



## European Commission Directorate General Justice

### EXPLANATORY WORKING PAPER RELATED TO THE IMPLEMENTATION OF DIRECTIVE 2012/29/EU ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME

#### Comments by the Redress Trust, 31 July 2013

##### 1. Introduction

The Redress Trust (REDRESS) is an international human rights non-governmental organisation based in London, with a mandate to assist survivors of torture and related international crimes to seek justice and reparation. Our programmes include casework, law reform, research and advocacy. We have wide expertise and experience on the right to reparation for victims of torture under international law and take cases on behalf of torture survivors before national, regional and international human rights mechanisms, courts and tribunals.

REDRESS has a long-standing track-record of working to ensure that the rights of victims of crimes under international law are effectively protected and respected. REDRESS advocates to ensure victims' rights to effective access to justice, participation in legal proceedings, redress for their suffering, as well as support and protection to address both their physical safety and their emotional and psychological well-being.<sup>1</sup> REDRESS has implemented European Commission-funded projects on extraterritorial jurisdiction in the EU since 2003. Focusing on the legal and practical frameworks in place in Member States to exercise jurisdiction over international crimes including genocide, crimes against humanity, war crimes and torture, we have a history of advocacy with EU institutions as well as with EU Member States in strengthening their role in combating impunity for these acts as well as protecting and supporting victims of international crimes.<sup>2</sup>

REDRESS welcomes the adoption of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the Directive)<sup>3</sup> in October 2012. The Directive is an important benchmark for the protection and support of victims of crime in Europe, which – if

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<sup>1</sup> For example, see REDRESS and ECCHR, *Torture in Europe: the Law and Practice*, September 2012; REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action*, December 2009. REDRESS also facilitates the Victims' Rights Working Group, a network of over 300 national and international civil society groups and experts which was established in 1997 and saw the inclusion of strong victims' rights provisions in the International Criminal Court's legal framework.

<sup>2</sup> See 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*, December 2010 (REDRESS, *Extraterritorial Jurisdiction*); REDRESS and FIDH, *Universal Jurisdiction Trial Strategies: Focus on victims and witnesses*, November 2010 (REDRESS and FIDH, *Trial Strategies*); REDRESS and FIDH, *Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture*, March 2007.

<sup>3</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.*

properly implemented– will help strengthen and consolidate what has been recognised as an inconsistent and unsatisfactory body of practice and standards related to victims of crime among EU Member States.<sup>4</sup> The Directive, and the victims’ rights package of which it forms part<sup>5</sup>, recognises the needs of victims of crime as a central requirement for the attention of national criminal justice systems.

REDRESS notes that although victims of crimes under international law are not specifically mentioned in the Directive, its broad scope and applicability implies that it will extend to victims of such acts once they fall within categories of offences criminalised under national law.<sup>6</sup> Most EU Member States have now 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 the crimes may be prosecuted within their national legal systems even if committed abroad.<sup>7</sup> Therefore it is notable that the Directive extends to victims of crimes committed extra-territorially in third party states, who may become involved in criminal proceedings related to those crimes which take place within Member States.<sup>8</sup>

We welcome the opportunity to respond to the Explanatory Working Paper produced by the Justice Directorate of the European Commission (the Commission) in relation to the implementation of the Directive, and respectfully set out some key concerns and recommendations below which are made in the context of our expertise in working with victims of crimes under international law. We seek to assist the Commission to provide guidelines to Member States which ensure the fullest inclusion of all categories of victims within the scope of the Directive, including those which fall within REDRESS’ mandate. We further see this as an opportunity to remind Member States, in taking steps to implement the Directive into national law through legislative and other means, of their international obligations and of standards in respect of victims of crimes under international law, and to incorporate them into national law and procedure.

## **2. Victims of Crimes under International Law**

International law has progressively recognised the importance of safeguarding the rights of victims of crimes under international law, and international standards are emerging 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>9</sup> This is well-established in international instruments prohibiting crimes under international law<sup>10</sup>, and international standards also require authorities to ensure

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<sup>4</sup> *European Commission report COM(2009) 166 pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)*, 20 April 2009.

<sup>5</sup> See European Commission Press Release, [European Commission ensures better protection of crime victims](#), IP/11/585, 18 May 2011.

<sup>6</sup> See Explanatory Paper, at p7.

<sup>7</sup> See REDRESS and FIDH, *Extraterritorial Jurisdiction*, at pp. 21-22. For a more recent survey of the incorporation of international crimes into national law, see also Amnesty International, *Universal jurisdiction: A preliminary survey of legislation around the world - 2012 update*, 9 October 2012.

<sup>8</sup> Recital 13 of the Directive, discussed further below.

<sup>9</sup> This includes the well-established right to an effective remedy under the European Convention on Human Rights and Fundamental Freedoms (ECHR), e.g. under Articles 2, 3 and 13. In relation to victims of criminal offences, see the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34.

<sup>10</sup> See for example Article 13 of the UN Convention Against Torture (CAT), which provides that all victims of torture shall enjoy a right to complaint and investigation, as well as protection from ill-treatment or intimidation as a consequence of complaints. Article 14 of the CAT provides for rights to redress and to fair and adequate compensation including the means for as full rehabilitation as possible; this has been explained by

effective access to justice, remedy and reparations for victims of crimes under international law within their own jurisdictions.<sup>11</sup> At the international level, the International Criminal Court (ICC)<sup>12</sup> and certain specialised criminal tribunals<sup>13</sup> have provided mechanisms and procedures to engage with victims and provide access to remedies in their statutes and codes of procedure.

Victims of crimes under international law are often socially or economically isolated within Member States. They typically suffer from language barriers and other practical obstacles to reporting such crimes, and they may be distrustful of law enforcement authorities. These factors may impact negatively upon their ability to access information about the opportunities to access justice, or the procedures for filing complaints. Their reluctance to engage with criminal justice authorities may also be fuelled by fear, particularly of reprisals for themselves and their family members.<sup>14</sup>

While many of the survivors with whom REDRESS works want justice, sharing their experience with their lawyer – let alone publicly – can be a deeply challenging and daunting process. Victims of torture and other international crimes are often ashamed and humiliated by what was done to them, and may worry that no one will believe them if they complain. Challenges to credibility in the asylum seeking process underscore such worries. Crimes such as torture and sexual violence are typically carried out behind closed doors, without eyewitnesses other than the victim and perpetrator themselves, and may leave no visible scars.

All of these factors may particularly impact on victims of crimes under international law which were committed extra-territorially in countries beyond the borders of the EU, who may also worry about the impact of criminal complaints on their immigration status or about intimidation of family members living in their country of origin, where suspected perpetrators may still wield power and influence.

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General Comment 3 of the Committee Against Torture, CAT/C/GC/3, 13 December 2012. Similar rights are contained in the International Convention for the Protection of All Persons from Enforced Disappearance; see Articles 8(2) on the right to a remedy, Article 18(2) on the right to protection; and Article 24 on the rights to truth, compensation and reparation.

<sup>11</sup> See generally the *United Nations 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*, General Assembly Res. 60/147 of 16 December 2005 (the Van Boven/Bassiouni principles); *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights Resolution E/CN.4/RES/2005/81 of 21 April 2005 (the Joinet/Orentlicher principles). In addition, Article 2(b) of the [Draft Convention on Justice and Support for Victims of Crime and Abuse of Power](#) goes so far to extend the Convention to any victims of abuses of power, which are defined as “violations of internationally recognized *jus cogens* norms”.

<sup>12</sup> See Articles 68 and 75 of the Rome Statute and Chapter 4, Section III, *Victims and Witnesses*, of the ICC Rules of Procedure and Evidence. The ICC Victims’ Strategy focuses on four key objectives of communication, protection and support, participation and representation, and reparations and assistance; see Assembly of States Parties, *Court’s Revised Strategy in Relation to Victims*, ICC-ASP/11/38, 5 November 2012.

<sup>13</sup> For example, the Extraordinary Chambers in the Courts of Cambodia, see FIDH, [Victims’ Rights Before the Extraordinary Chambers in the Courts of Cambodia \(ECCC\): A Mixed Record for Civil Parties](#), 5 December 2012. The newest example is the Extraordinary African Chambers, established in February 2013 pursuant to an agreement between the Government of Senegal and the African Union to try the former President of Chad, Hissène Habré. For an overview of victims’ rights under the Chambers’ Statute see Dr. Miša Zgonec-Rožej, [Opening of the Extraordinary African Chambers to try the former president of Chad, Hissène Habré](#), 11 February 2013.

<sup>14</sup> For more on the difficulties facing victims in accessing justice, see Section B, “Victims’ Experiences of the Trial Process” and Section C, “Protection of Victims and Witnesses” in REDRESS and FIDH, *Trial Strategies*. See also REDRESS and FIDH, *Extra-territorial Jurisdiction*, at pp. 50 and 55 for the results of a survey of victim participation and protection among EU Member States, Switzerland and Norway.

These victims remain an exceptionally vulnerable group with multifaceted needs. Clarification of the guidelines contained in the Explanatory Paper in order to expressly remind Member States of the application of the Directive to such persons would assist national authorities to address many of the specific obstacles affecting this particularly vulnerable and often marginalised group, which discourage victim participation in criminal justice processes. They would also improve the prospects for rehabilitation and healing, and help to overcome the difficulties faced by criminal justice authorities in building viable cases against persons suspected of such crimes who may enjoy impunity within the EU.

### **3. Victims' Rights in the Explanatory Paper**

We commend the Commission for setting out such a comprehensive and well considered draft Explanatory Paper, addressing many aspects of the Directive which are essential for Member States to implement and/or address to harmonise minimum standards of protection and support for victims of crime across the EU. We consider that the Explanatory Paper can be an invaluable tool for Member States to ensure the optimal impact of the Directive. We encourage the Commission to continue to proactively engage with and consult both Member States and civil society throughout the implementation period, consistent with its role as the organ assisting Member States to effectively implement the Directive.<sup>15</sup>

REDRESS particularly welcomes the individualised approach to victims' rights, protection and support which lies at the heart of the Directive. We commend the Commission's efforts to integrate the principle of individual assessment of victims comprehensively throughout the guidelines set out in the Explanatory Paper and its dedication to "a targeted and participatory approach" towards the provision of information, support, protection and procedural rights.<sup>16</sup> These guidelines, if implemented fully, effectively and comprehensively across all Member States, will significantly improve the realisation of what the Commission has identified as fundamental objectives of EU reform on victims' rights: "to be recognised and treated with respect and dignity; to be protected and supported; to have access to justice; and to get compensation as restoration,"<sup>17</sup>

The Directive marks an important departure from previous EU law and policy in relation to victims of crime; the comprehensive and detailed nature of its provisions (as discussed in more detail below) develops victims' rights significantly since the adoption of the 2001 Framework Decision on the standing of victims in criminal proceedings.<sup>18</sup> We note in particular the Commission's strengthened enforcement powers and anticipate its future role in monitoring and evaluating implementation of the Directive at the national level.<sup>19</sup> To that end, we welcome and support the collaborative approach which the Commission has adopted with Member States in exploring implementing models from the outset of the implementation period and opening consultation with civil society, and hope that it will continue to do so during the later evaluation phase.<sup>20</sup>

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<sup>15</sup> For example through infringement proceedings under Article 258, Treaty on the Functioning of the European Union (TFEU).

<sup>16</sup> Explanatory Working Paper, p2.

<sup>17</sup> Explanatory Working Paper, p2; European Commission, Communication on *Strengthening Victims' Rights in the EU*, COM(2011) 274 final, 18 May 2011, at p4; See also the principles as set out at Recital 9 of the Directive.

<sup>18</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

<sup>19</sup> See Article 258 of the Treaty on the Functioning of the European Union; Art 19 Treaty on the European Union and Articles 251-281 Treaty on the Functioning of the European Union.

<sup>20</sup> In accordance with Article 29 of the Directive.

#### **4. Observations and recommendations on key issues pertaining to the rights of victims of crimes**

##### **A. The scope of the Directive to cover victims of crimes committed extra-territorially: Articles 1 and 2**

###### *Jurisdiction under the Directive*

REDRESS notes the definition of victims contained within Article 2(1)(a)(i) of the Directive, taken in the context of the provision set out in Recital 13 that the Directive shall apply to criminal offences committed in the Union and to criminal proceedings which take place in the Union. In addition, Recital 13 provides that the Directive “confers rights on victims of extra-territorial offences *only* in relation to criminal proceedings that take place in the Union” (emphasis added).

The impact of Recital 13 as it relates to this jurisdictional question upon the subsequent provisions of the Directive is not addressed in the Explanatory Paper. REDRESS welcomes the inclusion of victims of extra-territorial crimes within the scope of the Directive, yet it is concerned that the precise scope and modality of the Directive’s provisions in relation to victims of such crimes remains somewhat unclear. Specifically, there is a lack of clarity with respect to i) the extent to which coverage of such victims will differ from that of victims of crimes committed within the EU; and ii) the exact moment at which their enjoyment of Directive rights will begin.

Recent practice in Member States with regard to the investigation and prosecution of crimes under international law has demonstrated that there are three situations which can arise with regard to extra-territorial crimes being addressed through proceedings that take place in the EU:

1. 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 that Member State. An example of this scenario was seen in the case of Adolfo 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.<sup>21</sup>
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 the prosecution of Joseph Mpambara; the 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.<sup>22</sup>
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 the case of Yvonne Basebya, who was convicted in the 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.<sup>23</sup>

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<sup>21</sup> See Richard J. Wilson, [Argentine Military Officers Face Trial in Spanish Courts](#), ASIL Insights, December 2003.

<sup>22</sup> Joseph Mpambara, The Netherlands, The Hague District Court, 23 March 2009. See the testimony of Wolfgang Blam and Jaqueline Mukandanga Blam in REDRESS and FIDH, *Trial Strategies*, at pp. 17-19, 22-23.

<sup>23</sup> These countries include Rwanda, Belgium, France, Switzerland, Poland, Canada, the United States of America, South Africa, Malawi and Kenya. See Yvonne Basebya, District Court of The Hague, Case No. 09/748004-09, 1 March 2013, at p7 of the [English-language translation of decision](#).

The Directive is intended to apply to any and all victims who are engaged as witnesses or participants in proceedings taking place in EU Member States. As such, REDRESS recommends that to ensure the widest possible enjoyment of all the provisions of the Directive by all such victims – including those set out in the three scenarios above – the Explanatory Paper should be clarified by the inclusion of an express reference to the jurisdictional impact of Recital 13.

- The Commission may consider inserting into guidelines on ARTICLE 1 – OBJECTIVE<sup>24</sup>, an express reference to the effect that the *Directive also confers rights on victims of extra-territorial offences in relation to criminal proceedings which take place in Member States (see further Recital 13). Thus, the Directive will apply and define as a “victim” a person who has suffered harm in accordance with Article 2(1)(a) as a result of acts which are criminalised under national law, even if the crimes were committed in a location outside the jurisdiction of a Member State.*
- The Commission may consider inserting into the fifth paragraph under ARTICLE 1 – OBJECTIVE<sup>25</sup>, “Thus, also third country nationals and stateless persons who have fallen victim of crime on the EU territory *as well as victims of crime committed extra-territorially in relation to which criminal proceedings are taking place within the EU* must benefit from these rights.”

#### *The definition of criminal proceedings*

Recital 22 provides that criminal proceedings *should*, for the purposes of the Directive, be defined as commencing from “the moment when a complaint is made”. REDRESS regrets that this provision was not included within Article 2 on Definitions in order to make it unequivocally binding upon Member States. At present this provision and its implications are not discussed within the Explanatory Paper.<sup>26</sup>

This provision merits express reference within the guidelines. Such a reference, which it is recommended, should constitute an overarching principle applicable to all provisions within the Directive, and would strengthen the numerous references within the Directive which link victims’ enjoyment of rights to their role or participation in “criminal proceedings”<sup>27</sup> by explicitly connecting them to a clear definition of their precise starting point. This would remove any uncertainty for victims such as those who may wait months or years after filing a criminal complaint or informing the competent authorities of the presence of criminal suspects within their territory, before formal investigations are opened - if they are opened at all.

REDRESS further notes that Recital 19 provides that the definition of victim is not dependent on whether an offender is identified, apprehended, prosecuted or convicted, and we commend the Commission for drawing the attention of Member States to this essential fact, in the Explanatory

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<sup>24</sup> Explanatory Paper at p7.

<sup>25</sup> See Explanatory Paper at p7.

<sup>26</sup> Recital 22 is cited in relation to Guidelines on Article 5 - Rights when making a complaint, but is not discussed in relation to its substance; see Explanatory Paper, p15.

<sup>27</sup> See Article 7 on the right to interpretation and translation; Article 10 on the right to be heard; Article 11 on rights in the event of a decision not to prosecute; Article 13 on right to legal aid; Article 14 on right to reimbursement of expenses; Article 15 on right to the return of property; Article 16 on right to decision on compensation; Article 21 on right to protection of privacy; Article 23 on right to protection of victims with specific protection needs during criminal proceedings; Article 24 on right to protection of child victims during criminal proceedings.

Paper.<sup>28</sup> We consider that this should be closely linked to Recital 22's definition of criminal proceedings arising from the moment of the complaint, because this would be consistent with a definition of victim which is formally separated from the status of the accused. Such an interpretation would mitigate any disadvantages which might be suffered by victims which stem from a failure to investigate or prosecute suspected perpetrators of criminal acts.

- The Commission may consider inserting a reference to Recital 22 under the heading ARTICLE 2 – DEFINITIONS<sup>29</sup>;
- The Commission may further wish to state under ARTICLE 2 - DEFINITIONS<sup>30</sup> that *it recommends, for the purposes of the Directive, that criminal proceedings should be defined as beginning at the moment when a complaint is made (see further Recitals 19 and 22);*

## **B. Role of victims in the relevant criminal justice system: Article 2**

REDRESS recognises that the role of victims in criminal proceedings differs greatly in various Member States due to the divergences among legal systems and rules of criminal procedure, particularly related to the question of whether victims may act as legal parties to a case. Therefore we note that Recital 20 requires that Member States determine, with relevance to their particular legal system, criteria to define the scope of rights set out in this Directive where there are references to the “role of the victim”.<sup>31</sup>

REDRESS supports the Commission's approach to this as a key outstanding issue and commends its request for clarification on this matter from Member States.<sup>32</sup> We note with concern, however, the current lack of guidelines on this matter, with a view to ensuring that victims are not deprived of the enjoyment of any of their procedural rights under the Directive as a consequence of restrictive national definitions of their “role”. We recommend that the Commission take the opportunity in the guidelines to remind Member States that international standards impose a clear duty on states to provide victims of crimes under international law with equal and effective access to justice, as well as to effective remedies including reparation.<sup>33</sup>

- REDRESS urges the Commission to carefully consider Member States' responses and implementation efforts in defining the “role” of victims. The Commission should develop recommendations based on these responses.

Drawing on REDRESS' recommendations for clarification of Member States' definitions under Article 2, the Commission should consider including an explicit RECOMMENDATION on ARTICLE 2 – DEFINITIONS<sup>34</sup>, requesting that Member States:

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<sup>28</sup> See Explanatory Paper at p8; this is also consistent with Article 9 of the Van Boven/Bassiouni principles.

<sup>29</sup> That is, alongside Recitals 19 and 20; Explanatory Paper at p8.

<sup>30</sup> For example, on p9 of the Explanatory Paper.

<sup>31</sup> This includes Article 6(2) on the right to receive information about their case and about the criminal proceedings instituted as a result of the complaint; Article 7 on the right to interpretation and translation; Article 9(1) on the specifics of support from victim support services; and Article 11 on rights in the event of a decision not to prosecute, among others.

<sup>32</sup> Explanatory Paper at p10.

<sup>33</sup> See Van Boven/Bassiouni principles at Article 3(c) and (d), and Chapter III on the Right to Justice of the Joinet/Orentlicher principles; Principle 19 of the Joinet/Orentlicher principles provides that “States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein”.

<sup>34</sup> Explanatory Paper at p9.

- a. *Clearly and precisely specify the moment at which criminal proceedings are considered to begin for the purposes of the Directive (Recital 22) in order to allow for victims' enjoyment of Directive rights from the earliest opportunity within the context of their national legal systems;*
- b. *Clearly and precisely define the criteria which will apply to determine the scope of victims' rights within the context of their national legal system (Recital 20), setting out how each applicable Directive right will apply or may be enjoyed by victims, based upon whether the victim:*
  - i. *Has – or chooses to have – legal status as a party to the criminal proceedings;*
  - ii. *Is under a legal requirement or is requested to participate actively in criminal proceedings;*
  - iii. *Has a legal entitlement under national law to participate actively in criminal proceedings and seeks to do so;*
  - iv. *Has no legal status – or chooses not to exercise legal status – as a party to the criminal proceedings under the national legal system.*

### **C. Right to information: Articles 3, 4, 5, 6 and 7**

REDRESS considers that the rights set out in Articles 3, 4, 5, 6 and 7 relating to the provision of information, along with their corresponding Recitals as set out in the Explanatory Paper,<sup>35</sup> are closely interlinked. Given their frequent overlap, they should be considered holistically and as mutually informing each other. The right to information is particularly important in that it may strongly bear upon the ability of victims to enjoy rights to participate; courts have also found that the right to information is closely tied to the right to an effective remedy.<sup>36</sup> In the context of the Directive, this also includes the ability to enjoy the right to review a decision not to prosecute, by virtue of Articles 6(1)(a) and 6(3).<sup>37</sup>

REDRESS welcomes the Explanatory Paper's detailed consideration of the categories of information which should be provided to victims, the modalities of information-sharing, and the recommended introduction of specific legislative measures to address the complexity of these rights.<sup>38</sup> We note that Article 6 categorises rights to receive information according to the stage of the proceedings or the role of the victim in the relevant criminal justice system. Recognising that the roles of victims in criminal proceedings differ in various Member States, it is submitted that these rights must necessarily extend to victims where relevant law enforcement authorities do not open an investigation following the submission of a criminal complaint, regardless of the criminal justice procedures in place, in accordance with Recital 22.

We further reiterate the critical importance of rights to information for victims located outside the EU who are taking part in proceedings within Member States, such as those described in the third scenario of extra-territorial cases, referred to above. These victims may face disproportionate

<sup>35</sup> This includes Recitals 21, 23, 24, 26-36 and 63.

<sup>36</sup> See for example *Zontul v Greece*, App. No. 12294/07, 17 January 2012; summary [here](#), in which it was held that by ignoring Zontul's request for information on the progress of his case, the Greek authorities had deprived him of his right to seek compensation and to participate in proceedings following his complaint regarding torture at the hands of state actors while in immigration detention; see also *Ognyanova and Choban v Bulgaria*, App. No. 46317/99, 23 February 2006. Information in the context of the right to an effective remedy also features in the Van Boven/Bassiouni principles, at Articles 11, 12 and 24.

<sup>37</sup> See further below, Section E: Rights to Participate, pp.11-13.

<sup>38</sup> Explanatory Paper at pp. 11 and 16-18; Recommendation 6.

obstacles and hurdles to obtain adequate and timely information about the progress of their case, their rights when filing criminal complaints, and the right to review decisions not to prosecute, as well as how this information may be used to ensure their effective participation in proceedings.

- REDRESS recommends that the Commission insert into the guidelines under ARTICLE 6 – RIGHT TO RECEIVE INFORMATION ABOUT THEIR CASE<sup>39</sup> a statement that *As Article 6 is closely linked to the enjoyment of Article 11 rights to review decisions not to prosecute, victims’ rights to be understood under Article 3, and rights to interpretation and translation under Article 7, bear particular importance in relation to the provision of information. These rights must be exercised without prejudice to the Directive’s clear requirement that victims’ rights are not to be made conditional on the victim’s residence status or on the victim’s citizenship or nationality.*<sup>40</sup>

#### **D. Right to access victim support services: Article 8**

REDRESS welcomes the reference to the positive obligation to provide access to victim support services contained in Article 8 as well as the Commission’s recognition that victim support can “prove particularly important in regard to a victim’s decision to ultimately report a crime and to cooperate with police investigation and trial”.<sup>41</sup> We consider that the availability of comprehensive, accessible and individualised support measures within national jurisdictions is a cornerstone of the Directive’s objective of ensuring “respectful, sensitive, tailored, professional and non-discriminatory” treatment of victims.<sup>42</sup>

##### *Jurisdictional issues related to Article 8*

Article 8(5) provides that Member States shall ensure that access to victim support services is not dependent on a victim making a formal complaint to a competent authority, i.e. that support should be available prior to the commencement of criminal proceedings. Recital 37 further provides that “support should be available from the moment the competent authorities are aware of the victim [...]”. REDRESS welcomes the subsequent emphasis placed in the Explanatory Paper on the availability of support from the earliest possible moment after the commission of a crime, irrespective of whether it has been reported.<sup>43</sup>

The obligation to provide support services to victims independently of whether they have filed a complaint may be at odds with the jurisdictional provisions of Recital 13, which provide that victims of crimes committed extra-territorially will enjoy Directive rights only in relation to criminal proceedings taking place within the EU. However, REDRESS emphasises that these services must be equally accessible to victims involved in proceedings in the EU but who are resident abroad, to the extent that they are involved in criminal proceedings, as well as persons who are located within Member States but whose residency status is unresolved, including asylum seekers, refugees and stateless persons.<sup>44</sup> REDRESS considers that an appropriate interpretation of Article 8(5), taken in

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<sup>39</sup> Explanatory Paper at p16.

<sup>40</sup> In accordance with Member States’ obligations to prevent discrimination; see Article 1(1) and Recitals 9 and 10 of the Directive; Article 21 of the EU Charter (by virtue of Article 6.1 Treaty on European Union) and Article 14 of the ECHR.

<sup>41</sup> Explanatory Paper, at p22.

<sup>42</sup> See Article 1(1).

<sup>43</sup> See Explanatory Paper at p22.

<sup>44</sup> For Member States’ non-discrimination obligations see Article 1(1) and Recitals 9 and 10 of the Directive; this is also consistent with Article 21 of the Charter of Fundamental Rights of the European Union (EU Charter) and Article 14 of the ECHR.

conjunction with Recitals 13 and 37, would therefore consider the needs of individual victims of crime – even where such are committed extra-territorially – as the primary consideration for Member States, irrespective of whether the crime has been reported, criminal proceedings have been initiated, or Member States have opened an investigation following a complaint.

- REDRESS suggests that the Commission may wish to insert, for example in the fourth paragraph under ARTICLE 8 – RIGHT TO ACCESS VICTIM SUPPORT SERVICES<sup>45</sup>, that *in making arrangements for access to victim support services, Member States should adopt the broadest possible definition of victim under the Directive (see further Recitals 13 and 37), and must ensure that these services are available without discrimination of any kind.*

#### *Assessment of support needs*

In the absence of a formal requirement for an individual needs assessment under Article 8, REDRESS supports the Commission’s identification of an “implicit” requirement for Member States to establish procedures or protocols for assessing the support needs of victims and families in accordance with their needs and the degree of harm suffered.<sup>46</sup> REDRESS also welcomes the various options which the Commission has set out regarding mechanisms to refer those in need to specialist support services, which Member States are now under an obligation to establish.<sup>47</sup>

- We suggest that implementation of these guidelines might be strengthened by the inclusion of a RECOMMENDATION on Article 8 that *Member States should explore the possibility of developing standardised procedures or protocols for assessing the support needs of victims and their family members, to ensure that individuals receive a service which is appropriate to their circumstances and the degree of harm they have suffered, as appropriate to the form or structure of victim support within their criminal justice systems. This should include mechanisms to ensure identification of victims requiring specialist support services and referral to the appropriate authorities, as well as provision of relevant training for those responsible for the implementation of such procedures (see further Article 25).*

#### *Referral mechanisms*

REDRESSSS welcomes the Commission’s recommendation to formalise referrals of victims by competent authorities which receive criminal complaints or by other relevant entities to victim support organisations (VSOs)<sup>48</sup>, and we believe that police referrals will play an important role in ensuring that VSOs can effectively connect with victims. However, we emphasise that alternative referral mechanisms or avenues to access support should be developed, to ensure that victims who have not made a formal complaint are able to gain information about and access support, as well as to ensure that victims who may be distrustful of criminal justice authorities are not marginalised from support services or referral mechanisms.<sup>49</sup>

- REDRESS suggests that the wording of RECOMMENDATION 35 could be amended, so that these agencies are *encouraged* to create such arrangements rather than merely *allowed* to do so.<sup>50</sup>

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<sup>45</sup> Explanatory Paper at p22.

<sup>46</sup> Explanatory paper, at p24.

<sup>47</sup> Explanatory Paper at p23.

<sup>48</sup> Explanatory Paper at p22.

<sup>49</sup> See Article 8(5) and discussion on p9, above.

<sup>50</sup> Explanatory Paper at p25.

## E. Rights to Participate

The Directive contains a range of rights which collectively safeguard the right to participation in criminal proceedings.<sup>51</sup> REDRESS considers that victims' engagement in the criminal justice process is a way in which to recognise and acknowledge their suffering, foster their agency and empowerment, and contribute to the process of accountability for perpetrators of crime. For victims of crimes under international law, their participation may contribute to combating the impunity of perpetrators and assist with both their healing and the process of reconciliation within their societies.<sup>52</sup>

### *Article 7: Right to interpretation and translation*

Meaningful enjoyment of Article 7 rights to interpretation and translation is closely connected to the right to participation. REDRESS commends the Commission for contextualising this right with a focus on victims' participation and role in the proceedings with reference to Recital 34, which emphasises that extended rights to interpretation and translation should be available if needed by the victim in their particular circumstances.<sup>53</sup>

- REDRESS suggests that the Commission include a specific RECOMMENDATION on ARTICLE 7 for Member States to consider the possibility of developing procedures or mechanisms to ensure that victims of crime can access additional or extended interpretation or translation services as and when necessary, for aspects of criminal proceedings other than during questioning or participation in court hearings (see further Recital 34). This is necessary to ensure that all victims may enjoy other Directive rights which are dependent upon language and understanding, such as the right to information, to make a complaint or to review decisions not to prosecute.

### *Article 11: Right to review decisions not to prosecute*

REDRESS considers that the right to review decisions not to prosecute established in Article 11 will hold considerable significance for victims of crimes under international law, whose complaints do not always lead to the initiation of investigations or prosecutions. REDRESS therefore regrets that both Article 11(1) and the Explanatory Paper provide that the right is limited to victims with a "formal role" in the criminal justice system, and we reiterate our concern that national determination of the "role" of victims should not detract from the effective enjoyment of Directive rights. We therefore welcome the Explanatory Paper's request for clarification from Member States on the procedural and legal criteria which will apply to the exercise of the right to review.<sup>54</sup>

REDRESS encourages the Commission to use the opportunity of the Guidelines to remind Member States that the right to review decisions not to prosecute may be closely linked to the right to an

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<sup>51</sup> Including Article 7 on the right to interpretation and translation, Article 10 on the right to be heard, Article 11 on rights in the event of a decision not to prosecute, Article 12 on rights to safeguards in the course of restorative justice proceedings, Article 13 on rights to legal aid, Article 14 on right to reimbursement of expenses and Article 15 on the right to return of property, Article 16 on the right to a decision on compensation from the offender, and Article 17 on the rights of victims resident in other Member States.

<sup>52</sup> This view is consistent with the approach of international courts and tribunals towards victim participation, particularly the ICC. See REDRESS, *The Participation of Victims in International Criminal Court Proceedings*, October 2012, Chapter 3 and pp.5-9; for a summary of the ICC's provisions on victim participation see American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), [Victims' Participation at the ICC: Purpose, Early Developments and Lessons](#), 25 March 2013.

<sup>53</sup> Explanatory Paper at p19.

<sup>54</sup> Explanatory Paper at p29.

effective remedy.<sup>55</sup> This right has been repeatedly explained with respect to human rights abuses, particularly torture and cruel, inhuman or degrading treatment. It is well-established that an effective remedy for torture, for example, requires a thorough investigation capable of leading to the identification and punishment of those responsible for any ill-treatment<sup>56</sup>, and there is developing recognition of a right to truth inherent in the right to an effective remedy<sup>57</sup>. In all cases the complainant must be afforded effective access to the investigatory procedure.<sup>58</sup>

Recital 43 provides that the right to review shall be understood as referring to “decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers”, although not to a decision of a court. REDRESS considers that this provision should inform the definition of victims who are entitled to exercise the right to view, and considers that it establishes a right to review decisions which are taken even at the earliest stages of criminal proceedings. For example, the UK’s Crown Prosecution Service introduced a new, simplified policy providing for victims’ right to review in June 2013<sup>59</sup>, which excludes from review those cases in which the police (rather than prosecutors) exercise their independent discretion not to investigate a case or to discontinue investigations.<sup>60</sup> REDRESS is concerned that precluding the right to review prior to prosecution stage, particularly in Member States where victims do not enjoy a “role” until a prosecution or trial is underway, would greatly reduce the effectiveness of the right to review, particularly with regard to serious crimes.<sup>61</sup>

REDRESS notes that the Directive is silent on the question of whether persons or organisations other than the victim may apply to review decisions not to prosecute. We suggest nonetheless that it may be helpful for the Commission to consider the possibility of Member States introducing a mechanism whereby, under certain circumstances, applications to review could be filed by persons with a legal interest in the case, persons or organisations acting on behalf of the victim(s), or civil society actors concerned with representing the public interest. This would reflect the reality that NGOs, victims’ associations or other civil society actors often assist victims in filing complaints related to crimes under international law. It could also help to mitigate practical difficulties which may be faced by victims who live outside the EU in applying for review.<sup>62</sup>

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<sup>55</sup> See Article 47 of the EU Charter: the right to an effective remedy was recognised in EU law in *Johnston v Chief Constable Royal Ulster Constabulary*, Case 222/84 Johnston [1986] ECR 1651. See also Article 13 of the ECHR, which requires that a remedy must be “effective” in practice as well as in law - its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State: *Aksoy v Turkey*, App. No. 21987/93, 18 December 1996, at para. 95.

<sup>56</sup> See *Ilhan v Turkey*, App. No. 22277/93, 27 June 2000 at para. 92; in *Mikheyev v The Russian Federation*, App. No. 77617/01, 26 January 2006 at paras. 106-121 the European Court of Human Rights considered the impartiality of those conducting investigations as well as decisions related to the progress of pre-trial investigations in finding a violation of Article 3 ECHR.

<sup>57</sup> See the Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, *El-Masri v the Former Yugoslav Republic of Macedonia, El-Masri v the Former Yugoslav Republic of Macedonia*, App. No. [39630/09](#), 13 December 2012.

<sup>58</sup> See *Grigoryev v Russia*, App. No 22663/06, 23 October 2012, para. 66.

<sup>59</sup> CPS, [Victims’ Right to Review: Interim Guidance](#), Director of Public Prosecutions, 5 June 2013; this is currently subject to public consultation, which will end in September 2013.

<sup>60</sup> “[C]ases where the police exercise their independent discretion not to investigate or not to investigate a case further (whether in consultation with the [Crown Prosecution Service (CPS)] or not) where a full file of evidence has not been provided with a view to the CPS taking a formal prosecution decision” do not fall within the scheme; see pp. 2-3, *ibid*.

<sup>61</sup> See Article 11(2) and the Explanatory paper at p28 regarding the right to review for “serious” crimes.

<sup>62</sup> The ability of victims and others, including their representatives, to review decisions not to prosecute varies greatly in form and content across EU Member States; see REDRESS and FIDH, *Extra-territorial Jurisdiction*, at pp.44-45.

- The Commission could insert guidance under ARTICLE 11 – RIGHTS IN THE EVENT OF A DECISION NOT TO PROSECUTE<sup>63</sup> that *victims should enjoy the right to review decisions not to prosecute from an early stage in the proceedings; such decisions should include those of any relevant criminal justice or law enforcement authorities (see further Recital 43);*

#### *Article 13: Right to legal aid*

REDRESS welcomes the right to legal aid for victims of crime set out in Article 13, as well as the corresponding provision in Article 4(1)(d) regarding victims' right to information on legal aid and legal advice. Although we regret that the right to legal aid is restricted to victims "where they have the status of parties to criminal proceedings"<sup>64</sup>, we endorse the Commission's recommendation to draw inspiration from the more expansive wording of the Human Trafficking Directive on victims' access to legal aid.<sup>65</sup> This provides a means of mitigating the risk that this provision may preclude access to legal aid for victims *before* they have the status of parties, i.e. when filing complaints.<sup>66</sup>

This is particularly relevant to crimes under international law, criminal complaints of which are by their very nature complex and lengthy. Victims frequently face significant hurdles in preparing and filing complaints to the standard required to trigger a criminal investigation, and those wishing to access justice often need legal advice or representation to assist them in the process of compiling and preparing their case before the filing of a formal complaint.<sup>67</sup> Therefore we suggest that the guidelines on Article 13 would be strengthened by reference to the importance of considering provision of legal aid with reference to all the individual circumstances of the victim and their case.

- REDRESS suggests that in its guidelines under ARTICLE 13 – RIGHT TO LEGAL AID<sup>68</sup>, the Commission should remind Member States that *in defining the applicable conditions and procedures for ensuring victims' access to legal aid, they should be guided by Article 47 of the EU Charter, which refers to "such aid [as] is necessary to ensure effective access to justice."*

#### **F. Right to protection and individual assessment: Articles 18 and 22**

Victim and witness protection measures are well-established at both the national<sup>69</sup> and regional<sup>70</sup> level. The importance of protection for victims of international crimes has also been reflected in

<sup>63</sup> Explanatory Paper at p28.

<sup>64</sup> International standards such as the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly Resolution s, A/Res/67/187, 20 December 2012, provides simply that "States should, *where appropriate*, provide legal aid to victims of crime". See Principle 4 and Guideline 7.

<sup>65</sup> See Recommendation 52 at p 32 of the Explanatory paper.

<sup>66</sup> For example, current proposals to reform provision of legal aid in the UK – if adopted – would remove eligibility for certain forms of legal aid for persons who are not resident within the UK or who have not been resident long enough to have a "strong connection" to the UK; See the Bingham Centre for the Rule of Law, [Response to Ministry of Justice Consultation Paper CP 14/2013: Transforming legal aid: Delivering a more credible and efficient system](#), 4 June 2013 at pp. 3-4.

<sup>67</sup> See, for example, the testimony of Wolfgang Blam on the importance of legal aid in initiating proceedings against Rwandan genocide perpetrator Joseph Mpambara in the Netherlands, REDRESS and FIDH, *Trial Strategies*, at p14. Difficulties in accessing legal aid for such cases means that victims are often obliged to rely upon pro bono assistance by NGOs, which are limited in their capacity; See REDRESS and FIDH, *European Approach*, at p30.

<sup>68</sup> Explanatory Paper at p32.

<sup>69</sup> See REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action*, December 2009, Part III for an overview of victim protection methods internationally; see also UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008.

emerging principles contained in international law and standards.<sup>71</sup> These standards are reflected in the three-pronged approach set out in Article 18 on the right to protection, which recognises protection needs related to a) the victims' dignity, b) secondary victimisation and c) physical protection from intimidation and retaliation, and are further developed in the positive obligation to carry out a timely and individual assessment of all victims to determine their specific needs set out in Article 22. These provisions are supplemented both by Recital 57 and by the Explanatory Paper which list victims who tend to experience a high rate of re-victimisation, intimidation and retaliation and with whom particular care should be taken during individual assessment.<sup>72</sup>

REDRESS reiterates that full and effective access to protection measures and to individual assessment must apply to victims who are involved in proceedings in the EU but who are resident abroad, as well as persons who are located within Member States but whose residency status is unresolved, including asylum seekers, refugees and stateless persons. National authorities face issues related to protection on three levels in many cases related to crimes under international law: protection measures within their territory, within another Member State, or within third party states where victims or their family members may be located.<sup>73</sup>

- REDRESS recommends that the Commission considers, in its guidelines under ARTICLE 18 – RIGHT TO PROTECTION<sup>74</sup>, reminding Member States that *provision of protection measures may also arise in relation to victims normally located outside the EU who are involved in criminal proceedings in a Member State. Member States should consider the possibility of cooperation with other national authorities as necessary in such circumstances, as an alternative or in addition to the development of security plans, use of remote monitoring or provision of protection aids such as a dedicated phone number, regular reporting structures or other forms of monitoring as required.*

In relation to 'vulnerable' victims who are deemed as requiring "particular care", REDRESS considers that Recital 57 does not contain an exhaustive list of such victims, but rather constitutes an illustrative guide. International standards provide clear guidance specific to victims of crimes under international law which can be used to assess the severity of harm experienced by victims.<sup>75</sup>

- REDRESS recommends that the Commission clarify, in its guidelines on ARTICLE 22, Paragraph 3<sup>76</sup>, that "victims of terrorism [...] and victims with disabilities shall be duly considered *as examples on an open list of victims who typically present particular vulnerability*".

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<sup>70</sup> For example, Directive 2011/99/EU on the European Protection Order, and Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, adopted by the [Council of the EU](#) on 6 June 2013.

<sup>71</sup> The right to protection has featured in several instruments related to crimes under international law, including Article 13 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46 of 10 December 1984; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) at p59, recommended by GA res 55/89 of 4 December 2000, para. 3(b); Articles 14 and 18 of the International Convention for the Protection of All Persons from Enforced Disappearance, GA res 61/177 of 12 January 2007.

<sup>72</sup> See Explanatory Paper, p42.

<sup>73</sup> Hester van Bruggen, a Prosecutor at the National Prosecution Office, Department for International Crimes in the Netherlands, previously told REDRESS that "[i]n practically every case we have worked on, witnesses have been threatened and intimidated"; REDRESS and FIDH, *Trial Strategies*, p24.

<sup>74</sup> For example, p38 of the Explanatory Paper.

<sup>75</sup> See Footnote 11 *supra*.

<sup>76</sup> Explanatory Paper at p42.

REDRESS notes the Commission's recommendation that the police should be designated as the national referral mechanisms for individual assessment of victims, which should ideally be carried out by victim support services. However, we consider that VSOs and criminal justice authorities should also enjoy close channels of cooperation. This is particularly important for victims who may participate in cases in a capacity other than as a witness. Given that victim and witness protection programmes are frequently implemented by law enforcement agencies, Member States must ensure that victims who have not been closely involved with the police nonetheless have equal access to protection in accordance with their needs.

- The Commission may wish to insert, into guidelines on ARTICLE 22, a recommendation that *for individual assessment of victims and provision of criminal, administrative or civil protection measures, a well-functioning channel of cooperation between VSOs and the criminal justice authorities is essential to create trust, share information and ensure provision of victim protection measures as needed.*<sup>77</sup>

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<sup>77</sup> This would mirror the guidelines regarding provision of victim support under Article 8; see Explanatory Paper, p24.