic Principles on the Role of Lawyers, UN Doc. A/CONF.144/28/Rev.1, 27 August to 7 September 1990.

<sup>172</sup> The ECtHR has held that individuals who file criminal complaints have a right to an effective remedy and a fair and impartial hearing, even where the crime was committed in a third state. See ECtHR, *Mutimura v France*, App. No 46621/99, 8 June 2004.

<sup>173</sup> Article 13 of the 2012 Directive; see also EC Guidance Document, p. 34, and VSE, *Handbook for Implementation*, p. 44.

<sup>174</sup> Article 20(c) of the 2012 Directive. The Directive also makes special provision for legal representation of child victims; Article 24(1)(c) and Recital 60.

<sup>175</sup> See Article 47 of the EU Charter; Case C-279/09 – *Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB)*, [2010] ECR I-3849, paras. 61-62.

<sup>176</sup> See Recital 19 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('EU Human Trafficking Directive'). This was previously contained in Article 6 of the 2001 Framework Decision.

<sup>177</sup> Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. The Directive applies only to cross-border civil and commercial disputes and does not encompass purely domestic, criminal or administrative proceedings; see EC report on the application of Directive 2003/8/EC, COM(2012) 71 final, 23 February 2012.

<sup>178</sup> Article 13 of the 2012 Directive.

<sup>179</sup> EC Guidance Document, p. 34.

recognised under EU law, particularly Article 47 of the EU Charter which provides that legal aid shall be made available where it “is necessary to ensure effective access to justice”.<sup>180</sup>

Victims’ need for legal advice can arise at the very earliest stage of proceedings, when they are considering the possibility of filing complaints or joining an ongoing case. In practice it is open to victims to approach the police with information about crimes or the whereabouts of alleged perpetrators. However, in reality victims frequently face significant hurdles in filing complaints to the standard required to trigger a criminal investigation, particularly in states where the authorities are unwilling to act unless there is a very clear-cut case. Victims who have not had legal advice at this stage risk not being fully appraised about legal requirements and the nature of proceedings, and cannot make informed choices about whether and, if so, how best to pursue their complaint. It is therefore of crucial importance that victims are not precluded from access to legal aid before they have the status of parties to proceedings. This applies particularly in states such as the UK where victims generally act only as witnesses or ‘simple’ complainants, and as such are generally deemed not to need legal aid at all.

## A. Legal advice and legal representation on serious international crimes

In serious international crimes cases, victims face particular challenges to access legal aid. Some national legal aid rules do not afford access to legal aid for serious international crimes cases or funding for such cases is insufficient to cover the costs. In many EU Member States, there is also a shortage of quality legal representation specialised in this field. Each of these difficulties are compounded for victims who live abroad, particularly in the countries where the crimes took place, who are likely to face greater linguistic and practical obstacles to access information about their rights and to contact suitable lawyers in the forum state.

While the scope of legal aid varies from country to country,<sup>181</sup> almost all Member States apply criteria to determine eligibility for legal aid, such as having an arguable case or an income which falls below certain thresholds.<sup>182</sup> Nationality and residency requirements,<sup>183</sup> and the need to prove eligibility with reference to an applicant’s residence,<sup>184</sup> often exclude victims of crimes committed extraterritorially, who may be resident abroad or have arrived in the Member State recently. Although legal aid applicants can sometimes apply for exemption from these rules, these very applications may require legal assistance.<sup>185</sup>

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<sup>180</sup> International law and standards on legal aid are also worded more broadly than the Directive in this respect. In addition to Article 47 of the EU Charter, see the UN Guidelines on Legal Aid, Principle 4, which provides that “States should, where appropriate, provide legal aid to victims of crime”.

<sup>181</sup> See the Faculty of Law and Administration, Adam Mickiewicz University of Poznań, *Improving Protection of Victims’ Rights: Access to Legal Aid, Research paper on the present legal framework and best practices*, ‘VICS project’, 2013, available at: <http://victimsrights.eu/general-report/>.

<sup>182</sup> For examples see Article 667, *Code Judiciaire* (‘Belgian Judicial Code’); Articles 7 and 9-2, *Loi n° 91-647 du 10 juillet 1991 relative à l’aide juridique*, as implemented by *Décret n°91-1266 du 19 décembre 1991 portant application de la loi n° 91-647 du 10 juillet 1991 relative à l’aide juridique* (‘French Law on Legal Aid’); in Germany, Article 1, *Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen* (‘Law on legal advice and representation for citizens with low incomes’); in the Netherlands, Articles 12, 34 and 44(4), *Wet op de rechtsbijstand* (‘Dutch Legal Aid Act’).

<sup>183</sup> Article 668, *Belgian Judicial Code*; Article 3, *French Law on Legal Aid*. The UK government has also proposed introducing a legal aid ‘residence test’ which would distinguish among applicants on the basis of their immigration status; see *Public Law Project v Secretary of State for Justice* [2014] EWHC 2365; REDRESS *Submission to Government on Proposed Legal Aid Changes*, 18 October 2013, paras. 6-14.

<sup>184</sup> In the Netherlands eligibility for legal aid is usually assessed with reference to an applicant’s tax records and social security number; Article 25(2), *Wet op de rechtsbijstand* (‘Dutch Legal Aid Act’). Foreign nationals also experience practical difficulties accessing legal aid in Spain; see VICS project, p. 90-91.

<sup>185</sup> For example section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) allows applications for ‘exceptional’ legal aid funding in the UK. However cases in which this is granted have been extremely rare, and efforts to enforce this mechanism have given rise to subsequent litigation: *R (Gudanaviciene & Others) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWHC 1840 (Admin).

Constraints and cutbacks in legal aid funding in recent years have affected all ‘ordinary’ victims of crime. They have also magnified the challenges already experienced by victims of serious international crimes to access quality, specialised legal advice and representation. Victims in genuine need are also excluded by restrictive eligibility criteria. For example Wolfgang Blam, a victim who brought a successful compensation claim in the *Mpambara* trial in the Netherlands, explained that he “was not poor enough to be automatically supported, but not wealthy enough to start legal proceedings that were going to cost [...] a lot of money”.<sup>186</sup>

As a result victims largely rely upon lawyers who provide some or all of their time on a case *pro bono*, or on civil society organisations and NGOs specialised in international crimes which provide legal assistance free of charge to victims. Both of these routes are however limited and cannot provide legal advice and representation to all of the victims who need it. A number of lawyers interviewed for this report indicated that they are approached by more victims than they have the time or capacity to represent. NGOs play an active and important role in filling this gap in a few EU Member States, but many other states do not have civil society with specific expertise in this field. NGOs themselves are often dependent on lawyers acting *pro bono* in order to advise and represent victims, and without adequate resources they may face difficult choices about which cases they can take forward to the authorities. This kind of voluntary assistance – which effectively subsidises shortcomings in national legal aid systems – cannot provide a substitute for states’ obligations to ensure effective access to legal representation. Review of national systems to ensure that obligations towards victims of serious international crimes can be met should therefore form a core element of states’ process of transposing the Directive into national law.

Even where legal aid is available, victims will often be unaware of their right to legal representation and how to access it. Some of the police and prosecutors interviewed for this report indicated that their teams had not taken steps to inform victims about their rights to legal representation during previous investigations. Others indicated that even if victims were informed about their rights under national law, they still considered it the victims’ own responsibility to find and instruct a suitable lawyer. In part, this stemmed from some authorities’ view that their role as independent prosecutors could be compromised by assisting victims to find a suitable lawyer.<sup>187</sup>

## **B. Strengthening access to legal representation and legal aid**

The Directive imposes an express obligation on national authorities to provide victims with information about how and under what conditions they can access legal advice and legal aid.<sup>188</sup> While authorities are not under a duty to *provide* legal representation, they are nonetheless responsible for *facilitating* access to representation within the national legal aid framework. This is an important safeguard for victims, particularly those living abroad, and is likely to encourage them to participate in proceedings.

Closer cooperation and/or consultation between national authorities and civil society could also enhance access to legal representation, by providing victims with legal assistance or connecting them with lawyers available in the forum state. For example, in a number of the Rwandan trials which took place in Belgium, civil society and individual members of the Rwandan diaspora

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<sup>186</sup> REDRESS and FIDH, *Trial Strategies*, p. 19.

<sup>187</sup> Interviews with German and French prosecutors, March and May 2014.

<sup>188</sup> Article 4(1)(d) of the 2012 Directive. Principle 8 on the ‘Right to be informed’, UN Guidelines on Legal Aid largely mirrors this obligation.

abroad helped victims living in Rwanda to instruct legal representatives and to act as civil parties.<sup>189</sup>

Courts can also enhance access to legal assistance by appointing lawyers to represent victims and witnesses participating in criminal proceedings. Prosecutors and other authorities should therefore consider invoking or requesting this facility within the context of their national legal systems, if they have the power to do so, when considering their obligations to ensure that victims can access their right to legal representation. Court-appointed counsel is particularly appropriate to mitigate the obstacles faced by victims living abroad, and avoids the need for victims to navigate the national legal aid framework in order to pay for a lawyer. For example, in the ongoing *FDLR Leadership Trial* in Germany the court of its own initiative appointed a lawyer to represent the interests of a number of victims living in eastern DRC who have testified in the case as witnesses.<sup>190</sup> The victims are not acting as civil parties, but all have been recognised by the court as particularly vulnerable and in need of support. The lawyer is therefore responsible for representing their interests during the trial, accompanying them while they gave their testimony – which was screened via video-link from the region during closed court sessions – explaining their rights and legal procedures to them and ensuring their safety during the proceedings.<sup>191</sup> As the lawyer was only appointed while the proceedings were already underway, she was only able to meet the clients for the first time the same day they had to provide testimony. She was not, therefore, in a position to address concerns and questions of her clients prior to proceedings.

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<sup>189</sup> Interviews with Belgian lawyer, victim acting as a civil party in a Belgian case, and Belgian police officer, September 2013 and May 2014.

<sup>190</sup> See Section 68b(2) of the German CCP.

<sup>191</sup> Interview with German prosecutors, Interview with German lawyer, both March 2014. See also Anna von Gall, 'Update on the "FDLR Leadership Trial" in Germany', REDRESS, *EU Update on International Crimes*, July 2014, p. 6.



## Chapter 6: Victim protection and security

*After the verdict comes the question of your safety and returning to your daily life. One of my friends also agreed to testify. He now has problems with other Rwandans; he is receiving threats and [is] called an accomplice. All of this scares me because I also came forward. Another friend of mine who lives in a village in Germany went shopping with two others. She overheard someone speaking in Kinyarwanda: 'Here you are', 'I thought they were all dead but here they are walking freely in Europe'. It can be scary because you can run into such people at any moment. When you have participated in a trial and you know that the whole family of the victim is living in Europe you are always afraid when you walk around, when you go out.<sup>192</sup>*

Victim and witness protection is a condition precedent to justice. Stakeholders interviewed for this Report were unequivocal in stressing that victim and witness safety and wellbeing is a real and persistent challenge. A Dutch prosecutor had reported that witnesses were threatened and intimidated in practically every case her team had worked on.<sup>193</sup> In states where the crimes took place, victims and their supporters have been targeted by persons in positions of political, military or economic power, by their neighbours and even by their own families – some have been ostracised by other survivors.<sup>194</sup> In forum states, members of the diaspora as well as suspected perpetrators have exerted direct or indirect forms of pressure. Reprisals include harassment and verbal abuse, social ostracism, threats or actual violence, loss of employment, defamation, arrests or fabricated charges, even killings. These may lead to victims and witnesses withdrawing or failing to testify, while others may be deterred from coming forward.

### A. The protection framework under the 2012 Directive

The 2012 Directive provides victims with an express right to protection, which operates during both investigation and prosecution stages of criminal proceedings.<sup>195</sup> States have a duty to protect victims against violence, intimidation or reprisals ('physical protection'). This includes taking measures against any actual or potential violence, intimidation or reprisals, carried out either by state actors or private parties. This may involve use of injunctions, protection and restraining orders, or relocation.<sup>196</sup> States also have a duty to prevent secondary or repeat victimisation ('emotional protection'). This concerns reducing victims' difficulty of participating in proceedings, such as avoiding undue delays; minimising interviews; and allowing victims to be accompanied during interviews by a legal representative and a supportive person of their choice.<sup>197</sup> During prosecutions, courts should allow for 'special measures' such as holding closed hearings, using communication technology, e.g. video-link, or avoiding unnecessary questions about the victim's private life.<sup>198</sup> At both stages of proceedings, victims have a right to avoid

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<sup>192</sup> Testimony of Jacqueline Mukandanga Blam, REDRESS and FIDH, *Trial Strategies*, p. 23.

<sup>193</sup> Hester van Bruggen, Chief Prosecutor, International Crimes Team, Public Prosecution Office of the Netherlands, *ibid*, p. 24. In *Mpambara* the court found that "great pressure had been exercised on a number of witnesses not to tell the truth"; see *Prosecutor v Joseph Mpambara*, Judgment of The Hague District Court, para. 32.

<sup>194</sup> REDRESS documented the barriers placed in front of victims who testified at the ICTR, from receiving government assistance. REDRESS, *Testifying to Genocide: Victim and Witness Protection in Rwanda*, October 2012, p. 27 and general overview at pp. 23-30.

<sup>195</sup> Articles 18-20 and 23-24 of the 2012 Directive.

<sup>196</sup> Article 18 and Recitals 7 and 52 of the 2012 Directive. The EU has also adopted a number of specific instruments designed to strengthen protection of victims of crime: Directive 2011/99/EU of 13 December 2011 on the European Protection Order; Regulation No. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. See also EU Human Trafficking Directive, Articles 12-13 and 15-16, Recitals 19-20 and 22.

<sup>197</sup> Articles 20 (a)-(d) and 23(2), Recital 53.

<sup>198</sup> Articles 23(3) and 24(1)(b), Recitals 58-59; EC Guidance Document p46-47; VSE *Handbook for Implementation*, pp. 30-31, 38-40. The Directive allows a margin of appreciation which recognises that such measures may be subject to operational or practical constraints.

contact with the accused and his or her family.<sup>199</sup> Although many of these measures are recognised as best practice, their incorporation into the Directive represents a progressive step.

These obligations are complemented by an overarching obligation to protect victims' privacy.<sup>200</sup> This duty includes measures to protect victims' dignity, such as preventing publication of pictures of crime scenes or deceased victims; and disclosure of, or cross-examination about, details of victims' private lives which are unnecessary for the case. This may be important in the context of media interest in the case, or in light of defence and prosecution access to victims' immigration files or medical records.

To ensure that all victims can enjoy effective protection, authorities are also obliged to conduct individual assessments of victims to determine their specific protection needs.<sup>201</sup> Assessments must take into account victims' personal characteristics and the type, nature and circumstances of the crime. Persons who have suffered "considerable harm due to the severity of the crime" or who are "particularly vulnerable" should be paid "particular attention".<sup>202</sup> The Directive does not define these terms, but provides a number of indicators which should be used to assess risks posed to victims.<sup>203</sup> Overall these indicators should help authorities to understand the situation and context of both the victim and alleged perpetrator, and which may include factors relevant to the characterisation of the crime such as the ethnic, cultural, political or social background in which alleged acts took place or the commission of widespread or systematic patterns of abuse.

The right to protection is likely to be of significance for witnesses and other persons affected by the case even if they do not qualify as 'victims'.<sup>204</sup> National authorities also need to consider victims and witnesses' family members,<sup>205</sup> and civil society organisations or human rights defenders assisting victims,<sup>206</sup> if they suffer harm as a result of their involvement in a case. Intimidation of these actors most typically occurs in the countries where the crimes took place. However, it can also occur in the forum state, or other states. In a number of past cases, including trials of Rwandan suspects in Belgium and The Netherlands, victims and other supporters of the prosecution reported that they were heckled, intimidated or insulted by supporters of the defendants while inside or nearby the courthouse.<sup>207</sup>

## B. Implementing victim protection during investigations and prosecutions

National authorities should consult with victims and take their views on board at an early point in the proceedings, including when formulating investigative and prosecutorial strategies,<sup>208</sup> and in determining appropriate measures of protection and related support. Victims' concerns and fears should help determine what – if any – measures they need. Equally, victims' wishes *not* to

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<sup>199</sup> Article 19 and Recital 53.

<sup>200</sup> Article 21 and Recital 54 of the Directive. See generally EC Guidance Document, p. 39-48; VSE *Handbook for Implementation*, pp. 27-30.

<sup>201</sup> Article 22 and Recital 55-56. Article 12(3) of the EU Human Trafficking Directive also provides for individual risk assessment.

<sup>202</sup> Article 22(3) and Recital 38.

<sup>203</sup> See further Articles 22(3)-(4) and 24, Recitals 55-57.

<sup>204</sup> See for example reprisals against defence witnesses in Rwanda see REDRESS, *Testifying to Genocide*, p. 27. For reprisals against ICTR witnesses see also REDRESS and FIDH, *Trial Strategies*, p. 21.

<sup>205</sup> Articles 18 and Recital 52 of the 2012 Directive.

<sup>206</sup> See e.g., OMCT, *Nepal: Physical assault against Mr. Yadav Prasad Bastola and threats against several AWC members*, Urgent Appeal NPL 001 / 0313 / OBS 022, 6 March 2013.

<sup>207</sup> Interview with civil party in France who attended other trials as an observer, May 2014. See also Luc Walley, *The Prosecution of International Crimes and the Role of Victims' Lawyers*, in Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in the making* (Brill, 2009), 353-367, p. 365.

<sup>208</sup> REDRESS, *A victim-centred prosecutorial strategy*, p. 2; REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action*, December 2009 ('Ending Threats and Reprisals Against Victims') p. 22-25.

be protected must be taken into account.<sup>209</sup> For example at the ICTY and War Crimes Chamber of the Court of Bosnia and Herzegovina, at times courts decided that it was in victims' best interests for their testimony to be heard in closed session or excluded from the public record, even though this was not necessarily what victims themselves wanted.<sup>210</sup>

Timely consultation can lay an important foundation for later victim protection throughout the proceedings. Several victims who filed complaints in France relating to torture and other inhuman acts subsequently had to request refugee status after receiving threats related to these proceedings in their own countries. This occurred for example in the 'Relizane' (Algeria)<sup>211</sup> and the 'Disappeared of the Beach' (Congo – Brazzaville)<sup>212</sup> cases. As explained by a former investigator, victim and witness protection is "only one part of an overall system", which begins with their first contact with the authorities and may only conclude after proceedings are completed. If victims and witnesses withdraw, fail to attend court or change their testimony late in proceedings, it often indicates that their protection needs were not adequately addressed at an earlier point in the chain of proceedings.<sup>213</sup>

The trial phase presents other challenges. Victims are confronted with public court hearings, the presence of the accused, and cross-examination in court. Enforcement of media reporting restrictions can be difficult if those who leak information are located outside the jurisdiction. During the trial of Erwin Sperisen in Switzerland, the identity of the sole victim participating as a civil party was leaked to a media outlet. A journalist subsequently discovered the address of the victim, an elderly woman living in Guatemala whose son was a victim of extra-judicial execution. The journalist approached her at her home, without the knowledge or presence of her lawyer, and filmed her giving contradictory answers about her participation in the case. This was subsequently submitted to the court as evidence by the defence. Media coverage meant that her identity and whereabouts became known publicly in Guatemala. The victim continued to participate in the case, but was subsequently threatened and had to be relocated.<sup>214</sup> Authorities may therefore need to consider strengthening enforcement mechanisms and sanctions for any breach of protection measures or reporting restrictions.

Member States must ensure that victim and witness protection mechanisms are fit to meet the Directive's obligations. Many states have established witness protection procedures, but these vary in terms of legal powers and resources.<sup>215</sup> For example in some Member States laws were enacted to address the situation of sensitive or vulnerable witnesses rather than the wider constellation of victims. These may need to be revised if victims cannot fully benefit. Member States must also ensure that appropriate 'special measures' are available within their national legal systems to facilitate the questioning and testimony of vulnerable victims in a protected manner. At least four EU Member States do not provide for any special measures within

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<sup>209</sup> Article 22(6) and Recital 58-59 of the 2012 Directive, EC Guidance Document p. 44-45.

<sup>210</sup> Medica Mondiale, *The Trouble With Rape Trials*, pp. 76, 78-79.

<sup>211</sup> FIDH, *Two Algerian torturers indicted by French justice*, Press Release of 31 March 2004.

<sup>212</sup> For more information on the 'Disappeared of the Beach' ('Congo-Brazzaville') case, see: <http://www.fidh.org/en/africa/Congo,296/The-Disappeared-of-the-Beach-Case/>.

<sup>213</sup> Interview with former investigator, May 2014. See *Prosecutor v Haradinaj et al*, Case No. IT-04-84-T, Trial Judgment, 3 April 2008, Section 2.2.

<sup>214</sup> Interview with Swiss lawyer, July 2014. On 6 June 2014 Erwin Sperisen was convicted of the extra-judicial killing of seven prisoners in Guatemala; he has filed an appeal.

<sup>215</sup> For an overview see Centre for the Study of Democracy, *Final Study on Victims' Rights*, pp. 72-74. For victim protection internationally, see OHCHR, *Manual on Human Rights Monitoring*, 2011, Chapter 14 'Protection of Victims, Witnesses and Other Cooperating Persons', available at: <http://www.ohchr.org/Documents/Publications/Chapter14-56pp.pdf> pp. 7-15.

national law,<sup>216</sup> even though these measures are regarded as best practice and expressly recommended by the 2012 Directive.<sup>217</sup>

Many states do not provide for anonymity of witnesses in criminal trials, for the important reason that accused persons have the right to prepare their defence. In addition, in a number of states including France, Germany and Switzerland, national law requires that the identity and contact details of civil parties must be included in the case file, which is disclosed to the defence and any other parties in the case. When such details are disclosed without adequate protection measures in place, this puts victims at risk and does a disservice to the justice process. Difficulties preventing leaks of this information can have serious consequences for victims' safety. A survivor of the 1994 genocide who had cooperated with Belgian prosecutors during investigations in the *Kibungo* case was sexually assaulted in Rwanda shortly before the start of the trial. Her lawyer believed this was because she had been named in the case file. The victim ultimately lodged an asylum claim in Belgium and was recognised as a refugee.<sup>218</sup> In a number of other cases – including the *FDLR Leadership Trial* in Germany – victims participated as anonymous witnesses, but, having to remain anonymous for reasons of safety, decided not to act as civil parties as otherwise their details would have been disclosed to the defence.<sup>219</sup> In the Simbikangwa trial in France, several witnesses declined to testify at all when they learned that it was not possible to testify anonymously.<sup>220</sup>

When victims and witnesses live outside the EU, national authorities in the forum state are dependent on law enforcement in the countries where victims are located to protect them. If these latter states are supportive of the prosecution of the accused, cooperation with authorities from the forum state can be the most effective way to protect victims.<sup>221</sup> For example, one of the witnesses in *Rwabukombe* reported that she had received threats by phone; German prosecutors were able to contact Rwandan authorities who subsequently relocated her.<sup>222</sup> However, cooperation arrangements may also pose security risks for victims and witnesses – or to other individuals named by them. For example, during and in the lead up to the trial in the Netherlands of three former members of the Sri Lankan Tamil Tigers (LTTE), Dutch authorities were reportedly not granted entry to Sri Lanka. Rather, they relied wholly on the cooperation of Sri Lankan authorities in contacting, questioning and arranging the testimony of witnesses by video-link. Because most of the witnesses were detainees in Sri Lankan prisons, a lawyer involved in the case expressed concerns regarding potential consequences for their safety after the proceedings.<sup>223</sup>

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<sup>216</sup> Bulgaria, Latvia, Lithuania and Slovakia; see Fundamental Rights Agency, *Mapping victims' rights and support in the EU*, available at: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/trial-rights>

<sup>217</sup> For example Articles 7(2) and 23(3) of the 2012 Directive.

<sup>218</sup> Luc Walleyn, *The Prosecution of International Crimes and the Role of Victims' Lawyers*, p.365.

<sup>219</sup> Interviews with German lawyers, February and March 2014; with French lawyers, May 2014. A victim also withdrew from the role of civil party midway through the trial of Rwandan genocide suspect Fulgence Niyonteze in Switzerland in 1999; see REDRESS, *Universal Jurisdiction in Europe*, June 1999, p. 42.

<sup>220</sup> Pascal Simbikangwa was convicted in Paris in March 2014 of genocide and complicity in crimes against humanity committed in Rwanda in 1994; interviews with French prosecutors, police and lawyers, May 2014.

<sup>221</sup> These kinds of cooperation arrangements are also used to identify and contact victims and witnesses in the course of investigations. For example during the *Zardad* investigation, UK police found some witnesses through cooperation between the British embassy in Kabul and Afghan authorities; Tobias Kelly, *This Side of Silence*, p. 125; Human Rights Watch, *Universal Jurisdiction in Europe: State of the Art*, June 2006, p. 16; "Huge challenge" of Afghan torture case', *BBC News*, 18 July 2005.

<sup>222</sup> Interview with German prosecutors, March 2014.

<sup>223</sup> Interview with Dutch lawyer, May 2014; *Prosecutor v Thiruna E., Joseph M.J., Srilangan R., Ramachandran S. and Lingaratnam T.*, Case No. 09/748801-09 and 09/748802-09, Judgment of The Hague District Court of 21 October 2011.

## Chapter 7: Victim participation at the investigation stage

### A. Victims' right to be heard under the 2012 Directive

Member States enjoy a margin of appreciation under the Directive to regulate the form and scope of victim participation during the investigation stage.<sup>224</sup> Regardless of the role victims play during the investigation stage, the Directive requires that national authorities enable victims to be heard.<sup>225</sup> The CJEU ruled that under the 2001 Framework Decision, at a minimum “it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence”.<sup>226</sup> This interpretation is likely to apply to the 2012 Directive, which has significantly strengthened victims' right to be heard.<sup>227</sup>

The right to be heard should be interpreted in light of developing international standards. Victims' right to participate during the investigative stage, before the confirmation of charges or even before the identification of perpetrators, has been specifically recognised by the ECtHR<sup>228</sup> and IACTHR<sup>229</sup> and has been articulated in standard setting texts.<sup>230</sup> The ICC has recognised that allowing victims to present their views and concerns in general terms about an investigation, or to submit material to investigative authorities, does not have an adverse impact on the investigation or infringe the independence and investigative powers of prosecutors.<sup>231</sup>

Victims' ability to be heard at the investigation stages has a significant impact on their subsequent enjoyment of other rights. For instance during investigations in the *Nkezabera* case in Belgium, victims' organisations brought forward witnesses and other evidence which led to the inclusion in the indictment of charges related to sexual violence. The case subsequently became one of the first universal jurisdiction cases to prosecute sexual violence as an international crime.<sup>232</sup> Victims helped to build investigations from the 'bottom up' in Spain, regarding crimes allegedly committed during the civil war and Franco era. Investigations were first opened by a Spanish investigating judge into 22 complaints filed by victims and civil society. After this investigation was closed in 2010 under Spain's 1977 amnesty law, relatives of Spanish victims based in Argentina filed a complaint with Argentinian criminal justice authorities. To date 300 victims and family members have applied to join the Argentinian case as 'simple' complainants and civil parties, many after hearing about the investigation in the media. So far at least 35 civil parties have submitted information or testified before the investigating judge during hearings in Argentina, Spain and at Argentine consulates abroad. The judge has issued

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<sup>224</sup> See Recital 20 of the 2012 Directive; EC Guidance Document pp. 10-11.

<sup>225</sup> Article 10 and Recitals 41-42 of the 2012 Directive; EC Guidance Document pp. 29-30.

<sup>226</sup> Case C-404/07 *Katz* [2008] ECR I-7607, para. 50; see EC Guidance Document, p. 29.

<sup>227</sup> For example Article 3 of the 2001 Framework Decision only mandated Member States to “safeguard the possibility for victims to be heard during proceedings and to supply evidence”, and as such did not grant victims a *right* to be heard.

<sup>228</sup> *Calvelli and Ciglio v. Italy*, ECtHR (Grand Chamber), No. 32967/96, 17 January 2002.

<sup>229</sup> Case of *Blake v. Guatemala*, Série C n°36, Judgment of 24 January 1998, para. 97; Case of *Villagran Morales v Guatemala*, Série C n°63, Judgment 19 November 1999, para. 227; Case of *García Cruz and Sánchez Silvestre v. Mexico*, Série C n°273, Judgment of 26 November 2013, para. 70.

<sup>230</sup> UN Victims' Declaration, Article 6(b); UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN, 1999) ('UNODC Handbook'), pp. 36-40. The Committee Against Torture, General Comment 3 recognises that the right to an effective remedy for torture includes access to judicial remedies and victim participation in the redress process; see paras. 4 and 30.

<sup>231</sup> ICC Pre-Trial Chamber I, Situation in the DRC, Decision on the applications for participation in the proceedings, ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 57-59.

<sup>232</sup> Interviews with Belgian lawyers, September 2013. Ephrem Nkezabera was convicted in 2009 of war crimes for giving specific orders to rape and subsequently execute Tutsi women, among other charges; see Civil Society Letter for the 16<sup>th</sup> Meeting of the EU Genocide Network, *Investigating and prosecuting sexual and gender-based violence as crimes under international law*, May 2014, available at: [http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-\(ns\).pdf](http://www.redress.org/downloads/civil-society-letter-to-eu-genocide-network-(ns).pdf).

arrest warrants against two former Spanish security officials for torture allegedly committed in the 1970s, and ordered the exhumation of at least one set of remains in Spain. Cases such as these illustrate the beneficial impact of victims' participation at the investigation stage, and show that early engagement of victims is a strategic decision which can help authorities to build effective cases from the outset.<sup>233</sup>

## B. Right to information about developments in the case

*Without regular updates, victims may get the impression that nothing has happened and that the victim's report is not taken seriously. For many victims, it is quite a traumatic experience reporting a crime to the police and going through investigative questioning, so it is important to recognise that victims have a need to see progression in their case.*<sup>234</sup>

The 2012 Directive provides victims with an express right to be afforded information and updates about the progress of their case, which begins during the investigation stage and continues until the conclusion of proceedings.<sup>235</sup> Victims' ability to review decisions not to prosecute may also hinge upon this information.

**Victims must be informed** of various developments in their case, including:

- Decisions not to proceed with or to end an investigation, and decisions not to prosecute an accused, along with reasons for that decision;
- The nature of the charges brought against the accused;
- In general, victims must be given "information enabling the victim to know about the state of the criminal proceedings";
- The time and place of the trial;
- Any final judgment in the trial, and reasons for this decision (unless it was made by a jury);
- When the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from detention or escapes.

These provisions reflect developing international standards regarding victims' right to information from state authorities – which are derived from the right to a fair hearing, effective remedy and adequate reparation under Articles 6 and 13 ECHR. For example the ECtHR has found that Greece and Bulgaria deprived complainants – who alleged mistreatment amounting to torture, and death in police custody, respectively – of their rights to seek compensation and participate in proceedings by ignoring their requests for information on progress with their complaints.<sup>236</sup>

<sup>233</sup> See José Manuel Romero, 'El Supremo vence al juez de la democracia', *El País*, 15 May 2010; Baltasar Garzón, *Auto. Diligencias previas proc. abreviada 399/2006, Juzgado Central de Instrucción Nº 005, Audiencia Nacional*, 16 October 2008 (copy on file with REDRESS); Ángeles Lucas, 'Argentinean Franco crimes judge: "You see people's fear of testifying"', *El País*, 23 May 2014. In April 2014 a Spanish court rejected the Argentinian extradition requests on the basis of amnesty laws; see Patricia Rafael and Jim Yardley, 'No Extradition for Franco-Era Police Inspector', *The New York Times*, 30 April 2014.

<sup>234</sup> VSE, *Handbook for Implementation*, p. 22.

<sup>235</sup> See Article 6 and Recitals 26-27 and 30-33 of the 2012 Directive; EC Guidance Document pp. 18-20. This is distinct from national authorities' positive duties to inform victims about their rights.

<sup>236</sup> *Zontul v Greece*, App. No. 12294/07, 17 January 2012, para. 71. *Ognyanova and Choban v Bulgaria*, App. No. 46317/99, 23 February 2006, paras. 43, 136-137. Similar rulings have been made by the Committee Against Torture: see *Dimitrijevic v. Serbia and Montenegro* (207/2002), CAT, A/60/44, Communication of 24 November 2004, para. 5.4; *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44, Communication of 21 November 2002, 85 CAT/C/29/D/161/2000, para. 9.5-9.6. See also Impunity Principles, Principles 11, 12 and 24; UN Principles and Guidelines, para. 24.

National authorities may inform victims and complainants of decisions to close investigations, however, they appear less proactive in informing victims about progress or developments other than the closure of cases. For example victims may have difficulty obtaining up-to-date information about the ‘state of criminal proceedings’ in cases where no formal decision has been taken to close the case, but the investigation has effectively stalled. When interviewed some victims felt that it had been up to them to proactively seek information and updates on their cases, sometimes over the course of many years. This may impose a burden on victims, particularly for persons located abroad. Some authorities indicated that they do not stay in touch with victims and witnesses who are abroad, after they are questioned or their statements are taken.<sup>237</sup> Authorities explained this partly as a matter of resources and capacity, but also suggested it was the responsibility of authorities in the territorial state pursuant to cooperation agreements.<sup>238</sup> It was unclear, however, if national authorities had ever checked to see if this responsibility was complied with. In cases which do not proceed quickly to prosecution, authorities may lose contact with victims and witnesses and have difficulty finding them to testify at trial. Even if their testimony is not ultimately required, if no outreach is conducted about the case victims may have no way of hearing about the final outcome of the case. One victim, who is a civil party in a case in France, explained that she has to instruct her lawyer to request regular updates on her case, sometimes incurring legal fees.<sup>239</sup>

Victims must be informed about their right to be notified about developments in the case at the outset of their involvement. Authorities should allow them to indicate if they want to receive information on the case, and to provide appropriate contact details.<sup>240</sup> Subsequently, victims should be contacted proactively, promptly, in a language or format which they can understand, and provided with copies of all relevant documents and written decisions. If victims have a right to appeal or review which is subject to time limits, for instance, they must not be prejudiced by delays obtaining information, reasons or translations of decisions.<sup>241</sup> The most effective way to carry out these duties is to appoint a specific contact point for victims’ queries, for whom victims are provided with contact details.<sup>242</sup> This person should, ideally, be the ‘victim support focal point’ for the case, or even a ‘liaison officer’ working in the territorial state.<sup>243</sup>

Best practice should – at a minimum – include transmission of decisions by prosecutors or the court on the charges against the accused, which may affect civil parties whose participation in the case or claims for compensation are linked to specific charges. For example, in *Rwabukombe* the court dropped all but one of the original six counts of genocide, although the four civil parties were able to continue participating in the trial.<sup>244</sup> In the *FDLR Leadership Trial* three charges relating to sexual violence and use of child soldiers were provisionally dropped, which could significantly impact victims who are legally entitled to join the case as civil parties.<sup>245</sup>

Outreach efforts in past cases have largely focused on disseminating information about ongoing investigations to encourage witnesses to come forward, but outreach should also include

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<sup>237</sup> For example interview with Belgian police, May 2014.

<sup>238</sup> Interviews with Belgian police and with French police, May 2014.

<sup>239</sup> Interview with victim acting as a civil party in a case under investigation in France, May 2014.

<sup>240</sup> See Article 6(1)-(2) of the 2012 Directive.

<sup>241</sup> For example, to judicially review the decisions of public bodies in the UK, applicants must submit their application ‘promptly’ or in any event not later than three months after the decision was made; Rule 54.5(1), Civil Procedure Rules.

<sup>242</sup> Article 4(1)(i) provides victims with a right to receive contact details for communications about their case; see also Recital 29. This is a regular practice by the UK police in international crimes cases, including when victims are located abroad; interview with UK lawyer, May 2013. It is also a routine procedure at the ICC, where individual contacts within the OTP periodically contact victims and witnesses; interview with staff of the OTP, May 2014.

<sup>243</sup> ‘Liaison officers’ have previously been posted in the Great Lakes region by Germany authorities.

<sup>244</sup> Interview with German lawyer, March 2014.

<sup>245</sup> ECCHR, Third Status Report of February 2014, p. 2.

informing affected communities as a whole about the trial proceedings and final outcome of the case. Some authorities expressed their view that this was a job for local authorities in the territorial state or for civil society,<sup>246</sup> but without taking steps to ensure that these actors are willing or able to conduct outreach, national authorities in the forum state should not presume this will take place. Rather, the full range of proceedings should be disseminated to affected communities,<sup>247</sup> because it promotes a broad concept of justice while fostering the prospects for future investigations and prosecutions. Numerous interviewees for this report explained how, ultimately, the best way to encourage victims and witnesses to participate in future proceedings is to demonstrate success in past cases.

National authorities should develop a media strategy to disseminate information about the outcome of cases in affected communities. The verdict or judgment should be accompanied by a press release which provides a simplified summary of the charges, proceedings and verdict. Both judgments and press releases should be translated into local languages and sent to media in the territorial state or other areas where large diaspora communities are located. A spokesperson appointed for the case should preferably be present in the territorial state on key dates such as the day of the verdict to conduct interviews with local media.<sup>248</sup> National authorities should also consider coordinating with civil society or victims' organisations who may be able to disseminate information about the case in the territorial state. For example, REDRESS made a short film about the experiences of two victims participating in the *Mpambara* case in the Netherlands.<sup>249</sup> This was later screened, and the case was discussed with affected communities in Rwanda.

### C. Victims of serious international crimes participating as civil parties

In countries where it is possible for victims to act as civil parties – for the purposes of this report, in Belgium, France, Germany and the Netherlands – they should be put in a position where they can choose whether they want to exercise this role.<sup>250</sup> The numbers of victims participating as civil parties in serious international crimes cases varies among Member States. In France, a total of 24 individuals have participated in three of the four serious international crimes cases which have taken place to date.<sup>251</sup> In Germany, four victims participated in one of the two cases which have taken place since 2002.<sup>252</sup> Nineteen victims have taken part in three of the nine international crimes prosecuted in The Netherlands to date.<sup>253</sup> In Belgium, much larger numbers of victims have participated in the four international crimes cases prosecuted to date.

<sup>246</sup> For example, interview with French police, May 2014.

<sup>247</sup> UN Basic Principles and Guidelines, para. 24.

<sup>248</sup> See for example outreach by Dutch authorities at the conclusion of proceedings in *Basebya*.

<sup>249</sup> See REDRESS, *The Appeal of Joseph M*; the film can be viewed at: <http://vimeo.com/28945133>.

<sup>250</sup> For example, see legal standing of victims in Belgium and France, European Parliament, *Locus Standi Country Reports*, pp. 38-39 and 108-109.

<sup>251</sup> Five victims participated in the 2005 prosecution *in absentia* of Ely Ould Dah for torture committed in Mauritania; see testimonies of Clémence Bectart, Mamadou Diagana and Héloïse Bajer-Pellet in REDRESS and FIDH, *Trial Strategies*, pp. 53-56, 64. One victim participated in the 2010 prosecution of Khaled Ben Saïd for torture committed in Tunisia; see FIDH, *The Conviction of Khaled Ben Saïd: A Victory Against Impunity in Tunisia*, November 2010. Eighteen individuals took part in the trial *in absentia* of thirteen Chilean officials of the Pinochet dictatorship for enforced disappearances committed in the 1970s; see FIDH, *Historic Decision on the Crimes of the Chilean Dictatorship*, Press Release of 17 December 2010. No victims acted as civil parties in the *Simbikangwa* trial in March 2014. Nine victims will reportedly participate in the trial of Tito Barahira and Octavien Ngenzi, which is expected to begin in 2015; 'Two to face trial in France over Rwandan genocide', *Radio France Internationale (RFI)*, 31 May 2014.

<sup>252</sup> Four Rwandan victims participated in the *Rwabukombe* trial; Human Rights Watch and REDRESS interview with German lawyer, March 2014. To date no victims have joined the *FDLR Leadership Trial* as civil parties. Germany's Code of Crimes against International Law came into force in June 2002. Five prosecutions of defendants from countries of the former Yugoslavia took place under older legal provisions, but the details of victim participation are unknown; see Schüller, 'The Role of National Investigations in the System of International Criminal Justice – Developments in Germany', p. 227.

<sup>253</sup> This includes three victims in the *Mpambara* case, (District Court). One victim participated in *Basebya*. Fifteen victims participated in the trial of Frans van Anraat, who was convicted on appeal in 2007 for war crimes for supplying materials used in the production of chemical weapons to the Hussein regime; see *Prosecutor v Frans van Anraat*, Case No. 2200050906-2, Judgment of The Hague Court of Appeal of 9 May 2007.



The 'Butare' case in 2001 involved 108 civil parties;<sup>254</sup> 63 took part in the *Kibungo* case in 2005,<sup>255</sup> and 66 in the prosecution of Ephrem Nkezabera in 2009.<sup>256</sup> 163 individuals as well as the states of Belgium and Rwanda were admitted as civil parties in the trial of Bernard Ntuyahaga in 2007.<sup>257</sup>

A number of cases featured victims who testified as witnesses but did not participate as civil parties. These include the *FDLR Leadership Trial, Simbikangwa*, and in The Netherlands, the trials of former Afghan intelligence officials Habibullah Jalalzoy and Heshamuddin Hesam<sup>258</sup> and Abdullah Faqirzada.<sup>259</sup> It is unclear precisely why civil party participation was low in certain cases. Protection concerns may militate against civil party participation in certain cases;<sup>260</sup> victims' may not have information about their right to be civil parties, or may have difficulties obtaining legal advice or representation. The charges ultimately prosecuted may not include the crimes suffered by victims wanting to participate as civil parties, as for instance in the *Simbikangwa* trial,<sup>261</sup> or the Court may ask the prosecution to drop certain charges as in the *FDLR leadership trial*. Lawyers representing victims have limited the numbers of victims acting as civil parties in some criminal proceedings. For example lawyers representing victims in the prosecution of Frans van Anraat in the Netherlands limited the number of civil parties in the case to 15 for "practical reasons". Although the individual victims were selected as representative of various locations where attacks took place, this strategy left other victims "empty-handed".<sup>262</sup>

Without effective outreach during the investigation stage, victims located abroad may not even know the proceedings are taking place. The Belgian cases may be illustrative, because the large numbers of victims coming forward appear to be partly related to the work of NGOs and victims' associations spreading information about proceedings in affected communities inside and outside Rwanda, identifying victims and helping them to come forward and access legal representation.<sup>263</sup> National authorities should take steps to conduct outreach to potential victims and witnesses or ensure that other organisations are willing and able to conduct outreach. Close and early consultation with civil society and victims' organisations can also help to ensure victims understand how they can play a meaningful role in the proceedings.

Victims have also been constrained where legislation providing for their role in the proceedings does not apply retrospectively. In the Netherlands legislation was introduced in 1995 which substantially reformed and enlarged mechanisms for victims to participate in proceedings,

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<sup>254</sup> Vincent Ntezimana, Alphonse Higanro, Consolata Mukangango and Julienne Mukabuteru, Judgment of *Cours d'Assises de L'Arrondissement Administratif de Bruxelles-Capitale*, 8 June 2001. See Linda M. Keller, 'Belgian Jury to Decide Case Concerning Rwandan Genocide', *ASIL Insight*, 25 May 2001.

<sup>255</sup> Etienne Nzabonimana and Samuel Ndashyikirwa, Judgment of *Cours d'Assises de L'Arrondissement Administratif de Bruxelles-Capitale*, 29 June 2005.

<sup>256</sup> Ephrem Nkezabera, Judgment of *Cours d'Assises de L'Arrondissement Administratif de Bruxelles-Capitale*, 1 December 2009. This judgment was later annulled because the trial took place in the absence of the defendant; the defendant subsequently died before a re-trial could take place, so this verdict is not final.

<sup>257</sup> Bernard Ntuyahaga, Judgment of *Cours d'Assises de L'Arrondissement Administratif de Bruxelles-Capitale*, 5 July 2007. See *Avocats Sans Frontières (ASF), Le procès de Bernard Ntuyahaga: Les éléments clés du dossier*, 2007.

<sup>258</sup> *Prosecutor v Habibullah J.*, Cases No. 09-751004-04 and 09-750006-05, Judgment of The Hague Court of Appeal of 29 January 2007; see '10.2 Voice recognition by the witness [victim 2]'; see in general *Prosecutor v Heshamuddin H.*, Case No. 09-751004-04 en 09-750006-05, Judgment of The Hague Court of Appeal of 29 January 2007.

<sup>259</sup> *Prosecutor v Abdullah F.*, Case No. 22-004581-07.a, Judgment of The Hague Court of Appeal of 16 July 2009, see for example Section 6.6, 'Considerations relating to count 1 of the indictment'.

<sup>260</sup> Interviews with German lawyers, February and March 2014, and French lawyers, May 2014.

<sup>261</sup> Interview with French lawyer, May 2014.

<sup>262</sup> *Prosecutor v Frans van Anraat*. See Liesbeth Zegveld, 'Compensation for the Victims of Chemical Warfare in Iraq and Iran', in Ferstman, Goetz and Stephens, pp. 369-381, at p. 376.

<sup>263</sup> These included *Avocats Sans Frontières (ASF)*, *RCN Justice & Démocratie* (previously known as *Réseau Citoyens – Citizens Network*), *IBUKA* ('Remember'), *AVEGA* (Association of Widows of the Genocide), *Collectif de Parties Civiles* in Belgium ('Civil Parties Collective' - CPCB) and *Collectif des Parties Civiles pour le Rwanda* ('Civil Party Collective for Rwanda' - CPCR).

particularly when filing civil claims in the course of proceedings.<sup>264</sup> However the legislation did not apply retrospectively, excluding victims whose crimes were committed before 1995. Victims participating in the *Mpambara* case in 2009 and 2011 for example were caught by pre-1995 rules, with the result that they were awarded only limited amounts of compensation against the defendant after his conviction.<sup>265</sup> Member States should treat the transposition of the 2012 Directive into national law as an opportunity to critically review and, if necessary, address these and other legal and procedural loopholes which impede victim participation.

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<sup>264</sup> The “Terwee Act”; for an overview of changes see Marc Groenhuijsen and Rianne Letschert, *Legal reform on behalf of victims of crime: The primacy of the Dutch legislature in a changing international environment?* Tilburg Law School Legal Studies Research Paper Series, No. 02/2011, pp. 6-11.

<sup>265</sup> Interview with Dutch specialised war crimes unit, May 2014; email correspondence with the victims and their legal representative, April-May 2014.

## Chapter 8: Victim participation at the trial phase

*When you come out of court you have heard witnesses saying things they never said before and that they have never told anybody. They tell you afterwards, after so many years and after such a vacuum, in front of a judge and even if he is a foreign judge that they felt confident to reveal more. [...] What many of the witnesses say after concluding their testimony is 'Now I can die. I have done what I needed to do and I am helping the families and the victims that have not been able to tell their story'.<sup>266</sup>*

### A. Victims' right to be heard at the trial phase

For many victims, the right to be heard assumes pivotal importance at the trial phase.<sup>267</sup> Victims have been silenced and marginalised by the crimes committed against them and the circumstances in which they were committed. Many victims have spent years campaigning for justice, gathering evidence, pursuing legal challenges and overcoming various procedural and practical obstacles. After all of this, their ability to attend the trial<sup>268</sup> and to be heard will often be of profound personal importance, because it allows victims to tell their story. A lawyer representing victims who made a statement in the *Mpambara* case stated that:

*I believe that the court, by listening to victims, watching the victims, realises that it is not only about suspects. And the consequences of the crimes are still visible in a very concrete way. [...] The damage and the harm they suffered is still ongoing, and that is something the court won't realise unless they see the victims.<sup>269</sup>*

In some Member States such as Ireland, The Netherlands and the UK victims are entitled to submit victim impact statements (VIS) to the court.<sup>270</sup> Although VIS are not considered part of the formal evidence in a case and do not allow victims to adduce or comment upon evidence, the opportunity to make such statements may provide the only opportunity for victims to have a voice in court. They create a permanent record of the victims' experiences which the court is obliged to take into account, and tell the 'human story' behind the charges.<sup>271</sup>

Victims who participate as civil parties or private prosecutors will be able to play a more active role: the ECtHR and CJEU have held that when they are parties to a case, victims must be given an adequate opportunity to participate in proceedings before the court, including the process of taking evidence.<sup>272</sup> In practice civil parties often enjoy rights to call and question the defendant, witnesses and experts, adduce evidence, and address the court in closing submissions.<sup>273</sup>

<sup>266</sup> Testimony of Manuel Ollé Sesé in REDRESS and FIDH, *Trial Strategies*, p. 39.

<sup>267</sup> Article 10 and Recitals 41-42 of the 2012 Directive.

<sup>268</sup> Interview with civil party to a case in France, May 2014.

<sup>269</sup> See REDRESS, *The Appeal of Joseph M*, which includes footage of a VIS in *Mpambara*.

<sup>270</sup> In the Netherlands VIS are submitted during trial; see Article 51e of the CCP; J.M. Voermans, *Protecting Victims' Rights in the EU: the theory and practice of diversity of treatment during the criminal trial*, National Report: the Netherlands, 'VICS Project', pp. 7 and 16. In the UK VIS are referred to as 'Victim Personal Statements' and are submitted only after the conviction of an offender, before sentencing. See *Criminal Practice Direction Sentencing, F: Victim Personal Statements*, Criminal Practice Directions, October 2013, [2013] EWCA Crim 1631;

Julian V. Roberts and Marie Manikis, *Victim Personal Statements: A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales, October 2011; European Parliament, *Locus Standi Country Reports*, pp. 72 and 270.

<sup>271</sup> See for example Marc Groenhuijsen and Rianne Letschert, *Legal reform on behalf of victims of crime: The primacy of the Dutch legislature in a changing international environment?*, pp. 11-14.

<sup>272</sup> ECtHR, *Mantovelli v France*, App. No. 21497/93, 18 March 1997; Case C-276/01, *Steffensen*, [2003] ECR I-03735, paras. 77-78.

<sup>273</sup> REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, pp. 45-47; Centre for the Study of Democracy, 'Final Study on Victims of Crime' pp. 47-48.

**An example of civil party participation in trial proceedings can be seen in the *Nkezabera* case in Belgium in 2009.** Shortly before the scheduled start date, the court had to consider whether to proceed in the absence of the defendant – who suffered from terminal cancer and was too ill to attend trial – and his lawyers, or to postpone in the hope that he might recover sufficiently to attend court at a future time. Victims acting as civil parties were invited to put forward their views. Some requested that a trial *in absentia* take place, because there had already been long delays since the defendant’s arrest in 2004, there was little chance of any improvement in his health, and a trial might allow them to obtain reparation. Others felt a trial without the defendant would be meaningless. The court ultimately decided that the trial should go ahead in the defendant’s absence. After hearing evidence including the testimony of a number of victims, in December 2009 he was convicted of war crimes including murder, attempted murder and rape. He appealed this verdict in January 2010, and died before the decision of the Appeal Court, putting an end to all proceedings against him.

Authorities should be mindful of the need to avoid further victimisation or secondary trauma, which can occur through inappropriate cross-examination,<sup>274</sup> particularly when intended to undermine the credibility or motivations of victims.<sup>275</sup> Further difficulties arise when victims and witnesses are repeatedly re-examined and questioned, firstly by police, prosecutors, investigative judges and defence counsel in the course of a single case,<sup>276</sup> or if they participate in more than one trial related to the same set of events. Victims and witnesses need to be prepared and familiarised with court proceedings, particularly for the possibility that they will be confronted with previous statements. These situations also illustrate the important role of victims’ legal representation at the trial phase.

## **B. Reimbursement of expenses**

Victims of international crimes have stressed how the costs of taking part in criminal proceedings can significantly limit their ability to participate in proceedings, emphasizing how “the small difficulties have an impact”.<sup>277</sup> It is common practice in most Member States to reimburse witnesses and, where applicable, civil parties, for expenses incurred as a result of their participation in criminal proceedings.<sup>278</sup> These expenses usually include the cost of travelling to court, accommodation, loss of earnings while away from work, or providing childcare during time spent away from home. For many victims living abroad, particularly those in territorial states, the cost of participating in proceedings would otherwise make participation impossible. At a minimum their participation requires international travel and accommodation in the forum state, but in reality much more will be needed: local transportation in their home country (for example from remote regions to an airport, which may require overnight stays);

<sup>274</sup> Medica Mondiale, *In Search of Justice: What does justice mean for women and girls who have experienced sexualised violence in violent conflicts?* Conference report, September 2008, p. 20; Witteveen, ‘Dealing with old evidence in core international crimes cases: the Dutch experience as a case study’ pp. 82, 92-95; T. Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010), pp. 210-217.

<sup>275</sup> For example a detailed account of the cross-examination of former Iraqi detainees during the courts martial of Corporal Donald Payne, including excerpts of the transcript, is included in A.T. Williams, *A Very British Killing: the Death of Baha Mousa* (Jonathan Cape, 2012), pp. 202-216. Tobias Kelly, *This Side of Silence*, p. 135, compares and contrasts the *Payne* and *Zardad* trials.

<sup>276</sup> Article 20(b) of the 2012 Directive; Witteveen, ‘Dealing with old evidence in core international crimes cases: the Dutch experience as a case study’ pp. 82.

<sup>277</sup> Testimony of Wolfgang Blam in REDRESS and FIDH, *Trial Strategies*, pp. 18-19.

<sup>278</sup> Centre for the Study of Democracy, ‘Final Study on Victims of Crime’ p. 74.

appropriate clothing for European climates; healthcare and medicine; or even additional psychological support before or after providing testimony.<sup>279</sup>

The 2012 Directive recognises that victims incur these expenses, and provides them with the right to reimbursement of costs incurred as a result of their “active participation” in criminal proceedings.<sup>280</sup> In addition, victims are entitled to the return of property seized in the course of criminal proceedings.<sup>281</sup> These rights arise independently of the status of the accused and regardless of the outcome of the case; it is therefore independent of any compensation or awards for losses or damage suffered as a result of the crime itself.<sup>282</sup>

The Directive conceives of this right as an essentially administrative procedure. Victims should be informed about their right to apply for reimbursement on their first contact with the authorities, so that they are not deterred from participating due to the anticipated costs.<sup>283</sup> The procedure for applying for and receiving reimbursement should be timely, so that delays in reimbursement do not cause hardship.<sup>284</sup> Procedures must also be sufficiently flexible so they can facilitate expenses incurred in a range of circumstances which do not arise in most ‘ordinary’ criminal cases. For example, expenses will likely be incurred in the forum state and the state where the victim is based and investigations may last for years, so that it would be neither just nor feasible to wait until the end of proceedings to compensate victims and witnesses for expenses incurred.

National authorities have faced a number of challenges to reimburse expenses to victims and witnesses in territorial states. Although payment of expenses represents a vital recognition of the time and risks that victims and witnesses take to participate in proceedings, significant discrepancies between the amounts paid and the average earnings in the community can have unintended consequences. In some cases, defence counsel challenged the credibility and impartiality of victims and witnesses on the basis that they had received financial reward for their participation.<sup>285</sup> Victims and witnesses may also be placed at risk of intimidation or reprisal if it is known publicly that the authorities reimburse expenses. For example, a number of witnesses from Rwanda who had testified abroad in a foreign jurisdiction reported that they suffered from problems within the community upon their return home, and were accused by their neighbours of testifying solely to make money. Neighbours said to them, “When it comes to a trial outside of Rwanda, sometimes people give testimony they would not give inside. They go outside and they tell one story and then they come here and tell a different story.”<sup>286</sup>

Addressing these challenges should include close consultation in advance with victims, witnesses, their lawyers or other intermediaries such as NGOs working in the community. Consultation should focus on (a) identifying the expenses which victims and witnesses are likely to incur, (b) calculating the amount to be paid with reference to an appropriate benchmark,<sup>287</sup> and (c) agreeing an appropriate method of payment. This could include, for example, paying for

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<sup>279</sup> See for example Human Rights Centre of UC Berkeley School of Law, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses*, June 2014, p. 14.

<sup>280</sup> To “the extent that the victim is obliged or requested by the competent authorities to be present and actively participate” in the case; Article 14 and Recital 47 of the 2012 Directive, EC Guidance Document, p. 35. These expenses do not include legal fees.

<sup>281</sup> Article 15 and Recital 48. For example see Section 111k of the German CCP.

<sup>282</sup> As regulated by Article 16 of the Directive.

<sup>283</sup> Article 4(1)(k) and Recital 23 of the 2012 Directive.

<sup>284</sup> EC Guidance Document, p. 35.

<sup>285</sup> *Prosecutor v Mpambara*, Chapter 5, paras. 27-28, and *Prosecutor v Basebya*, Chapter 4, para. 29.

<sup>286</sup> REDRESS, *Testifying to Genocide*, p. 26.

<sup>287</sup> For example Dutch authorities compensated witnesses in Rwanda for loss of earnings by paying them the daily expenses rate which the UN provided to its local staff; in other countries they calculated rates with reference the practice of UN criminal tribunals. See *Mpambara*, Chapter 5, para. 27; *Basebya*, Chapter 4, para. 29.

or supplying services such as local travel, accommodation or food directly, so that victims and witnesses do not need to cash or apply for reimbursements. Reimbursement of costs should also be coordinated among national authorities where different Member States are investigating and prosecuting crimes committed in the same territorial state, so as to avoid discrepancies in the amounts reimbursed by national authorities. Where there is cooperation with the territorial state, or if local authorities play a role administering expenses or arranging victims' services, expressly clarifying that the payment is being provided by the authorities of the forum state may also help ensure victims' and witnesses' safety and impartiality.<sup>288</sup>

### C. Sentencing, appeal and other issues after trial

The 2012 Directive includes a number of rights for victims that come into play after the conviction of the offender, when the court makes its decision on an appropriate sentence, during the subsequent execution of that sentence or during appeal proceedings. Victims should be informed of their entitlements in respect of each of these rights at the outset of proceedings.<sup>289</sup> For instance, victims' right to access support services free of charge expressly continues after trial.<sup>290</sup> Victims must be informed about the final judgment in their case, including reasons for the decision: this should include disseminating information about the case and the outcome to the affected communities in the territorial state.<sup>291</sup> Victims also have a right to be informed about the time and place of any appeal hearings,<sup>292</sup> and they have a right to be notified when a person detained or imprisoned in connection with the case is released or has escaped.<sup>293</sup>

Victims will also continue to enjoy a right to be heard when national rules provide them with a role in appeal proceedings or decisions regarding the length and execution of sentence. For example victims acting as civil parties or private prosecutors enjoy rights to appeal decisions which affect their interests, particularly relating to their claim for damages.<sup>294</sup> In some Member States appeal proceedings may re-hear evidence and take the form of a second trial, so that victims may be able to repeat their role as civil parties or submitting statements.<sup>295</sup> Several Member States provide victims with a right to be heard during sentencing and parole proceedings, either by allowing them to make representations to decision-makers<sup>296</sup> or by taking into consideration VIS and other statements made by victims.<sup>297</sup> Victims may also have rights under national law to information about sentencing. The purpose and intent of these procedures is to ensure that victims' perspectives are heard in a way which "do[es] not and should not dictate sentences, but should allow more intelligent sentencing decisions".<sup>298</sup>

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<sup>288</sup> In *Basebya*, *ibid*, the investigative judge explained to all witnesses that expenses were being provided by him rather than by Rwandan authorities. Nonetheless "some witnesses felt not at ease about his offer and a number of witnesses refused the expense allowance".

<sup>289</sup> Article 4(1)(a) and 6(2)-(6), Recital 31, 32 of the 2012 Directive.

<sup>290</sup> Article 8(1), *ibid*.

<sup>291</sup> Article 6(2)(a) and 6(3), Recital 30, *ibid*.

<sup>292</sup> Recital 31, *ibid*.

<sup>293</sup> Article 6(5)-(6) and Recitals 32-33, *ibid*. EC Guidance Document p. 19, VSE, *Handbook for Implementation*, pp. 48-52.

<sup>294</sup> Dr. Wendy De Bondt, *Protecting Victims' Rights in the EU: The theory and practice of diversity of treatment during the criminal trial*, *National Report: Belgium*, 2013 pp. 27, 32; available from <http://www.victimprotection.eu/index.php/2014-05-01-19-31-19/jd/finish/4-be-belgium/67-be-national-report>. See also section 406(a) German CCP.

<sup>295</sup> For example see victim participation in REDRESS, *The Appeal of Joseph M.*

<sup>296</sup> For example in Belgium victims can propose conditions for the execution of sentence, including decisions on temporary leave from prison or provisional release on medical grounds. See *Loi 17 Mai 2006 relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d'exécution de la peine* ['Law concerning the position of victims with respect to the modalities governing sentence execution']; De Bondt, *Protecting Victims' Rights in the EU*, pp. 27-28.

<sup>297</sup> In the UK a court ruling on any appeal against sentence must take into account any VIS or other statements made by victims; Sections 35 and 36, Criminal Justice Act 1988

<sup>298</sup> See Victim Support, *Victims' Justice? What victims and witnesses really want from sentencing*, November 2010, p. 21.

As with the other rights discussed throughout this report, national authorities must ensure that these rights are fully accessible for victims located outside the EU. In practice, implementation will largely require staying in contact with victims after the proceedings; providing victims with individual contact points for their case; proactively exercising communication channels and conducting outreach to affected communities. Victim support also does not end after the proceedings: national authorities should conduct follow up with victims after the proceedings, and ensure that victims can access psychological or other forms of support if they need it. They should also seek victims' feedback on their perspectives of the proceedings, with a view to learning lessons and strengthening future practice.

## Chapter 9: Access to compensation

*One victim wrote to us from America explaining that her husband [...] had no way of proving what he went through in Chile. She asked if the bank payment showing the transfer of money to their account could be sent. Even though it was only \$200 he wanted to frame it and [...] put it up in the room to show it as proof of what Pinochet had done. The psychological dimension of this is very important.<sup>299</sup>*

Reparation is a broad concept which comprises restitution, rehabilitation, satisfaction and guarantees of non-repetition in addition to compensation.<sup>300</sup> States will bear obligations to implement these forms of reparation for victims, in addition to compensation, when responsibility for the underlying crime or human rights violation rests with the state. Within national criminal justice systems however, reparation is largely limited to financial compensation for losses incurred by victims as a result of the crime committed against them, due to the limited powers available to criminal courts as well as the current structure of state compensation schemes. Although it is also open to victims to bring separate civil proceedings against the individual perpetrator or the state which is responsible for the underlying wrong, those proceedings give rise to distinct legal and practical challenges, and fall outside the scope of the 2012 Directive.

Financial compensation can play a crucial role in acknowledging victims' suffering and ameliorating the hardship, poverty or ill-health they suffer as a result of the crime. For some victims, payment of compensation may also signal an offender's acceptance of responsibility for his or her actions and attempt to make amends, so that compensation can be seen as an intrinsic element of the justice process. Criminal justice standards emphasise the importance of compensation as an element of justice for victims of ordinary domestic offences.<sup>301</sup> In practice however access to reparation including compensation remains elusive for victims of serious international crimes. Despite the growing number of cases being prosecuted, very few victims who have participated in criminal proceedings – either as civil parties or in other roles – have been awarded or actually obtained compensation.

In most legal systems, there are two main avenues for victims of crime to access compensation: (i) compensation orders made against the offender in the course of criminal proceedings, and (ii) national criminal compensation schemes.

### A. Compensation from the offender in the course of criminal proceedings

The 2012 Directive provides victims of crime with a right, in the course of criminal proceedings, to a decision on compensation by the offender within a reasonable time.<sup>302</sup> Victims can enforce this right by acting as civil parties, in Member States where this mechanism is available.<sup>303</sup> In

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<sup>299</sup> Testimony of Juan Garces, lawyer representing victims in proceedings against former president of Chile, Augusto Pinochet, after reparations were obtained from a bank accused of hiding Pinochet's assets; REDRESS and FIDH, *Trial Strategies*, p. 66.

<sup>300</sup> See for example UN Basic Principles and Guidelines, paras. 15-23; Committee Against Torture General Comment 3, paras. 9-10.

<sup>301</sup> See for example the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116), entered into force 1 February 1988; UN Victims' Declaration, paras. 12-13; CoE Recommendation Rec(2006)8, on assistance to crime victims, para. 8.

<sup>302</sup> Article 16(1) and Recital 49 of the 2012 Directive. Article 16(2) encourages Member States to "promote measures to encourage offenders to provide adequate compensation to victims". This right applies "except where national law provides for such a decision to be made in other legal proceedings", for example through a separate civil claim.

<sup>303</sup> This mechanism is available, in various forms, in at least 23 Member States.



other countries prosecutors and/or judiciary are responsible for enforcing this right, and victims have no control or input over the application. In the Netherlands for example, the court has the power to order the defendant to pay compensation when convicted, even if the victim does not formally join the case.<sup>304</sup> In the UK, where the civil party mechanism does not exist, the court must always consider imposing a ‘compensation order’ when sentencing a guilty offender, either as an alternative or in addition to other forms of sanction. The prosecution should make submissions to the sentencing judge about an appropriate compensation order.<sup>305</sup> In other states including Denmark, Sweden and Finland the prosecution also has the responsibility to seek compensation on behalf of victims, by presenting a formal request or claim during criminal proceedings.<sup>306</sup>

The general principle is that once criminal proceedings have begun, all victims are entitled to apply for compensation regardless of their nationality or where the crime was committed. In reality many victims of ‘ordinary’ criminal offences experience difficulty in accessing compensation in this way, because the convicted offender has no means to pay compensation. Victims of serious international crimes face *additional* obstacles which disproportionately undermine their chances of receiving compensation in the course of criminal proceedings. The relatively low numbers of international crimes cases being prosecuted in EU Member States and low numbers of victims acting as civil parties – for reasons already described - has by definition blocked most victims’ access to compensation in such cases.<sup>307</sup> A difficult situation arises when an offender is convicted on some counts but acquitted on others, so that some victims receive compensation but others are excluded.<sup>308</sup> Further, satisfying the burden of proof may be difficult for victims of crimes committed historically or during conflict, who may be unable to access paperwork and official records, or to have them validated, notarised or translated. In *Ntuyahaga*, the court refused to award compensation to many civil parties – surviving relatives of persons killed during the 1994 Rwandan genocide – on the basis that the victims’ death certificates were not sufficiently detailed to prove they were related to the claimants. The court also rejected claims where death certificates were not available, or where certificates did not specify the date or location of death.<sup>309</sup>

Where statutes of limitation have been removed for serious international crimes prosecutions, procedural rules have not always been amended accordingly: for example legislation extending victims’ ability to obtain compensation in the Netherlands did not apply retrospectively, excluding victims of the 1994 Rwandan genocide. Inconsistencies among Member States on whether criminal courts must apply civil or criminal procedural rules in respect of compensation claims open further gaps between victims of ‘ordinary’ and international crimes. When civil rules are applied in criminal courts, claims for crimes committed several years ago may be barred by civil limitation periods which are generally much shorter than those which apply in criminal law.<sup>310</sup> Rules of private international law also require courts to apply the law of the

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<sup>304</sup> REDRESS and FIDH, *Extraterritorial Jurisdiction in the European Union*, p. 195.

<sup>305</sup> §130, Powers of the Criminal Courts (Sentencing) Act 2000. These usually award only a nominal or token amount, so that victims of ordinary offences are almost always required to bring separate civil proceedings if they want to obtain compensation for their actual losses.

<sup>306</sup> REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, p. 45; Center for the Study of Democracy, ‘Final Study on Victims of Crime’ p. 80.

<sup>307</sup> The question of criminal compensation is also academic in states where there are legal or jurisdictional obstacles to the prosecution of international crimes, such as amnesty laws, or when victims cannot act as civil parties because of security concerns or other reasons.

<sup>308</sup> This was seen in *Mpambara*, which three victims joined as civil parties. Two of the victims were awarded compensation but the defendant’s acquittal on sexual violence charges due to a lack of corroborating evidence meant that one of the victims received nothing, even though the court had found him to be a credible and consistent witness. See Liesbeth Zegveld, ‘Prosecution of international crimes of sexual violence in Dutch courts’, in International Bar Association, *Equality of Arms Review*, January 2010, pp. 12-13. A similar issue arose regarding a partial acquittal in *Basebya*.

<sup>309</sup> Bernard Ntuyahaga case. see also Luc Walley, REDRESS and FIDH, *Trial Strategies*, p. 60.

<sup>310</sup> REDRESS and FIDH, *Extraterritorial Jurisdiction in the EU*, p. 46.

territorial state – rather than their own law – to determine civil disputes.<sup>311</sup> For example, criminal courts in Belgium and the Netherlands have applied Rwandan laws when awarding compensation to victims.<sup>312</sup> Rules also distinguish between compensation for victims of crimes committed inside and outside the EU, particularly because some countries only grant criminal courts power to award compensation in ‘straightforward’ cases. This means that if detailed or complex inquiries are required, victims should pursue separate claims in civil rather than criminal courts.<sup>313</sup> These rules significantly extend the length and cost of litigation, and require victims to repeatedly undergo questioning in court about traumatic events. For example in *Van Anraat* a criminal court refused to interpret Iraqi law to determine victims’ compensation claims. Sixteen victims were ultimately successful in obtaining compensation from a civil court, but this process took another four years of litigation and considerable expense.

When a court awards victims with compensation, they face the process of enforcing orders against the perpetrator, who may have few if any financial resources. In the case of Joseph M in The Netherlands, two victims were awarded compensation of 680 Euro and 7,120 Euro in costs each.<sup>314</sup> The victims were advised that they could be assisted in enforcing the claim by a bailiff who they would need to pay. As the perpetrator is indigent, the decision has yet to be enforced.<sup>315</sup> Even where the perpetrator does have assets, such as property, they are often located in the territorial state or other countries abroad, so that victims will need to undertake enforcement proceedings in foreign jurisdictions. Such claims are usually legally complex, require additional lawyers in the foreign jurisdiction and tracing of existing assets, depend on the cooperation of the authorities in the territorial state, and are expensive to pursue. When the perpetrator has been involved in the commission of mass atrocities, competing claims may also arise from other victims. For example, one of the convicted perpetrators in the *Kibungu* case owned property in Rwanda. Some of the civil parties filed a separate claim against the offender before Rwandan courts to enforce part of the Belgian criminal compensation order against the properties, and eventually obtained an order to enforce the sale of the property. However this was disputed and eventually execution was prevented by other victims in Rwanda.<sup>316</sup>

## B. National Criminal Compensation Schemes

The alternative way for victims of crime to obtain compensation is to apply to national criminal compensation schemes, which now exist in all Member States.<sup>317</sup> States began to set up these schemes in the 1980s, partly in recognition of the fact that practical realities prevent many victims of ‘ordinary’ offences from receiving compensation in the course of criminal proceedings. Member States are now legally obliged to implement such schemes under the 2004 Directive,<sup>318</sup> to ensure that victims of crimes committed within the EU are able to obtain compensation across EU borders.<sup>319</sup> Many of the existing schemes provide compensation regardless of the conviction or even identification of the offender, and compensate a range of

<sup>311</sup> See Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), 11 July 2007, L199/40, 31 July 2007, by which the law of the place where the damage occurred applies.

<sup>312</sup> Bernard Ntuyahaga case; Ephrem Nekezabera case; Mpambara case (Appeal judgment).

<sup>313</sup> See Section 406, German CCP; Article 361(3), the Netherlands’ CCP; in the UK, *R v Donovan* (1981) 1 WLR 986, at p. 993. For an overview see David Miers, ‘Offender and state compensation for victims of crime: two decades of development and change’, *International Review of Victimology* (2014) Vol. 20(1), 145–168, pp. 149–151.

<sup>314</sup> The amount of 680 Euro represents the maximum amount of compensation available for crimes committed in 1994.

<sup>315</sup> Letter from the prosecutor in the case to the victims’ representative, 3 April 2014, copy on file with REDRESS.

<sup>316</sup> Interview with Belgian lawyer, September 2013; testimony of Luc Walley in REDRESS and FIDH, *Trial Strategies*, p60.

<sup>317</sup> Center for the Study of Democracy, ‘Final Study on Victims of Crime’ pp. 78–79.

<sup>318</sup> Council Directive 2004/80/EC on compensation for crime victims.

<sup>319</sup> See also Case 186/87, *Ian William Cowan v Trésor public*, [1989] ECR 195, para. 20.

different types of loss and damage.<sup>320</sup> In this sense these schemes reflect international standards and best practice which emphasise the duty of states to provide compensation to victims who are unable to obtain it from the offender.<sup>321</sup> Victims have no absolute 'right' to access such schemes, but once established, they must provide all due process to applicants.<sup>322</sup>

The 2004 Directive and most of the national compensation schemes which comply with it are not designed to apply to victims of serious international crimes, or crimes committed abroad. The 2004 Directive applies only to crimes committed in Member States' territories, specifically excluding crimes committed extra-territorially.<sup>323</sup> These shortcomings are manifested in the provisions of national compensation schemes in several states including Belgium, France, Germany and the Netherlands, whose compensation schemes apply only to crimes committed on their own territory, in other EU Member States or in respect of their own citizens.<sup>324</sup> This is also the case in the UK, with a narrow exception for British victims of terrorism committed abroad since 2012.<sup>325</sup> Some of the schemes also apply residency or nationality criteria, including in France, which exclude victims living abroad even if they take part in criminal proceedings within France.<sup>326</sup> The 2012 Directive does not mention national compensation schemes; although the EC undertook to review implementation of the 2004 Directive in 2011, this has not been carried out to date.<sup>327</sup> Rather, the EC has encouraged Member States to evaluate and address their own role in providing compensation to victims when transposing the 2012 Directive.<sup>328</sup>

Even victims of international crimes which have been committed on the territory of Member States may be hampered from applying to national schemes by a patchwork of procedural requirements including time limits, obligations to report the crime, principles of subsidiarity, and requirements that criminal proceedings have already taken place.<sup>329</sup> These rules suggest that Member States still do not consider serious international crimes to form part of the canon of domestic criminal offences – even when they are committed on their own territory or against their own citizens.

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<sup>320</sup> Center for the Study of Democracy, 'Final Study on Victims of Crime' pp. 78-79. A survey of 11 Member States is also contained in Ministry of Justice of Latvia, *Development of Compensation Mechanisms in Latvia: Summary* (2013) pp. 17-21.

<sup>321</sup> Eur. T.S. No. 116, 23 November 1983. The Convention has been ratified by 25 countries including 17 EU Member States. See also CoE 2006 Recommendation, Article 8 and Explanatory Memorandum, p. 98; UN Victims' Declaration, Article 12; UN Basic Principles and Guidelines, Article 20; Committee Against Torture General Comment 3, paras. 9-10 and 24-26.

<sup>322</sup> ECtHR *Gustafson v. Sweden*, App. No 23196/94, Judgment of 1 July 1997, paras. 40-41.

<sup>323</sup> Recitals 6 and 7 of the 2004 Directive. See also Case C-122/13 - *Paola C. v Presidenza del Consiglio dei Ministri*, judgment of 30 January 2014 [not yet reported].

<sup>324</sup> In Belgium, Article 31bis de la loi du 1er août 1985 portant des mesures fiscales et autres; In France, Article 706-3(3) of the CCP, Ministry of Justice, *La commission d'indemnisation des victimes d'infractions* ('Commission on Compensation for Victims of Crime' - CIVI): <http://www.vos-droits.justice.gouv.fr/indemnisation-du-prejudice-11940/indemnisation-par-le-tribunal-11949/la-commission-dindemnisation-des-victimes-dinfraction-20242.html>; in Germany Article 1(1) and 3a, *Gesetz über die Entschädigung der Opfer von Gewalttaten* ('Law on compensating crime victims'); in the Netherlands, Articles 3(1) and 18a *Wet Schadefonds Geweldsmisdrijven* ('Damages Fund for Violent Crimes Act'). See also *Schadefonds Geweldsmisdrijven* (Criminal Injuries Compensation Fund): <https://schadefonds.nl/aanvraag-indienen/ik-ben-slachtoffer/onze-criteria-slachtoffer>.

<sup>325</sup> Criminal Injuries Compensation Scheme 2012 paras. 4, 8, 10-16; See 'Compensation for Victims of terrorist attacks abroad', updated as of 17 June 2014, available at: <https://www.gov.uk/compensation-victim-terrorist-attack>.

<sup>326</sup> See Ministry of Justice, *La commission d'indemnisation des victimes d'infractions* ('Commission on Compensation for Victims of Crime' - CIVI): <http://www.vos-droits.justice.gouv.fr/indemnisation-du-prejudice-11940/indemnisation-par-le-tribunal-11949/la-commission-dindemnisation-des-victimes-dinfraction-20242.html>.

<sup>327</sup> EC, *Strengthening victims' rights in the EU*, COM(2011) 274 final, p. 10.

<sup>328</sup> EC Guidance Document, pp. 36-37.

<sup>329</sup> Miers, 'Offender and state compensation for victims of crime', p. 161; Center for the Study of Democracy, 'Final Study on Victims of Crime' p. 81. Time limits can sometimes be extended in special circumstances: for example in France, a general deadline of three years is extended for one year in the event of a final decision on the crime from a criminal court: Article 706-5 French CCP.

### C. Strengthening access to compensation for victims of serious international crimes

The effect of the challenges outlined above, taken collectively, is that victims of serious international crimes are frequently excluded from all established reparations channels. The case of Jackie Arklöv illustrates this point. Arklöv is a Swedish citizen who was convicted in Sweden in 2006 of war crimes committed during the Bosnian conflict in the 1990s. Eleven victims who participated in the trial were awarded compensation for damages totalling 2,271,900 Swedish Crowns – almost €250,000 EUR at the rates of exchange in 2014. However, this could not be enforced against Arklöv because he lacked funds to pay. The victims tried to obtain funds from the government through the Crime Damage Act. However as the crimes were committed outside of the country and the victims were not Swedish residents at the time of the crime, their applications were denied.<sup>330</sup>

Remedying these gaps, and addressing compensation as a fundamental right for victims of serious international crimes, will require political will and firm commitment by Member States. Review and evaluation of national legislation and procedural rules during transposition of the 2012 Directive should, at a minimum, include a critical appraisal of the availability of criminal compensation and, to the greatest extent possible, remedying comparative disadvantages amongst different classes of victims. This should include ensuring that removal of limitation periods for serious international crimes is also reflected in procedural rules and mechanisms which may impede access to compensation and other forms of reparation. National rules should also provide for legal representation and legal aid for victims during compensation proceedings.

Some states including France and The Netherlands have sought to address difficulties faced by victims when seeking to enforce criminal compensation awards by establishing national schemes under which the state assumes responsibility for enforcement of the awards.<sup>331</sup> If victims are unable to obtain payment from offenders, the state pays the victim directly and subsequently pursues the offender for the debt. These schemes are considered best practice, and efforts should be undertaken to ensure that any residency or nationality loopholes are eliminated for victims who have taken part in criminal proceedings within the Member State.

National criminal compensation funds should be strengthened so that all loopholes which prevent victims of serious international crimes from benefiting are identified and remedied. The guiding principle must be that all victims who participate in criminal proceedings within the Member State must be included.

In addition, authorities should strengthen their capacity to conduct effective financial investigations and asset-confiscation measures from the outset of investigations. The failure to identify and freeze assets *before* suspects are arrested allows them to hide, dissipate or redistribute assets later. Asset confiscation and freezing should be a routine matter for serious international crimes investigations, just as they are for counter-terrorism operations.<sup>332</sup>

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<sup>330</sup> Stockholm District Court, 18 December 2006, Case No. B 4084-04. See Amnesty International, *Sweden: End Impunity Through Universal Jurisdiction*, No Safe Haven Series No. 1, AI Index: EUR 42/001/2009, January 2009, p92. Similar circumstances were seen in the case of Ely Ould Dah in France; see Héloïse Bajer-Pellet in REDRESS and FIDH, *Trial Strategies*, p. 64

<sup>331</sup> Similar schemes operate in states including Austria, Bulgaria and Greece; Center for the Study of Democracy, 'Final Study on Victims of Crime' p. 77.

<sup>332</sup> Interview with former international crimes practitioner, May 2014. See discussion of efforts to confiscate illegally obtained assets of political actors in Switzerland by Philip Grant, REDRESS and FIDH, *Trial Strategies*, pp. 61-63.

## Part III: Conclusion and Recommendations

There are growing numbers of investigations and prosecutions of serious international crimes cases across the EU. National authorities such as police and prosecutors have more expertise in this field, and have a growing awareness of victims' needs and the importance of their participation. These developments indicate how far practice has come in the past two decades, yet much more needs to be done to make the 2012 Directive relevant to victims of serious international crimes.

The need for Member States to implement the 2012 Directive presents a key opportunity to ensure that all components of the Directive are made applicable to victims of serious international crimes. Addressing existing shortcomings requires political will, but is also a question of changing mindsets and refocusing energy on the practical steps which can enhance victims' experiences of the criminal justice system.

The '*Victims' rights checklist for investigators and prosecutors responsible for serious international crimes*' annexed to this Report provides further guidance which may assist national authorities to consolidate and implement their obligations to serious international crimes victims throughout all stages of the criminal justice process.

### EU Institutions

- The EU should reaffirm its commitment to the fight against impunity for international crimes *and* to ensuring the rights of victims of serious international crimes within its internal Justice and Home Affairs policy. The JHA Council should adopt conclusions reaffirming these commitments and call for the adoption of an EU Action Plan on Combating Impunity for Serious International Crimes, which includes recognition of the rights of victims.
- The European Commission should:
  - Include reference to victims of serious international crimes when monitoring the implementation of the 2012 Directive for the purposes of (a) bringing infringement proceedings against any Member States not in compliance and (b) preparing a report for the European Parliament and Council in accordance with Article 29 of the Directive;
  - Complete its review of the 2004 Directive on compensation for crime victims, in accordance with the Budapest Roadmap;
  - Complete its planned assessment of the implementation of Council Decisions 2002/494/JHA and 2003/335/JHA.
  - Begin preparing proposals for an EU Action Plan on Combating Impunity in close consultation with the Secretariat of the EU Genocide Network;
  - Provide funding to the Secretariat of the EU Genocide Network to ensure that it can broaden its work and contribute to strengthening victims' rights in national proceedings.
- The European Parliament, particularly the Committee on Civil Liberties, Justice and Home Affairs (LIBE), should play a key role in fostering the EU's commitment to ensuring the rights of victims of serious international crimes. The LIBE Committee should:
  - Include specific reference to victims of serious international crimes in any future initiatives on the rights of victims of crime in the EU, such as (a) evaluation of the implementation of the 2012 Directive in accordance with Article 29 of the Directive, (b)

adopting future funding programmes in the area of criminal justice in accordance with Article 84 TFEU, (c) planning future strategic guidelines in the Area of Freedom, Security and Justice in accordance with Article 68 TFEU;

- Host periodic discussions on efforts to combat impunity within EU Member States, including on the rights victims of serious international crimes;
  - Request the preparation of a policy study on strengthening accountability for international crimes and the rights of victims of international crimes within the field of JHA.
- The EU Genocide Network and its Secretariat should place victims' rights on the agenda of future meetings, exchange best practices on the implementation of victims' rights, and raise common concerns with EU Institutions and Member States.

Member States should:

- Ratify and incorporate into national criminal law all treaties prohibiting serious international crimes and confer powers to exercise extraterritorial jurisdiction as applicable. Ensure that obligations to investigate and prosecute serious international crimes are incorporated into national legislation, criminal codes and procedural rules in a way which is consistent with international law, standards and best practice.
- Review and, where necessary, amend domestic legislation and procedural rules to ensure full and effective implementation of the 2012 Directive in relation to victims of serious international crimes taking part in proceedings, regardless of their nationality or country of residence. Transposition of the Directive should:
  - Be conducted in close consultation with experts and non-governmental organisations;
  - Have close regard to international standards and best practice.
- Create adequately resourced and experienced specialised unit(s) within immigration, police and prosecution services.
- Strengthen the capacity of immigration, law enforcement and other authorities to identify victims of serious international crimes and ensure they can enforce their rights, including access to necessary medical and psychological care, support, legal representation and justice.
- Ensure regular cooperation and coordination on the investigation and prosecution of serious international crimes on the national and regional level. This should include:
  - Appointing a national contact point in charge of serious international crimes in accordance with Council Decision 2002/494/JHA to attend the meetings of the EU Genocide Network;
  - Establishing a 'National Task Force on Serious International Crimes' comprising all relevant national authorities and state agencies working on international justice, which should convene regular coordination meetings;
  - Establishing a 'Community Involvement Panel' comprising the national contact point and all national authorities working on international crimes together with civil society, lawyers, VSOs and other stakeholders who work with victims, which should convene regular coordination meetings.

- Adopt a comprehensive approach to witness and victim protection in the form of appropriate legislation and practical policies. Seek to enhance mutual legal assistance and cooperation with states outside the EU.
- Strengthen domestic mechanisms for victims to access reparation including compensation, particularly when it is unavailable from a convicted offender. This could include:
  - Defining eligibility for national criminal compensation schemes with reference to the state's jurisdiction over the crime or the accused, so that all victims participating in proceedings within the Member State can apply for compensation regardless of their nationality or country of residence.

National authorities including police and prosecutors

- Build the capacity of specialised units and other relevant authorities to implement the rights of victims of serious international crimes, with reference to the 'Victims' rights checklist for investigators and prosecutors responsible for serious international crimes' annexed to this Report.
- Engage and consult with victims, their lawyers and stakeholders working with victims when developing investigative and prosecutorial strategies at the outset of proceedings. Consultation should foster implementation of victims' rights and enhance the effectiveness of investigations and prosecutions.
- Develop strategies to foster effective support, protection and participation of victims and/or witnesses, including programmes and activities to ensure awareness of the existence and outcomes of investigations and prosecutions.
- Ensure that experiences and expertise are shared within the unit to minimise the impact of staff turnover.
- Participate actively in regional and national coordination mechanisms, including the EU Genocide Network and any 'National Task Forces on Serious International Crimes' to be established. Seek to engage proactively with civil society and experts working with victims of serious international crimes, including asylum and immigration organisations, torture and trauma rehabilitation centres, VSOs and human rights organisations.

Civil society working with victims of serious international crimes, including human rights organisations, immigration and asylum organisations, and rehabilitation centres for victims of torture and trauma

- Become familiar with the 2012 Directive, and integrate its provisions into activities to support and promote the rights of victims of serious international crimes, including research, advocacy with the relevant authorities or strategic litigation.
- Immigration, asylum and rehabilitation organisations should familiarise themselves with the options for victims to access justice and reparation for serious international crimes, with a view to identifying victims, providing them with information about their rights, and/or referring them for further advice and support in this area. For example, develop referral mechanisms with NGOs or lawyers specialised in these areas which could assist victims.

- Seek to open communication channels and to develop referral mechanisms with national authorities working with victims of serious international crimes, including immigration and asylum authorities, police and prosecutors, with a view to ensuring that victims of serious international crimes are able to access specialised support, assistance or legal representation as needed.
- Advocate for the establishment of (a) specialised units within national immigration, police or prosecution authorities, (b) appointment of national contact points to the EU Genocide Network, and (c) establishment of coordination mechanisms such as ‘National Task Forces on International Crimes’ or ‘Community Involvement Panels’. Participate actively in such mechanisms, and provide information about ongoing developments or matters of concern to national contact points.
- For organisations working in territorial states or with affected communities, explore options to conduct outreach to victims and witnesses in cooperation with national authorities, to:
  - Disseminate information about options for justice, about their rights, and about ongoing investigations and prosecutions;
  - Assist victims to come forward to file complaints or join ongoing proceedings;
  - Inform and explain to victims the outcome of criminal proceedings.



# Annexes

## I. Victims’ rights checklist for investigators and prosecutors responsible for serious international crimes

This checklist sets out recommended steps to be taken by specialised units or other criminal justice authorities responsible for investigating and prosecuting international crimes. These recommendations consolidate states’ legal obligations under the 2012 Directive and draw on best practice derived from international standards and identified in the course of research for this Report.

Recommended steps by specialised units, or other criminal justice authorities tasked with international crimes cases	Provision in 2012 Directive
<p>Develop outreach strategy to raise awareness of authorities’ work on international crimes. Strategy should include:</p> <ul style="list-style-type: none"> <li>• A dedicated website or webpage and leaflets and information materials which (a) set out authorities’ mandate and powers, using past cases as examples; (b) set out the rights of victims of international crimes in national law; (c) clarify the role of national authorities in helping victims to access those rights;</li> <li>• Translation of website and materials into key languages, e.g. English, French, Spanish, Arabic;</li> <li>• Designate contact points within the team for (a) inquiries from victims and witnesses and (b) media inquiries.</li> </ul>	<p>Article 4(1) Recitals 21 and 26</p>
<p>Distribute and disseminate leaflets and information materials, website address and contact details to stakeholders working with victim communities in the Member State:</p> <ul style="list-style-type: none"> <li>• Immigration and asylum authorities and service-providers; civil society and NGOs; specialised psychological and medical caregivers for survivors of torture and trauma.</li> </ul>	<p>Article 4(1) Recitals 21 and 62</p>
<p>Ensure all members of the team have training which includes:</p> <ul style="list-style-type: none"> <li>• General training on implementation of the 2012 Directive</li> <li>• Specialist training on the needs of victims of international crimes during investigations and prosecutions, including effective support, protection and participation;</li> <li>• Training on secondary traumatisation and ‘burnout’.</li> </ul>	<p>Article 25 Recital 61</p>
<p>Establish referral mechanisms to ensure that victims can be referred for support including:</p> <ul style="list-style-type: none"> <li>• General victim support provided by VSOs or other national service providers;</li> <li>• Specialist support such as medical or psychological examination, treatment or counselling; for example, specialised for survivors of trauma or sexual violence;</li> <li>• Legal advice, legal representation and legal aid by lawyers or NGOs specialised in international crimes.</li> </ul>	<p>Articles 8, 9, 26 Recitals 38, 39, 40</p>
<p>Provide victims with a written acknowledgment of their complaint, translated into a language they can understand if necessary.</p>	<p>Article 5 Recitals 21, 24, 25</p>
<p>Provide victims with contact details for further communication about their case.</p>	<p>Article 4(1)(i) Recitals 27, 29</p>

<p>Provide victims with information about their rights, translated into a language they can understand if necessary. For example, provide copies of leaflets or information materials.</p> <ul style="list-style-type: none"> <li>• Explain these rights and ensure victims understand them;</li> <li>• Pay particular attention to informing victims about legal representation, legal aid and civil party participation if available within the national legal system.</li> </ul>	<p>Articles 3, 4, 11, 13 Recitals 23, 26, 27</p>
<p>Assess each individual victim to determine if they have any protection needs or require special protective measures:</p> <ul style="list-style-type: none"> <li>• Consult with victims, their lawyers, civil society and other relevant stakeholders to seek their views on protection and vulnerability;</li> <li>• Put any relevant or necessary measures in place, in consultation with victims.</li> </ul>	<p>Article 22 Recitals 55, 56, 57, 58</p>
<p>Ensure victims have access to appropriate and effective support, preferably via established referral mechanisms (as developed in Stage 1, above).</p>	<p>Articles 8, 9 Recital 37, 38, 39</p>
<p>After conducting an initial assessment of the complaint and making a decision whether to open a formal investigation or to dismiss victims' complaints:</p> <ul style="list-style-type: none"> <li>• Inform victims about the decision, providing reasons or a summary of reasons in a language victims understand;</li> <li>• If the complaint is dismissed, inform victims about their right to review decisions not to investigate or prosecute;</li> <li>• Provide copies of all relevant documents, translated into a language victims can understand if necessary.</li> </ul>	<p>Articles 6(1), 7(3), 11 Recitals 26, 27, 30, 43, 44, 45</p>
<p>When a decision is taken to open a formal investigation, appoint victim support focal point(s) within the investigation team, responsible for:</p> <ul style="list-style-type: none"> <li>• Providing victims with information about their rights;</li> <li>• Providing victims with information about progress in their case;</li> <li>• Coordinating general and specialised victim support, including support for witnesses when necessary;</li> <li>• Liaising with all relevant authorities on victim and witness protection measures.</li> </ul>	<p>Articles 4, 6, 8, 18, 19, 20, 21 Recitals 26, 37, 58</p>
<p>Provide victims with contact details for victim support focal point(s), and schedule an initial meeting or contact so that victims can ask questions or raise any concerns.</p>	<p>Articles 4, 8 Recitals 26, 37</p>
<p>Begin consultation with victims, their lawyers, civil society and experts when planning investigation strategy. Identify and discuss issues such as:</p> <ul style="list-style-type: none"> <li>• Key threats and risks for victims and witnesses located in forum, territorial and third states;</li> <li>• Victims' and witnesses' needs and perspectives on protection and security measures;</li> <li>• Safe and effective ways of communicating and conducting outreach with victims and witnesses;</li> <li>• Ethnic, religious, social, cultural, political or other factors which need to be addressed to facilitate or encourage victim and witness participation;</li> <li>• Victims' and witnesses' perspectives of law enforcement authorities in territorial and third states, if relying on mutual legal assistance measures;</li> <li>• Are there credible, reliable and impartial NGOs or other stakeholders who could provide or assist victim and witness support or legal representation, or help identify victims and witnesses?</li> </ul>	<p>Article 8, 10, 18, 20</p>
<p>Prepare to implement victims' rights during investigations abroad:</p> <ul style="list-style-type: none"> <li>• Translate information materials and leaflets into local languages in affected regions, to inform victims about their rights;</li> </ul>	<p>Articles 3, 7 Recitals 34, 35, 36</p>

<ul style="list-style-type: none"> <li>Put in place mechanisms to ensure access to victim support, legal advice or legal representation;</li> <li>Prepare to answer victims' and witnesses' questions about available protection and security measures.</li> </ul>	
Conduct outreach in forum, territorial and third states, to raise public awareness of the investigation and encourage victims and witnesses to come forward.	Articles 6, 26 Recitals 21, 27, 62
For victims identified in the course of investigations, from their first point of contact with the authorities: <ul style="list-style-type: none"> <li>Inform them of their rights, particularly their right to legal representation and civil party participation if available in the respective national legal system;</li> <li>Provide contact details for victim support focal point(s);</li> <li>Conduct individual assessment of victims to identify their protection needs;</li> <li>Refer victims for general or specialist support.</li> </ul>	Articles 4, 8, 13, 22
Ensure that regardless of their ultimate role in the proceedings, victims have the right to be heard by the authorities during the investigation stage.	Article 10 Recital 41
Provide physical and 'emotional' protection for victims during interviews and questioning: <ul style="list-style-type: none"> <li>Victims to be accompanied by legal representatives and a supportive friend or relative;</li> <li>Duration, frequency and intrusiveness of interviews to be minimised;</li> <li>Support, including psychological support, to be provided for victims before, during and after interviews.</li> </ul>	Article 18, 20, 21 Recitals 52, 53
Victim support focal point(s) or other stakeholders ensure prompt and effective reimbursement for expenses incurred by victims in the course of investigations.	Article 14 Recital 47
Victim support focal point(s) provide information and updates about progress in the case to victims, including: <ul style="list-style-type: none"> <li>Decision to close the investigation, with reasons; or</li> <li>Decision to charge suspect(s) and details of the charges;</li> <li>Information about "state of the criminal proceedings";</li> <li>If the defendant is released or has escaped from custody, detention or remand, and about available protection measures in those circumstances.</li> </ul>	Article 6 Recitals 21, 26, 27, 30, 32, 33
Victim support focal point(s) provide information to victims about prosecution, including the time and place of the trial.	Article 6 Recital 26, 30, 31
Conduct outreach to affected communities in forum, territorial and third states: <ul style="list-style-type: none"> <li>Consider media reporting to raise publicity about the case, e.g. publishing press releases, giving radio interviews and using social media such as Twitter;</li> <li>Prepare to disseminate details of the case to affected communities by ensuring that translation and interpretation services will be available when the court/jury gives its verdict;</li> <li>Contact and consult with NGOs, intergovernmental organisations such as the UN or other stakeholders in territorial or third states who could assist.</li> </ul>	Articles 6 and 26 Recital 21, 26, 62.
Consult with victims, their lawyers and other stakeholders responsible for providing victim support regarding special measures which should be available at trial: <ul style="list-style-type: none"> <li>Interpretation and translation if required by victims to testify as witness AND participate in proceedings;</li> <li>Arrangements for victims to be accompanied by a supportive friend or relative;</li> <li>Preventing contact between victims, defendant(s) and their family member(s);</li> </ul>	Articles 18, 19, 21, 23, 24 Recitals 34, 35, 36, 52, 53, 54, 58, 59

<ul style="list-style-type: none"> <li>• Any appropriate security measures in the courthouse;</li> <li>• Special measures while testifying, such as closed court sessions, use of video-link, screens, frequent breaks, etc.;</li> <li>• Trial monitoring by an appropriate, impartial civil society organisation or legal expert group.</li> </ul>	
All national authorities and stakeholders involved in the case to coordinate and plan implementation of victims' rights during the trial phase.	Articles 8, 18, 19, 21, 23, 24, 26 Recitals 62
Consider role of prosecutors or victim support stakeholders to assist victims to prepare and submit a statement to the court, e.g. victim impact statement.	Articles 9, 10 Recitals 38, 41
Consider role of prosecutors, judges or victim support stakeholders to assist victims to apply for compensation from the defendant at trial.	Article 16 Recital 49
Consider role of victim support focal point(s) or victim support stakeholders to assist victims applying for: <ul style="list-style-type: none"> <li>• Prompt reimbursement for expenses incurred when participating in proceedings;</li> <li>• Return of property seized in the course of proceedings.</li> </ul>	Articles 14 and 15 Recitals 47, 48
Continue regular coordination and consultation between all stakeholders to ensure victims' rights are implemented during trial.	Article 26 Recital 62
Ensure victims can make authorities immediately aware of any change in circumstances or security threats during trial.	Article 18, 22 Recitals 53, 58
Ensure victims have the opportunity to be heard during the trial phase, by submitting or making a statement to the court or through their legal representatives.	Article 10 Recital 41
Ensure that victims who are entitled to be heard in respect of sentencing decisions have the opportunity to submit views to the court, judge or parole board.	Article 10 Recital 41
If appeal proceedings take place, ensure that: <ul style="list-style-type: none"> <li>• Victims are informed about the proceedings and are able to participate if entitled to do so in national law;</li> <li>• Victims are informed about the time and place of appeal proceedings;</li> <li>• Victims can access translation and interpretation to participate or testify in appeal proceedings;</li> <li>• Victims are informed if the defendant is released or has escaped from custody, detention or remand; and about available protection measures in those circumstances.</li> </ul>	Articles 6, 7 Recitals 31, 32, 33, 34, 35, 36
Disseminate information about the final outcome of the case: <ul style="list-style-type: none"> <li>• To victims and witnesses in the case;</li> <li>• Translate judgments and decisions into a language victims can understand;</li> <li>• By implementing media strategy in the forum, territorial and third states, as planned during Stage 4.</li> </ul>	Articles 6 and 26 Recital 21, 26, 62.
Promptly reimburse victims' expenses and return property confiscated in the course of proceedings.	Articles 14 and 15 Recitals 47, 48
Victim support focal point(s) coordinates support and assistance for victims involved in further proceedings related to compensation proceedings, such as: <ul style="list-style-type: none"> <li>• Enforcement proceedings against the offender;</li> <li>• Application to state compensation schemes.</li> </ul>	Articles 8, 9, 13, 16
Conclude consultation with victims, witnesses, civil society, trial monitors, VSOs and other national authorities: <ul style="list-style-type: none"> <li>• Request feedback on victims' experiences and perspectives of the investigation and trial;</li> </ul>	Article 26 Recital 62

<ul style="list-style-type: none"><li>• Evaluate input from trial monitors, VSOs, civil society or other observers;</li><li>• Identify existing gaps and lessons learnt in consultation with all authorities responsible for implementing victims' rights;</li><li>• Integrate best practice into future planning of investigative and prosecutorial strategies, and integrate recommendations into future training programmes.</li></ul>	
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## II. Excerpt from EC Guidance Document related to the transposition and implementation of EU Directive 2012/29/EU

### ARTICLE 1 — OBJECTIVE

#### (Recitals 9-14)

The purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Member States should ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or competent authorities operating within the context of criminal proceedings. Member States should ensure that the national criminal justice system recognises the victim as an individual with individual needs, with a key role in the criminal proceedings, while ensuring the fair trial principle and bearing in mind that the rights set out in the Directive are without prejudice to the rights of the offender.<sup>333</sup>

The Directive applies in relation to criminal offences committed in the Union and to criminal proceedings that take place in the Union (see further Recital 13). However, its object is not to criminalise certain acts or behaviours in the Member States. Thus, whether the Directive will apply and define as a 'victim' a person who has been a victim of specific conducts depends on whether such acts are criminalised and prosecutable under national law.<sup>334</sup>

Victims of crime under international law are not specifically mentioned in the Directive. However, most EU Member States have recently taken steps to incorporate international crimes such as genocide, war crimes and torture into their national criminal codes and to establish universal jurisdiction over them, so that these types of crimes may be prosecuted within their national legal systems even if committed abroad. Consequently, the Directive also confers rights on victims of extra-territorial offences who will become involved in criminal proceedings, which take place within the Member States (see Recital 13).

Recent practice in Member States<sup>335</sup> with regard to the investigation and prosecution of crimes under international law has demonstrated that in principle, 3 scenarios can arise when extra-territorial crimes are being addressed through proceedings in Member States:

1. Cases in which a crime was committed outside the EU, the victims of which are located within the Member State, and criminal proceedings in relation to the crime take place within the MS. An example of this scenario was seen in the case of A. Scilingo, who was convicted in Spain in 2005 of crimes against humanity and torture committed in Argentina in the 1970s and 80s; victims of his crimes were located in Spain or held Spanish nationality.
2. Cases in which a crime was committed outside the EU, the victims of which are located within a Member State and criminal proceedings in relation to the crime take place within another member State. An example of this scenario was seen in prosecution of J. Mpambara; the

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<sup>333</sup> The Article is based on FD Art. 2 and UN and other international instruments, in particular Council of Europe Recommendation (2006)8 (which requires in particular respect for the security, dignity, private life and family life of victims and the recognition of the negative effects of crime on victims). International law has progressively recognised the importance of safeguarding the rights of victims of crimes under international law and international standards which recognise the rights of such victims to participate in legal proceedings; to be protected from reprisals and to safeguard their privacy and psychological integrity; and to have recourse to effective remedies and adequate forms of reparation.

<sup>334</sup> For example, the criminalisation of some acts, such as for example road traffic offences or discrimination, hate- or bias conducts or stalking varies to a large degree between the Member States.

<sup>335</sup> As researched by Redress Trust, an international human rights non-governmental organisation based in the UK.

accused was convicted in 2009 of crimes which were committed in Rwanda in 1994, after a trial which took place in the Netherlands and involved victims living in Germany.

3. Cases in which a crime was committed outside the EU, the victims of which are located outside the EU, but who take part in criminal proceedings within a Member State in relation to that crime. An example of this can be seen in case of Y. Basebya, who was convicted in Netherlands in March 2013 of incitement to genocide in Rwanda in 1994; the Dutch court heard testimony from a large number of victims and witnesses in a number of European, North American and African countries, including Rwanda.

Member States should pay particular attention to the principle of non-discrimination, which covers all possible discrimination grounds, including sexual orientation and gender identity. This is particularly relevant in the context of gender-based violence (explained in Recital 17) as well as all forms of hate crime.

The application of the Directive in a non-discriminatory manner also applies to a victim's residence status. Member States should ensure that rights set out in this Directive are not made conditional on the victim having legal residence status on their territory or on the victim's citizenship or nationality (see also Recital 10). Thus, third country nationals and stateless persons who have been victims of crime on EU territory should benefit from these rights. [...]

### **III. Select Provisions of the EU Directive 2012/29/EU of 25 October 2012 on minimum standards on the rights, support and protection of victims of crime**

#### CHAPTER 1

#### **GENERAL PROVISIONS**

##### Article 1

##### Objectives

1. The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.

2. Member States shall ensure that in the application of this Directive, where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child.

##### Article 2

##### Definitions

1. For the purposes of this Directive the following definitions shall apply:

(a) 'victim' means:

- (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
  - (ii) 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 death;
- (b) 'family members' means 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;
- (c) 'child' means any person below 18 years of age;
- (d) 'restorative justice' means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.

2. Member States may establish procedures:

- (a) to limit the number of family members who may benefit from the rights set out in this Directive taking into account the individual circumstances of each case; and



(b) in relation to paragraph (1)(a)(ii), to determine which family members have priority in relation to the exercise of the rights set out in this Directive.

## CHAPTER 2

### PROVISION OF INFORMATION AND SUPPORT

#### Article 3

##### Right to understand and to be understood

1. Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority.
2. Member States shall ensure that communications with victims are given in simple and accessible language, orally or in writing. Such communications shall take into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.
3. Unless contrary to the interests of the victim or unless the course of proceedings would be prejudiced, Member States shall allow victims to be accompanied by a person of their choice in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood.

#### Article 4

##### Right to receive information from the first contact with a competent authority

1. Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive:
  - (a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
  - (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
  - (c) how and under what conditions they can obtain protection, including protection measures;
  - (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice;
  - (e) how and under what conditions they can access compensation;
  - (f) how and under what conditions they are entitled to interpretation and translation;
  - (g) 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;
  - (h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;
  - (i) the contact details for communications about their case;
  - (j) the available restorative justice services;

(k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.

2. The extent or detail of information referred to in paragraph 1 may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details may also be provided at later stages depending on the needs of the victim and the relevance, at each stage of proceedings, of such details.

## Article 5

### Right of victims when making a complaint

1. Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned.

2. Member States shall ensure that victims who wish to make a complaint with regard to a criminal offence and who do not understand or speak the language of the competent authority be enabled to make the complaint in a language that they understand or by receiving the necessary linguistic assistance.

3. Member States shall ensure that victims who do not understand or speak the language of the competent authority, receive translation, free of charge, of the written acknowledgement of their complaint provided for in paragraph 1, if they so request, in a language that they understand.

## Article 6

### Right to receive information about their case

1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:

- (a) any decision not to proceed with or to end an investigation or not to prosecute the offender;
- (b) the time and place of the trial, and the nature of the charges against the offender.

2. Member States shall ensure that, in accordance with their role in the relevant criminal justice system, victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by them and that, upon request, they receive such information:

- (a) any final judgment in a trial;
- (b) 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 notification.

3. Information provided for under paragraph 1(a) and paragraph 2(a) shall include reasons or a brief summary of reasons for the decision concerned, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.

4. The wish of victims as to whether or not to receive information shall bind the competent authority, unless that information must be provided due to the entitlement of the victim to active participation in the criminal proceedings. Member States shall allow victims to modify their wish at any moment, and shall take such modification into account.

5. Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender.

6. Victims shall, upon request, receive the information provided for in paragraph 5 at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification.

## Article 7

### Right to interpretation and translation

1. Member States shall ensure that victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.

2. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, communication technology such as videoconferencing, telephone or internet may be used, unless the physical presence of the interpreter is required in order for the victims to properly exercise their rights or to understand the proceedings.

3. Member States shall ensure that victims who do not understand or speak the language of the criminal proceedings concerned are provided, in accordance with their role in the relevant criminal justice system in criminal proceedings, upon request, with translations of information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge, to the extent that such information is made available to the victims. Translations of such information shall include at least any decision ending the criminal proceedings related to the criminal offence suffered by the victim, and upon the victim's request, reasons or a brief summary of reasons for such decision, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.

4. Member States shall ensure that victims who are entitled to information about the time and place of the trial in accordance with Article 6(1)(b) and who do not understand the language of the competent authority, are provided with a translation of the information to which they are entitled, upon request.

5. Victims may submit a reasoned request to consider a document as essential. There shall be no requirement to translate passages of essential documents which are not relevant for the purpose of enabling victims to actively participate in the criminal proceedings.

6. Notwithstanding paragraphs 1 and 3, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

7. Member States shall ensure that the competent authority assesses whether victims need interpretation or translation as provided for under paragraphs 1 and 3. Victims may challenge a decision not to provide interpretation or translation. The procedural rules for such a challenge shall be determined by national law.

8. Interpretation and translation and any consideration of a challenge of a decision not to provide interpretation or translation under this Article shall not unreasonably prolong the criminal proceedings.

## Article 8

### Right to access victim support services

1. Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings. Family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

2. Member States shall facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services.

3. Member States shall take measures to establish free of charge and confidential specialist support services in addition to, or as an integrated part of, general victim support services, or to enable victim support organisations to call on existing specialised entities providing such specialist support. Victims, in accordance with their specific needs, shall have access to such services and family members shall have access in accordance with their specific needs and the degree of harm suffered as a result of the criminal offence committed against the victim.

4. Victim support services and any specialist support services may be set up as public or non-governmental organisations and may be organised on a professional or voluntary basis.

5. Member States shall ensure that access to any victim support services is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority.

## Article 9

### Support from victim support services

1. Victim support services, as referred to in Article 8(1), shall, as a minimum, provide:

- (a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial;
- (b) information about or direct referral to any relevant specialist support services in place;
- (c) emotional and, where available, psychological support;
- (d) advice relating to financial and practical issues arising from the crime;

(e) unless otherwise provided by other public or private services, advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation.

2. Member States shall encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime.

3. Unless otherwise provided by other public or private services, specialist support services referred to in Article 8(3), shall, as a minimum, develop and provide:

(a) shelters or any other appropriate interim accommodation for victims in need of a safe place due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation;

(b) targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling.

### CHAPTER 3

#### **PARTICIPATION IN CRIMINAL PROCEEDINGS**

##### Article 10

###### Right to be heard

1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity.

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.

##### Article 11

###### Rights in the event of a decision not to prosecute

1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out-of-court settlement, in so far as national law makes such provision.

## Article 12

### Right to safeguards in the context of restorative justice services

1. Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

- (a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;
- (b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;
- (c) the offender has acknowledged the basic facts of the case;
- (d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;
- (e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

## Article 13

### Right to legal aid

Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.

## Article 14

### Right to reimbursement of expenses

Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.

## Article 15

### Right to the return of property

Member States shall ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay, unless required for the purposes of criminal proceedings. The conditions or procedural rules under which such property is returned to the victims shall be determined by national law.

#### Article 16

##### Right to decision on compensation from the offender in the course of criminal proceedings

1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.
2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

#### Article 17

##### Rights of victims resident in another Member State

1. Member States shall ensure that their competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a Member State other than that where the criminal offence was committed, particularly with regard to the organisation of the proceedings. For this purpose, the authorities of the Member State where the criminal offence was committed shall, in particular, be in a position:
  - (a) to take a statement from the victim immediately after the complaint with regard to the criminal offence is made to the competent authority;
  - (b) to have recourse to the extent possible to the provisions on video conferencing and telephone conference calls laid down in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 [\(17\)](#) for the purpose of hearing victims who are resident abroad.
2. Member States shall ensure that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence, if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so.
3. Member States shall ensure that the competent authority to which the victim makes a complaint transmits it without delay to the competent authority of the Member State in which the criminal offence was committed, if the competence to institute the proceedings has not been exercised by the Member State in which the complaint was made.

#### CHAPTER 4

##### **PROTECTION OF VICTIMS AND RECOGNITION OF VICTIMS WITH SPECIFIC PROTECTION NEEDS**

#### Article 18

##### Right to protection

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

#### Article 19

##### Right to avoid contact between victim and offender

1. Member States shall establish the necessary conditions to enable avoidance of contact between victims and their family members, where necessary, and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact.
2. Member States shall ensure that new court premises have separate waiting areas for victims.

#### Article 20

##### Right to protection of victims during criminal investigations

Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

- (a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;
- (b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;
- (c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;
- (d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.

#### Article 21

##### Right to protection of privacy

1. Member States shall ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, Member States shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim.
2. In order to protect the privacy, personal integrity and personal data of victims, Member States shall, with respect for freedom of expression and information and freedom and pluralism of the media, encourage the media to take self-regulatory measures.

#### Article 22

##### Individual assessment of victims to identify specific protection needs



1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.
2. The individual assessment shall, in particular, take into account:
  - (a) the personal characteristics of the victim;
  - (b) the type or nature of the crime; and
  - (c) the circumstances of the crime.
3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.
4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article.
5. The extent of the individual assessment may be adapted according to the severity of the crime and the degree of apparent harm suffered by the victim.
6. Individual assessments shall be carried out with the close involvement of the victim and shall take into account their wishes including where they do not wish to benefit from special measures as provided for in Articles 23 and 24.
7. If the elements that form the basis of the individual assessment have changed significantly, Member States shall ensure that it is updated throughout the criminal proceedings.

## Article 23

### Right to protection of victims with specific protection needs during criminal proceedings

1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.
2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

- (a) interviews with the victim being carried out in premises designed or adapted for that purpose;
- (b) interviews with the victim being carried out by or through professionals trained for that purpose;
- (c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

- (a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
- (b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
- (d) measures allowing a hearing to take place without the presence of the public.

#### Article 24

##### Right to protection of child victims during criminal proceedings

1. In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

- (a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;
- (b) in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;
- (c) where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

The procedural rules for the audiovisual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law.

2. Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child.

## CHAPTER 5

### OTHER PROVISIONS

#### Article 25

##### Training of practitioners

1. Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.
2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request that those responsible for the training of judges and prosecutors involved in criminal proceedings make available both general and specialist training to increase the awareness of judges and prosecutors of the needs of victims.
3. With due respect for the independence of the legal profession, Member States shall recommend that those responsible for the training of lawyers make available both general and specialist training to increase the awareness of lawyers of the needs of victims.
4. Through their public services or by funding victim support organisations, Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.
5. In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.

## Article 26

### Cooperation and coordination of services

1. Member States shall take appropriate action to facilitate cooperation between Member States to improve the access of victims to the rights set out in this Directive and under national law. Such cooperation shall be aimed at least at:
  - (a) the exchange of best practices;
  - (b) consultation in individual cases; and
  - (c) assistance to European networks working on matters directly relevant to victims' rights.
2. Member States shall take appropriate action, including through the internet, aimed at raising awareness of the rights set out in this Directive, reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation, in particular by targeting groups at risk such as children, victims of gender-based violence and violence in close relationships. Such action may include information and awareness raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders.

## CHAPTER 6

### **FINAL PROVISIONS**

## Article 27

### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 16 November 2015.
2. When Member States adopt those provisions they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

## Article 28

### Provision of data and statistics

Member States shall, by 16 November 2017 and every three years thereafter, communicate to the Commission available data showing how victims have accessed the rights set out in this Directive.

## Article 29

### Report

The Commission shall, by 16 November 2017, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including a description of action taken under Articles 8, 9 and 23, accompanied, if necessary, by legislative proposals.

## Article 30

### Replacement of Framework Decision 2001/220/JHA

Framework Decision 2001/220/JHA is hereby replaced in relation to Member States participating in the adoption of this Directive, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law.

In relation to Member States participating in the adoption of this Directive, references to that Framework Decision shall be construed as references to this Directive.

## Article 31

### Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

## Article 32

### Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

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