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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts
on Transnational Criminal Justice
(PC-TJ)

Second meeting
Strasbourg, 31 January - 2 February 2005

FIRST PART
CONSIDERATIONS ON THE PLACE AND THE PROTECTION OF VICTIMS AND WITNESSES IN THE FIELD OF TRANSNATIONAL CRIMINAL JUSTICE

SECOND PART
CONSIDERATIONS ON THE CONCRETE WAYS TO ADDRESS SOME OF THE CURRENT OBSTACLES TO TRANSNATIONAL CRIMINAL JUSTICE

REPORT
by
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1) Introduction: the assignment for this written contribution

As requested by the Secretariat, this written contribution is intended to provide a platform for the next meeting of the PC-TJ Committee, in order to stimulate further discussion on the follow-up of the "New Start Report" ([1]), with the purpose to create a new approach to transnational criminal justice (TCJ). In particular, this contribution is supposed to deal with two different topics: a) the place and the protection of victims and witnesses in the field of transnational criminal justice; b) the possible concrete ways to address some of the current obstacles to transnational criminal justice.

According to the "general objectives and working methodology" indicated in the Summary Report of the first meeting of the PC-TJ Committee ([2]), the purpose is giving the Committee the possibility to "reach concrete, useful and practical results" on the way aiming "to improve the efficiency of transnational criminal justice". In order to better reach such ambitious goal it was recommended:

- to keep in mind the importance given by the CoE to the fight against terrorism;
- to ensure co-ordination and synergies with works on related matters in other Committees;
- to keep in mind the existing CoE instruments and achievements;
- to keep in mind the work carried out within the European Union, in particular when addressing issues limiting sovereignty, such as the European Arrest Warrant;
- to avoid any repetition of work already undertaken both within the CoE and within the European Union.

2) First part: Considerations on the place and the protection of victims and witnesses in the field of transnational criminal justice

A – A survey of the documents identified and indicated by the Secretariat on the position of victims and witnesses in criminal proceedings

The Secretariat prepared a compilation of the documents on the position of victims and witnesses in criminal proceedings, both from the Council of Europe and from the European Union, and requested the Committee to take into consideration the question of the place and the protection of victims and witnesses "in a transnational criminal procedure", keeping in consideration such documents and, in particular, "the 2nd additional Protocol to the MLA Convention" and "the work of the PC-PW on witnesses and collaborators of justice".

The relevant parts of the indicated documents will be reported in this paragraph. A special attention will be devoted to some specific international aspects of them, which appear to be particularly relevant for the purposes of the research to be carried on in the next paragraphs.

Document 1: Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters – Strasbourg, 8 November 2001:

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[1] CDPC(2002)1/PC-S-NS(2002)6/APPENDIX-II, Strasbourg, 30 April 2002. The text of the *New Start Report*, whose subtitle is *Transnational Justice: a European Area of Shared Justice*, can be found in *www.coe.int/tcj* ('Information' page of the website).

[2] *Summary Report of the 1st meeting*, Strasbourg, 20-22 September 2004, PC-TJ (2004) 4, page 3.

> *(…omissis…)*
> *Article 23 – Protection of witnesses.* Where a Party requests assistance under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection, the competent authorities of the requesting and requested Parties shall endeavour to agree on measures for the protection of the person concerned, in accordance with their national law. *(…omissis…)*

In the *Explanatory Report* to this document is said that (a) this article is to apply only where a request for assistance has been made under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection, (b) the obligation deriving from the article is simply "one to endeavour to agree", (c) the terms "witness" and "intimidation" are to be itended with the meaning given to them in Recommendation R (97) 13 (see *infra*, Document 2 in this paragraph).

Document 2: Council of Europe Recommendation No. R (97) 13 concerning Intimidation of Witnesses and the Rights of the Defence (Adopted on 10 September 1997):

> The Committee of Ministers *(…omissis…) r*ecommends that Governments of member States: […] be guided, when formulating their internal legislation and reviewing their criminal policy and practice, by the principles appended to this recommendation *(…omissis…).*
>
> **I. Definitions**
> For the purposes of this Recommendation:
> - "witness" means any person, irrespective of his status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition includes experts as well as interpreters;
> - "intimidation" means any direct, indirect or potential threat to a witness, which may lead to interference with his duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting either (i) from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or (ii) from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein;
> - "anonymity" means that the identifying particulars of the witness remain totally unknown to the defendant;
> - "collaborator of justice" means any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to co-operate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime.

II. General Principles

1. Appropriate legislative and practical measures should be taken to ensure that witnesses may testify freely and without intimidation.

2. While respecting the rights of the defence, the protection of witnesses, their relatives and other persons close to them should be organised, where necessary, including the protection of their life and personal security before, during and after trial.

3. Acts of intimidation of witnesses should be made punishable either as separate criminal offences or as part of the offence of using illegal threats.

4. While taking into account the principle of free assessment of evidence by courts, procedural law should allow for consideration of the impact of intimidation on testimonies.

5. Subject to legal privileges, witnesses should be encouraged to report any relevant information regarding criminal offences to the competent authorities and thereafter agree to give testimony in court.

6. While respecting the rights of the defence, witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face to face confrontation with the accused, e.g. by allowing witnesses to give evidence in a separate room.

7. Criminal justice personnel should have adequate training to deal with cases where witnesses might be at risk of intimidation.

III. Measures to be taken in relation to organised crime

8. When designing a framework of measures to combat organised crime, specific rules of procedure should be adopted to cope with intimidation. These measures may also be applicable to other serious offences. Such rules shall ensure the necessary balance in a democratic society between the prevention of disorder or crime and the safeguarding of the right of the accused to a fair trial.

9. While ensuring that the defence has adequate opportunity to challenge the evidence given by a witness, the following measures should, inter alia, be considered :

- recording by audio-visual means of statements made by witnesses during pre-trial examination;
- using pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them;

- revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details;
- xcluding the media and/or the public from all or part of the trial.

10. Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his credibility and the origin of his knowledge.

11. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that:

i. the life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his potential to work in the future is seriously threatened;

and

ii. the evidence is likely to be significant and the person appears to be credible.

12. Where appropriate, further measures should be available to protect witnesses giving evidence, including preventing identification of the witness by the defence e.g. by using screens, disguising his face or distorting his voice.

13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.

14. Where appropriate, special programmes, such as witness protection programmes, should be set up and made available to witnesses who need protection. The main objective of these programmes should be to safeguard the life and personal security of witnesses, their relatives and other persons close to them.

15. Witness protection programmes should offer various methods of protection; this may include giving witnesses and their relatives and other persons close to them an identity change, relocation, assistance in obtaining new jobs, providing them with body-guards and other physical protection.

16. Given the prominent role that collaborators of justice play in the fight against organised crime, they should be given adequate consideration, including the possibility of benefiting from measures provided by witness protection programmes. Where necessary, such programmes may also include specific arrangements such as special penitentiary regimes for collaborators of justice serving a prison sentence.

(…omissis…)

> **IV. International co-operation**
> 30. Instruments aiming to foster international co-operation as well as national laws should be supplemented in order to facilitate the examination of witnesses at risk of intimidation and to allow witness protection programmes to be implemented across borders. The following measures should, for example, be considered:
> - use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses or witnesses whose appearance in court in the requesting state is otherwise impossible, difficult or costly, while safeguarding the rights of the defence;
> - assistance in relocating protected witnesses abroad and ensuring their protection;
> - exchange of information between authorities responsible for witness protection programmes

For the purposes of the present paper, the final part of this document deserves particular attention, since it deals with the need for witness protection programmes to be implemented across borders, international video-links to facilitate examination of protected witnesses without appearance in court, and assistance in relocating protected witnesses abroad. This Recommendation constitutes the main basis for the further elaboration carried on by the Committee of Experts on the Protection of Witnesses and *Pentiti* in Relation to Acts of Terrorism (PC-PW), whose work is still going on ([3]).

Document 3: Council of Europe Recommendation No. R (85) 11 concerning the Position of the Victim in the Framework of Criminal Law and Procedure (Adopted on 28 June 1985):

> The Committee of Ministers *(...omissis...)* recommends the governments of member states to review their legislation and practice in accordance with the following guidelines *(...omissis...)*.
> 5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender ;
> 6. The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information ;
> 7. The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings *(...omissis...)*.

[3] The PC-PW produced a short document (*Draft Conclusions of the Final Report*, Strasbourg, 18 September 2003). The most recent meeting of this Committee occurred in Strasbourg in December 2004. According to its terms of reference, the aim of the activity of the PC-PW should be the development of guidelines and, if necessary, a convention to strengthen the protection of witnesses and collaborators of justice in cases of terrorism, including through an improved international co-operation in this area, taking due account of Recommendation No. R (97) 13.

> 9. The victim should be informed of :
> - the date and place of a hearing concerning an offence which caused him suffering ;
> - his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice ;
> - how he can find out the outcome of the case ;
> 10. It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished *(...omissis...)*.
> 16. Whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender. *(...omissis...)*

This document is the first CoE document on the position of the victims within criminal proceedings (but see *infra* in this paragraph, Document 7 on compensation to crime victims). The document does not consider any international aspect of the matter.

Document 4: Council of Europe Recommendation No. R (87) 21 concerning the Assistance to Victims and the Prevention of Victimisation (Adopted on 17 September 1987):

> The Committee of Ministers*(...omissis...)* recommends that the governments of member states take the following measures :
> 1. ascertain, by victimisation surveys and other types of research, victims' needs and victimisation rates in order to gather the necessary data to assist in the development of victim assistance programmes and structures ;
> 2. raise the consciousness of the public in general and of public services regarding the needs of the victim, for example, by debates, round tables and publicity campaigns, and promote solidarity in the community and, in particular, in the victim's family and social environment ;
> 3. identify currently existing public and private services able to provide assistance to victims, their achievements and any deficiencies;
> 4. ensure that victims and their families, especially those who are most vulnerable, receive in particular :
> - emergency help to meet immediate needs, including protection against retaliation by the offender ;
> - continuing medical, psychological, social and material help ;
> - advice to prevent further victimisation ;
> - information on the victim's rights ;
> - assistance during the criminal process, with due respect to the defence ;
> - assistance in obtaining effective reparation of the damage from the offender, payments from insurance companies or any other agency and, when possible, compensation by the state *(...omissis...);*
> 13. provide the public and the victims themselves with specific information and advice to prevent victimisation or any further

> victimisation, whilst refraining from unduly exacerbating feelings of fear and insecurity *(…omissis…)*;
> 19. evaluate the effectiveness of programmes aimed at preventing victimisation of the population as a whole or of certain social groups.

This document is mainly devoted to the prevention of victimisation. The document does not consider any international aspect of the matter and presents no special interest to the effect of our research.

Document 5: European Union Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA):

> The Council of the European Union – Having regard to the Treaty on European Union *(…omissis…)* – Whereas:
> (3) The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, in particular point 32 thereof, stipulate that minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victims' access to justice and on their right to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.
> (4) Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present.
> (5) Victims' needs should be considered and addressed in a comprehensive, co-ordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation *(…omissis…)*.
> (8) The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed *(…omissis…)*.
> Has adopted this Framework Decision:
>
> *Article 1*
> Definitions *(…omissis…)*

Article 2
Respect and recognition
1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.
2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.

Article 3
Hearings, and provision of evidence *(...omissis...)*

Article 4
Right to receive information
1. Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows:
(a) the type of services or organisations to which they can turn for support;
(b) the type of support which they can obtain;
(c) where and how they can report an offence;
(d) procedures following such a report and their role in connection with such procedures;
(e) how and under what conditions they can obtain protection;
(f) to what extent and on what terms they have access to:
  (i) legal advice or
  (ii) legal aid, or
  (iii) any other sort of advice, if, in the cases envisaged in point (i) and (ii), they are entitled to receive it;
(g) requirements for them to be entitled to compensation;
(h) if they are resident in another State, any special arrangements available to them in order to protect their interests.
2. Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of:
(a) the outcome of their complaint;
(b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
(c) the court's sentence.

3. Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary.
4. In so far as a Member State forwards on its own initiative the information referred to in paragraphs 2 and 3, it must ensure that victims have the right not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings.

Article 5
Communication safeguards *(...omissis...)*

Article 6
Specific assistance to the victim *(...omissis...)*

Article 7
Victims' expenses with respect to criminal proceedings *(...omissis...)*

Article 8
Right to protection
1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.
2. To that end, and without prejudice to paragraph 4, each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position.
3. Each Member State shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims.
4. Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.

Article 9
Right to compensation in the course of criminal proceedings
1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.
2. Each Member State shall take appropriate measures to encourage the offender to provide adequate compensation to victims.
3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.

Article 10
Penal mediation in the course of criminal proceedings *(…omissis…)*

Article 11
Victims resident in another Member State
1. Each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred, particularly with regard to the organisation of the proceedings. For this purpose, its authorities should, in particular, be in a position:
- to be able to decide whether the victim may make a statement immediately after the commission of an offence,
- to have recourse as far as possible to the provisions on video conferencing and telephone conference calls laid down in Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000(3) for the purpose of hearing victims resident abroad.

2. Each Member State shall ensure that the victim of an offence in a Member State other than the one where he resides may make a complaint before the competent authorities of his State of residence if he was unable to do so in the Member State where the offence was committed or, in the event of a serious offence, if he did not wish to do so. The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the national law of the State in which the offence was committed.

Article 12
Co-operation between Member States
Each Member State shall foster, develop and improve co-operation between Member States in order to facilitate the more effective protection of victims' interests in criminal proceedings, whether in the

> form of networks directly linked to the judicial system or of links between victim support organisations.
> *(...omissis...)*

This framework decision is probably the most important document concerning the general scope of the standing of victims in criminal proceedings. With respect to our research, it is interesting to note that it pursues "the objective of affording victims of crime a high level of protection, *irrespective of the Member State in which they are present*". In particular, this international aspect is dealt with in articles 11 and 12.

Document 6: European Union Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA):

> *(...omissis...)*
> *Article 9 – Jurisdiction and prosecution*
> 1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:
> (a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;
> (b) the offence is committed on board a vessel flying its flag or an aircraft registered there;
> (c) the offender is one of its nationals or residents;
> (d) the offence is committed for the benefit of a legal person established in its territory;
> (e) the offence is committed against the institutions or people of the Member State in question or against an institution ofthe European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.
> 2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall co-operate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate co-operation between their judicial authorities and the co-ordination of their action. Sequential account shall be taken of the following factors:
> - the Member State shall be that in the territory of which the acts were committed,
> - the Member State shall be that of which the perpetrator is a national or resident,
> - the Member State shall be the Member State of origin of the victims,
> - the Member State shall be that in the territory of which the perpetrator was found.

> 3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country.
> 4. Each Member State shall ensure that its jurisdiction covers cases in which any of the offences referred to in Articles 2 and 4 has been committed in whole or in part within its territory, wherever the terrorist group is based or pursues its criminal activities.
> 5. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.
>
> *Article 10 – Protection of, and assistance to, victims*
> 1. Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State.
> 2. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (1), each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.
> *(...omissis...)*

This document is particularly important because of the common definitions of the terrorist offences contained therein (articles 1 to 4). It considers international aspects referring to the case – very frequent – when offences occurr in the territories of different States or anyway fall within the jurisdiction of more than one State (art. 9). Victims are considered briefly in art. 10.

Document 7: Council of Europe Resolution (77) 27 concerning the Compensation of Victims of crime (Adopted on 28 September 1977):

> The Committee of Ministers *(...omissis...)* recommends that the governments of the member states take into consideration the following principles :
> 1. When compensation cannot be ensured by other means the state should contribute to compensate :
> *a.* anyone who has sustained severe bodily injury as a result of crime,
> *b.* the dependants of any person who died as a result of crime ;
> 2. As regards the crimes which caused the bodily injury, at least all intentional crimes of violence should be covered even if the offender could not be prosecuted ;
> 3. The compensation might be effected either within the framework of the social security system, or by the setting up of a special compensation scheme or by recourse to insurance ;

> 4. The compensation should be the fullest and fairest possible, taking into account the nature and the consequences of the injury ;
> 5. The compensation should include, in appropriate cases, at least loss of past and future earnings, increase of expenses, medical expenses, expenses of medical and professional rehabilitation, and funeral expenses ; *(...omissis...)*

This document, the oldest one on the issue of compensation to victims of crime, does not consider any international aspect and presents no particular interest to our research.

Document 8: European Union Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims:

> The Council of the European Union – Having regard to the Treaty establishing the European Community *(...omissis...)* – Having regard to the opinion of the European Economic and Social Committee ([4]) – Whereas: *(...omissis...)*
> (6) Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed.
> (7) This Directive sets up a system of co-operation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crime, committed in their respective territories. Therefore, a compensation mechanism should be in place in all Member States. *(...omissis...)*
> (11) A system of co-operation between the authorities of the Member States should be introduced to facilitate access to compensation in cases where the crime was committed in a Member State other than that of the victim's residence. *(...omissis...)*

[4] This Opinion was also indicated by the Secretariat in its list of relevant documents. It was published in *OJEU*, C 95, 23 April 2003, page 40.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
ACCESS TO COMPENSATION IN CROSS-BORDER SITUATIONS

Article 1

Right to submit an application in the Member State of residence

Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.

Article 2

Responsibility for paying compensation

Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.

Article 3

Responsible authorities and administrative procedures

1. Member States shall establish or designate one or several authorities or any other bodies, hereinafter referred to as 'assisting authority or authorities', to be responsible for applying Article 1.
2. Member States shall establish or designate one or several authorities or any other bodies to be responsible for deciding upon applications for compensation, hereinafter referred to as 'deciding authority or authorities'.
3. Member States shall endeavour to keep to a minimum the administrative formalities required of an applicant for compensation.

Article 4

Information to potential applicants

Member States shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate.

Article 5

Assistance to the applicant

1. The assisting authority shall provide the applicant with the information referred to in Article 4 and the required application forms, on the basis of the manual drawn up in accordance with Article 13(2).
2. The assisting authority shall, upon the request of the applicant, provide him or her with general guidance and information on how the application should be completed and what supporting documentation may be required.
3. The assisting authority shall not make any assessment of the application.

Article 6
Transmission of applications
1. The assisting authority shall transmit the application and any supporting documentation as quickly as possible to the deciding authority.
2. The assisting authority shall transmit the application using the standard form referred to in Article 14.
3. The language of the application and any supporting documentation shall be determined in accordance with Article 11(1).

Article 7
Receipt of applications
Upon receipt of an application transmitted in accordance with Article 6, the deciding authority shall send the following information as soon as possible to the assisting authority and to theapplicant:
(a) the contact person or the department responsible for handling the matter;
(b) an acknowledgement of receipt of the application;
(c) if possible, an indication of the approximate time by which a decision on the application will be made.

Article 8
Requests for supplementary information
The assisting authority shall if necessary provide general guidance to the applicant in meeting any request for supplementary information from the deciding authority.
It shall upon the request of the applicant subsequently transmit it as soon as possible directly to the deciding authority, enclosing, where appropriate, a list of any supporting documentation transmitted.

Article 9
Hearing of the applicant
1. If the deciding authority decides, in accordance with the law of its Member State, to hear the applicant or any other
person such as a witness or an expert, it may contact the assisting authority for the purpose of arranging for:
(a) the person(s) to be heard directly by the deciding authority, in accordance with the law of its Member State, through
the use in particular of telephone- or video-conferencing; or
(b) the person(s) to be heard by the assisting authority, in accordance with the law of its Member State, which will subsequently transmit a report of the hearing to the deciding authority.
2. The direct hearing in accordance with paragraph 1(a) may only take place in co-operation with the assisting authority and on a voluntary basis without the possibility of coercive measures being imposed by the deciding authority.

> *Article 10*
> Communication of the decision
> The deciding authority shall send the decision on the application for compensation, by using the standard form referred to in Article 14, to the applicant and to the assisting authority, as soon as possible, in accordance with national law, after the decision has been taken. *(...omissis...)*

This document is the most recent and advanced document on the compensation to crime victims. According to the Directive, crime victims in the European Union should be entitled to a compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed. A system of co-operation is set up to facilitate access to compensation to victims in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crimes committed in their respective territories. As a consequence, a compensation mechanism is supposed to be established in the next future in each one of the Member States of the European Union.

Document 9: Council of Europe Guidelines concerning Human Rights and the Fight against Terrorism (Adopted on 11 July 2002):

> *(...omissis...)*
> *XVII – Compensation for victims of terrorist acts* – When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned. *(...omissis...)*

This document considers that terrorism seriously jeopardises human rights and heavily threatens democracy. It reaffirms the imperative duty of States to protect their populations against possible terrorist acts, and recalls that fighting terrorism is absolutely necessary, although respecting human rights, the rule of law and, where applicable, international humanitarian law. The Guidelines do not consider any international aspect of the matter, except assuming that "extradition is an essential procedure for effective international co-operation in the fight against terrorism" (art. XIII). Protection of witnesses is not dealt with. The position of victims is considered only in art. XVII as reported *supra*, again with no reference to any international viewpoint.

Document 10: Council of Europe Recommendation No. R (91) 11 concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults (Adopted on 9 September 1991):

> The Committee of Ministers *(...omissis...)* recommends that the governments of member States review their legislation and practice with a view to introducing, if necessary, and implementing the following measures:
> *(...omissis...)*

> 13. Ensure throughout judicial and administrative proceedings confidentiality of record and the respect for privacy rights of children and young adults who have been victims of sexual exploitation by avoiding, in particular, the disclosure of any information that could lead to their identification;
> 14. Provide for special conditions at hearings involving children who are victims or witnesses of sexual exploitation, in order to diminish the traumatising effects of such hearings and to increase the credibility of their statements while respecting their dignity;
> 15. Provide under an appropriate scheme for compensation of children and young adults who have been victims of sexual exploitation;
> *(...omissis...)*
>
> II. International aspects
> *(...omissis...)*
> 2. Introduce rules on extraterritorial jurisdiction in order to allow the prosecution and punishment of nationals who have committed offences concerning sexual exploitation of children outside the national territory, or, if applicable, review existing rules to that effect, and improve international co-operation to that end;
> 3. Increase and improve exchanges of information between countries through Interpol, in order to identify and prosecute offenders involved in sexual exploitation, and particularly in trafficking in children and young adults, or those who organise it;
> 4. Establish links with international associations and organisations working for the welfare of children and young adults in order to benefit from data available to them and secure, if necessary, their collaboration in combating sexual exploitation;
> 5. Take steps towards the creation of a European register of missing children.

This document considers that sexual exploitation of children and young adults for profit-making purposes in the form of pornography, prostitution and traffic of human beings has assumed new and alarming dimensions at national and international level. It assumes that it is in the interests of member States of the Council of Europe to harmonise their national legislation on this phenomenon in order to improve the co-ordination and effectiveness of action taken at national and international level. The specific recommendation to "introduce rules on extraterritorial jurisdiction" for the criminal proceedings concerning this phenomenon – a recommendation directed to all member States of the Council of Europe – is particularly interesting to the effect of our research, because it is surprisingly consistent with the spirit of the New Start Report.

Document 11: Council of Europe Recommendation No. R (2000) 11 concerning Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation (Adopted on 19 May 2000):

> The Committee of Ministers, *(...omissis...)*
> Bearing in mind that Europe has recently experienced a considerable growth of activities connected with trafficking in human beings for

the purpose of sexual exploitation, which is often linked to organised crime in as much as such lucrative practices are used by organised criminal groups as a basis for financing and expanding their other activities, such as drugs and arms trafficking and money laundering;
Considering that trafficking in human beings for the purpose of sexual exploitation extends well beyond national borders, and that it is therefore necessary to establish a pan-European strategy to combat this phenomenon and protect its victims, while ensuring that the relevant legislation of the Council of Europe's member states is harmonised and uniformly and effectively applied;
Recalling the Declaration adopted at the Second Summit of the Council of Europe (October 1997), in which the heads of state and government of the member states of the Council of Europe decided "to seek common responses to the challenges posed by the growth (…) in organised crime (…) throughout Europe" and affirmed their determination "to combat violence against women and all forms of sexual exploitation of women"; *(…omissis…)*
Considering that trafficking in human beings for the purpose of sexual exploitation, which mainly concerns women and young persons, may result in slavery for the victims;

Condemns trafficking in human beings for the purpose of sexual exploitation, which constitutes a violation of human rights and an offence to the dignity and the integrity of the human being,

Recommends that the governments of member states:
1. review their legislation and practice with a view to introducing, where necessary, and applying the measures described in the appendix to this recommendation;
2. ensure that this recommendation is brought to the attention of all relevant public and private bodies, in particular police and judicial authorities, diplomatic missions, migration authorities, professionals in the social, medical and education fields and non-governmental organisations.

Appendix to Recommendation No. R 11

I. Basic principles and notions

1. The basic notions should be as follows: trafficking in human beings for the purpose of sexual exploitation includes the procurement by one or more natural or legal persons and/or the organisation of the exploitation and/or transport or migration – legal or illegal – of persons, even with their consent, for the purpose of their sexual exploitation, inter alia by means of coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability.
On this basis, the governments of member States are invited to consider the following measures:

II. General measures

2. Take appropriate legislative and practical measures to ensure the protection of the rights and the interests of the victims of trafficking, in particular the most vulnerable and most affected groups: women, adolescents and children.
3. Give absolute priority to assisting the victims of trafficking through rehabilitation programmes, where applicable, and to protecting them from traffickers.
4. Take action to apprehend, prosecute and punish all those responsible for trafficking, and to prevent sex tourism and all activities which might lead to forms of trafficking.
5. Consider trafficking in human beings for the purposes of sexual exploitation as falling within the scope of international organised crime, and therefore calls for co-ordinated action adapted to realities both at national and international levels.

III. Basis for action and methods
(...omissis...)

IV. Prevention
i. Awareness-raising and information
(...omissis...)
ii. Education
(...omissis...)
iii. Training
(...omissis...)
iv. Long-term action
(...omissis...)

V. Assistance to and protection of victims

i. Victim support
26. Encourage the establishment or development of reception centres or other facilities where the victims of human trafficking can benefit from information on their rights, as well as psychological, medical, social and administrative support with a view to their reintegration into their country of origin or the host country.
27. In particular, ensure that the victims have the opportunity, for example through the reception centres or other facilities, to benefit from legal assistance in their own language.

ii. Legal action
28. Provide, where possible, victims of trafficking, particularly children and witnesses, with special (audio or video) facilities to report and file complaints, and which are designed to protect their private lives and their dignity and reduce the number of official procedures and their traumatising effects.

29. If necessary, and particularly in the case of criminal networks, take steps to protect victims, witnesses and their families to avoid acts of intimidation and reprisals.
30. Establish victim protection systems which offer effective means to combat intimidation as well as real threats to the physical security of the victims and their families both in countries of destination and countries of origin.
31. Provide protection when needed in the country of origin for the families of victims of trafficking when the latter bring legal proceedings in the country of destination.
32. Extend, where appropriate, this protection to members of associations or organisations assisting the victims during civil and penal proceedings.
33. Enable the relevant courts to order offenders to pay compensation to victims.
34. Grant victims, if necessary, and in accordance with national legislation, a temporary residence status in the country of destination, in order to enable them to act as witnesses during judicial proceedings against offenders; during this time, it is essential to ensure that victims have access to social and medical assistance.
35. Consider providing, if necessary, a temporary residence status on humanitarian grounds.

iii. Social measures for victims of trafficking in countries of origin
36. Encourage and support the establishment of a network of NGOs involved in assistance to victims of trafficking.
37. Promote co-operation between reception facilities and NGOs in countries of origin to assist the return and reintegration of victims.

iv. Right of return and rehabilitation
38. Grant victims the right to return to their countries of origin, by taking all necessary steps, including through co-operation agreements between the countries of origin and countries of destination of the victims.
39. Establish, through bilateral agreements, a system of financing the return of victims and a contribution towards their reintegration.
40. Organise a system of social support for returnees to ensure that victims are assisted by the medical and social services and/or by their families.
41. Introduce special measures concerned with victims' occupational reintegration.

VI. Penal legislation and judicial co-operation

42. Enact or strengthen legislation on trafficking in human beings for the purpose of sexual exploitation and introduce, where necessary, a specific offence.
43. Introduce or increase penal sanctions that are in proportion to the gravity of the offences, including dissuasive custodial sentences, and allow for effective judicial co-operation and the extradition of the persons charged or convicted.
44. Take such steps as are necessary to order, without prejudice to the rights of third parties in good faith, the seizure and confiscation of the instruments of, and proceeds from, trafficking.
45. Facilitate police investigation and monitoring of establishments in which victims of trafficking are exploited and organise their closure if necessary.
46. Provide for rules governing the liability of legal persons, with specific penalties.
47. Provide for traffickers to be extradited in accordance with applicable international standards, if possible, to the country where evidence of offences can be uncovered.
48. Establish rules governing extra-territorial jurisdiction to permit and facilitate the prosecution and conviction of persons who have committed offences relating to trafficking in human beings for the purpose of sexual exploitation, irrespective of the country where the offences were committed, and including cases where the offences took place in more than one country.
49. In accordance with national laws concerning the protection of personal data, as well as with the provisions of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, set up and maintain information systems which could be useful for the investigation and prosecution of trafficking offences.

VII. Measures for co-ordination and co-operation

i. At national level
50. Set up a co-ordinating mechanism responsible for drawing up the national policy on combating trafficking and organising a multidisciplinary approach to the issue.
51. Use this mechanism to encourage the exchange of information, the compilation of statistics and the assessment of practical findings obtained in the field, trends in trafficking and the results of national policy.
52. Use this mechanism to liaise with mechanisms of other countries and international organisations in order to co-ordinate activities, and to monitor, review and implement national and international strategies aimed at combating trafficking;

> ii. At international level
> 53. As far as possible, make use of all the available international instruments and mechanisms applicable to trafficking, particularly regarding the seizure and confiscation of profits earned from trafficking.
> 54. Set up an international body to co-ordinate the fight against trafficking, with particular responsibility for establishing a European file of missing persons, in accordance with national laws concerning the protection of personal data.
> 55. Increase and improve exchanges of information and co-operation between countries at bilateral level as well as through international organisations involved in combating trafficking. *(…omissis…)*

This document is the most recent and advanced document of the Council of Europe concerning the issue of trafficking in human beings. The document is of great interest to the effect of our research, because it seems to outline a concrete possible scheme of "transnational justice" in the sense envisaged by the drafters of the New Start Report. This Recommendation considers that trafficking in human beings for the purpose of sexual exploitation – which mainly concerns women and young persons and is often linked to organised crime – "extends well beyond national borders", then requires "a pan-European strategy" to combat it and to protect its victims. Furthermore, trafficking in human beings for the purpose of sexual exploitation "may result in slavery for the victims" and "constitutes a violation of human rights and an offence to the dignity and the integrity of the human being".

B – The meaning of the expression "transnational criminal justice" and the scope of a specific research on the position of victims and witnesses "in transnational criminal justice"

It is now necessary to ascertain *whether* and *to what extent* each one of the aforementioned official CoE and EU documents may be said to deal with the position of victims and/or witnesses in *transnational criminal justice*, an expression which defines the specific field of our research. However, in order to make this assessment possible, a crucial and preliminary step is needed. And in fact, we need first of all to draw a clear distinction between the general expression "international co-operation in criminal justice" and the more specific expression "transnational criminal justice" coined by the New Start Report, giving a concrete and acceptable definition of the latter in accordance with the spirit of that Report.

We know that the New Start Report was drafted after a deep reflection "on developments in international co-operation in criminal matters", and contains the general outlines of an extremely ambitious and wide-scope project for "*a European area of shared justice*", in pursuance of a specific decision taken on 21 September 2001 by the Committee of Ministers of the Council of Europe. Furthermore, the leading idea of the New Start Report can be found in the opening chapter of the 'Renewal' section – concerning the need for reconsidering the role of governments and judicial authorities – where a *really new approach* is envisaged "*to the relations between sovereignty and international co-operation*". As a matter of fact, the Reflection Group pointed out that "It is not a matter of doing away with or undermining sovereignty; it is a matter of *redefining the notion of sovereignty* when it comes to the exercise of a function – namely justice – that States can no longer exercise individually. Indeed no State alone is capable of effectively responding to crime. It is thus

worth reflecting on whether States could not freely enter into agreements whereby they accept to *share with other States their rights and duties in matters pertaining to their response to crime*".

If we consider the comparable documents on criminal justice carried out by the Council of Europe and the European Union in recent years, we can observe that there is a surprising resemblance between the philosophy of the New Start Report and the philosophy that we can recognize in the Conclusions of the Tampere European Council of 15 and 16 October 1999, which referred to the *principle of mutual recognition* as the new 'cornerstone' of international judicial co-operation in criminal matters, and promoted the European arrest warrant (EU Framework Decision 2002/584/JHA of 13 June 2002) as the first concrete measure in the field of criminal law implementing that principle. And in fact, in an international community where States are used to be jealous of their sovereignty, only an advanced level of "mutual recognition" may convince them to "share with other States their rights and duties" in matters pertaining to their response to crime.

Keeping in mind all this, we can assume that the traditional concept of "international co-operation in criminal justice" was based upon a rigid and severe notion of sovereignty, which accepted only scanty mitigations ruled by the old principle of *reciprocity*. This old philsophy (there is not 'our common interest', there are only 'my interest' and 'your interest' and we are compelled to find a compromise) is the one which characterizes the traditional schemes of extradition and mutual legal assistance.

On the other hand, the new principle of *mutual recognition* is the core of a new and more advanced philosophy (there is no difference between 'my interest' and 'your interest', there is only 'our common interest') and gives rise to a more sophisticated system of international co-operation in criminal matters that is characterized by a deliberate *sharing* of common responsibilities among a number of States and by a deliberate *granting of confidence* to one another's criminal legislations. Well, this new system of international co-operation in criminal matters is what we call "transnational criminal justice": a system strictly connected to a revised notion of sovereignty that is actually redefined and made more flexible by the acknowledgement of a *common responsibility* of the member States – among which the 'mutual recognition' is established – as for their response to crime.

To conclude, we can briefly define *transnational criminal justice* as

> any advanced level of international co-operation in criminal matters based on the new principles of *mutual recognition* and *shared responsibility*, so as to move beyond the traditional schemes of extradition and mutual legal assistance based on the old principle of *reciprocity*.

In other words, we can say that the traditional schemes of extradition and mutual legal assistance constitute the *first degree* of international co-operation, whereas the *second degree* thereof is constituted by each and any of the legal instruments (and the whole of them) which may fit the definition of "transnational criminal justice" given above.

Keeping in mind this definition, we can now ascertain whether and to what extent the official documents listed *supra* in par. 2.*A* may be said to contain any indication on the position of victims or witnesses *in transnational criminal justice*. This assessment, however, will not cover the entire scope of our research on the position of victims and witnesses "in transnational criminal justice". And in fact, our research shall also be extended briefly to some legal instruments – *other* than the ones listed in par. 2.*A* – which clearly belong to the most advanced front of transnational criminal justice (essentially, ICC and *ad hoc* Tribunals).

C – The current position of victims and witnesses in the field of transnational criminal justice: the documents considered in paragraph 2.A

Five of the documents reported *supra* in par. 2.*A*, appear to have no relevance to our research. In fact, document 1 only deals with the need for protection of witnesses in the framework of a request of mutual legal assistance pursuant to the relevant European Convention, then it operates within the limited scope of the *first degree* of international co-operation in criminal matters. As for documents 3, 4, 7 and 9, they don't even consider any international aspect related to the position of victims or witnesses.

The remaining six documents have undoubted relevance to the effect of our research, since they do refer to the position of either witnesses (document 2) or victims (documents 5, 6, 8, 10 and 11) from a point of view of transnational criminal justice.

Document 2 (CoE Recommendation R (97) 13 *on Intimidation of Witnesses and the Rights of the Defence*) deals, *inter alia*, with the need for witness protection programmes to be implemented across borders and the need for assistance in relocating protected witnesses abroad, a matter on which inter-State agreements imply some extent of mutual recognition and mutual confidence in one another's criminal systems, moving beyond the mere dimension of reciprocity. As we have said, this document is one of the bases for the further elaboration carried on by the PC-PW on the matter of protection of witnesses and collaborators of justice in relation to terrorism.

Document 5 (EU Framework Decision of 15 March 2001 *on the Standing of Victims in Criminal Proceedings*) pursues the objective of affording protection to victims of crime irrespective of the State in which they are present. Appropriate measures are devised to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred. *Inter alia*, it is provided that the victim may make a complaint before the competent authorities of his State of residence if he was unable to do so in the State where the offence was committed, and the complaint will be transmitted without delay to the competent authority in the territory in which the offence was committed. This approach is quite consistent with some observations concerning victims which one can read in the New Start Report ("facilitation of the transmission of complaints was mentioned as a topic to be discussed"). On the other hand, this document clearly considers the safeguard of

victims' interests as a *common interest* and a *common responsibility* of the member States, and tackles the problem of the transmission of complaints in a way that implies some extent of mutual recognition.

Document 6 (EU Framework Decision of 13 June 2002 *on Combating Terrorism*) provides that, when a terrorist offence falls within the jurisdiction of more than one Member State of the EU, the Member States concerned shall co-operate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate co-operation between their judicial authorities and the co-ordination of their action. Sequential account shall be taken of the following factors: the territory where the acts were committed, the nationality or residence of the perpetrator, the State of origin of the victims, the territory where the perpetrator was found. Each Member State shall take all measures possible to ensure appropriate assistance for victims' families. This approach refers back to the principle of *shared responsibility* and is quite consistent with some observations concerning jurisdiction which one can read in the New Start Report:

> The question of jurisdiction is mainly […] that of avoiding impunity. It is linked to the rights of the victim. Shared objectives and shared responsibility in pursuing the ends of justice also means that States are prepared (a) to relinquish jurisdiction to the benefit of another State when this would contribute to the ends of justice and (b) conversely, to recognise their own duty to exercise jurisdiction where no other State is in a position to do it. […] Where more than one State has an interest in exercising jurisdiction, or a duty to exercise jurisdiction, a system could be envisaged for determining – preferably on objective grounds and at a very early stage - which State should be given priority. The objective should not be seen as one of interpreting the law, or finding a necessary consequence of the law, as it would have been the case of a court finding. The objective is to devise a practical way to determine, on the face of the concrete circumstances of the case, using objective criteria, how better to ensure that justice is done and that it is done in the best possible way.

Document 8 (EU Directive of 29 April 2004 *on Compensation to Crime Victims*) provides that crime victims in the European Union should be entitled to a compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed. A system of co-operation is set up to facilitate access to compensation to victims in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crimes committed in their respective territories. As a consequence, a compensation mechanism is supposed to be established in the next future in each one of the Member States of the European Union. Each Member State shall establish an 'assisting authority', to be responsible for receiving the applications for compensation, and a'deciding authority', to be responsible for deciding upon applications for

compensation (the 'assisting authority' who receives the application shall transmit it to the 'deciding authority' of the State on whose territory the crime was committed). It is clear that this document considers the protection of victims' interests, and in particular the need for victims' compensation, as a *common interest* and a *common responsibility* of the member States, and tackles the relevant problem in a way that implies a remarkable extent of mutual recognition.

Finally, Documents 10 and 11 (CoE Recommendations R (91) 11 *on Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults*, and R (2000) 11 *on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation*), as we have already observed, envisage an international dimension which is extremely interesting for our research. Both documents present an approach surprisingly coherent with the principles of *mutual recognition* and *shared responsibility*. As for document 10, the specific recommendation to "introduce rules on extraterritorial jurisdiction" for the criminal proceedings concerning trafficking in human beings is clearly consistent with the spirit of the New Start Report. On the other hand, document 11 is the most recent and advanced legal instrument of the Council of Europe concerning the issue of trafficking in human beings and appears to outline a concrete possible scheme of "transnational justice" in the sense envisaged by the drafters of the New Start Report. This Recommendation considers that trafficking in human beings for the purpose of sexual exploitation, which may result in slavery for the victim, "extends well beyond national borders", then requires "a pan-European strategy" (the New Start Report would say "a European area of shared justice") to combat it and to protect its victims. The most significant points are point 48 ("Establish rules governing extra-territorial jurisdiction to permit and facilitate the prosecution and conviction of persons who have committed offences relating to trafficking in human beings for the purpose of sexual exploitation, irrespective of the country where the offences were committed, and including cases where the offences took place in more than one country"), point 54 ("Set up an international body to co-ordinate the fight against trafficking, with particular responsibility for establishing a European file of missing persons, in accordance with national laws concerning the protection of personal data") and point 55 ("Increase and improve exchanges of information and co-operation between countries at bilateral level as well as through international organisations involved in combating trafficking").

D – The current position of victims and witnesses in the field of transnational criminal justice: the ICC and the ad hoc *Tribunals*

The Statutes of the Tribunals for the former Yugoslavia and Rwanda overlook victims in two respects: victims cannot take part in a personal capacity in the criminal proceedings and are not entitled to obtain compensation for the harm they suffered. The first of those prerogatives is vested exclusively in the Prosecutor, who is deemed, throughout the course of the proceedings, to represent the interests of the international community – including, therefore, those of the victims – whilst the second falls mainly within the jurisdiction of domestic courts.

This conception of international criminal justice has been criticized, since it ignores the facts that the concerns of the Prosecutor do not necessarily coincide with those of the victims, and that their attendance in person at the trial may help in establishing the truth. Furthermore, in the absence of national courts with the power and the will to award reparations, victims are left without an important recourse.

The adoption in July 1998 of the Statute of the International Criminal Court (ICC) appears to mark a new step forward and to fill those gaps: victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals. First, they are able to take part in the criminal process and to present their 'views and concerns' where their 'personal interests' are affected. Secondly, they are entitled to seek from the Court reparations for the harm suffered by them ([5]).

In particular, according to the ICC Statute, victims can participate in a procedure, including through an intermediary of counsels, and claim compensation (Articles 68 and 75). Moreover, a Trust Fund in favour of victims has been created (Article 79), which may collect funds resulting from fines and orders for compensation issued against condemned persons as well as voluntary contributions from Governments, international organizations, corporations or individuals. The functions of the International Criminal Court related to the participation of victims and the compensation in favour of them have been entrusted to a specialized unit, the Victims Participation and Compensation Unit.

Equally important, at the International Criminal Court, will be the function related to the protection of victims and witnesses appearing before the Court: experience from the two International Penal Tribunals for the former Yugoslavia and Rwanda has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses that appear before the Court so as to contribute to the establishment of truth about the most serious crimes existing ([6]). The general principles for the protection of victims and witnesses are established in Article 68 paragraph 1 of the ICC Statute:

> The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[5] See JORDA, DE HEMPTINNE, "The Status and the Role of the Victim" in CASSESE, GAETA, JONES (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, New York, Oxford University Press, 2002, Vol. II, pages 1387 and ff.

[6] See JONES, "Protection of Victims and Witnesses" in CASSESE, GAETA, JONES (eds.), *The Rome Statute* cit., Vol. II, pages 1355 and ff.

To this end, and learning from the experience of the two *ad hoc* International Penal Tribunals, article 43 paragraph 6 of the Statute has foreseen that the Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses, as well as plan protective measures and security arrangements for them. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. Article 68 paragraph 4 of the Statute specifies that this Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

The Rules of Procedure and Evidence detail the functions of the Victims and Witnesses Unit. Thus, the Unit shall in particular ensure the protection and security of all witnesses and victims that appear before the Court through appropriate measures and establish short and long-term plans for their protection. Moreover, the Unit shall help victims who appear before the Court, as well as witnesses, to receive medical and psychological care. It shall also, in consultation with the Office of the Prosecutor, draw up a code of conduct emphasising the vital importance of security and professional secrecy for investigators of the Court, the defence and for all inter-governmental and non governmental organisations acting on behalf of the Court. The Victims and Witnesses Unit shall also be in charge of the negotiation of agreements with States concerning the resettlement on State territory of witnesses or victims that are traumatised or threatened ([7]).

E – Possible future developments of transnational justice in favour of the victims of transnational crime: some hints about trafficking in human beings

As we can read in the New Start Report, the real *main* interest of any victim of crime is that of *avoiding impunity*. As a consequence, a fundamental right has to be recognized to the victims of grave facts of transnational criminality: i.e. the right to receive satisfaction by an effective system of transnational criminal justice capable of discovering, prosecuting and punishing the transnational offenders.

As we saw in the previous paragraph, the most advanced and suitable institution to reach such a goal would be an International Criminal Court having jurisdiction on all the major phenomena of transnational criminality, international terrorism included. I strongly believe that an international judicial body like this (better, a *network of local branches* of a transnational judicial body having extraterritorial jurisdiction) will be the final goal of any follow-up research like the one that we are now carrying on.

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[7] A very peculiar kind of *ad hoc* international Tribunal was the Scottish court which sat at Camp Zeist (Netherlands) in 2000 and 2001 and conducted the trial for the Lockerbie disaster (December 1988) in which two Libyan men were accused. See, about this experience, MCFADYEN, *Protecting Victims and Witnesses in International Criminal Cases*, a presentation given in the framework of the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, Canada, August 2004 (*www.isrcl.org/Papers/2004*).

For the time being, we might envisage and propose – as a first step in that direction – a concrete improvement on the ground of the Council of Europe Recommendation No. R (2000) 11 adopted on 19 May 2000 and concerning *Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation* (see *supra*, document 11, in paragraphs 2.*A* and 2.*C*).

The phenomenon considered in this Recommendation (which "extends well beyond national borders" and requires "a pan-European strategy") is particularly suitable to become the core of a new and advanced experiment in *transnational criminal justice*. On the other hand, the leading principles of such an experiment are already indicated in the Recommendation itself, as it affirms the need for

a) establishing rules governing extra-territorial jurisdiction to permit and facilitate the prosecution and conviction of the traffickers, irrespective of the country where the offences were committed, and including cases where the offences took place in more than one country (point 48);
b) establishing an international body charged to co-ordinate the fight against trafficking and responsible, *inter alia*, for keeping and updating a European file of missing persons (point 54);
c) improving the co-operation making use, *inter alia*, of international organisations involved in combating trafficking (point 55).

As a first step, a concrete and practical solution could be the creation – among all the countries of the Council of Europe – of an international body *similar* to Eurojust and entrusted with the co-ordination of investigations and prosecutions concerning international trafficking in human beings. To that effect, a specific joint programme might be set up between the European Commission and the Council of Europe. The following step could be the creation of an international judicial body having extraterritorial jurisdiction on the relevant trafficking offences.

3) Second part: Considerations on the concrete ways to address some of the current obstacles to transnational criminal justice

A – The 'obstacles' to an effective transnational criminal justice which were identified by the Committee at the first PC-TJ meeting

The PC-TJ Committee, during its first meeting, identified the following five issues as potential *obstacles* to an effective transnational criminal justice: 1) delays in answering to co-operation requests; 2) reservations to the relevant Conventions; 3) issues related to double criminality; 4) nationality issues in extradition procedures; 5) issues related to *ne bis in idem*.

In my opinion, if we accept and keep in mind the definition of "transnational criminal justice" given *supra* in paragraph 2.*B*, these issues actually constitute or may constitute 'obstacles' mainly to the effective functioning of the *traditional tools* of international co-operation, i.e. extradition and mutual legal assistance. In other words, these *obstacles* mainly operate *in a backward dimension* with respect to the new concept of "transnational criminal justice", as it is intended in the New Start Report and – after all – in this paper. Although nobody can deny that the problems raised by these obstacles do deserve to be tackled.

As for the issues of delays, reservations, nationality and *ne bis in idem*, I have no further observations besides what one can read in the Summary Report of the first meeting ([8]). On the other hand, a few remarks will be made in the next paragraph about issues related to double criminality, in connection with the European arrest warrant (EAW) and in relation to possible further developments (within the CoE) in the field of "transnational criminal justice" as it was intended *supra*.

B – The 'obstacle' connected to the principle of dual criminality: the European arrest warrant and the possible developments within the CoE

As we know, the *European Union Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA) fulfilled "the objective set for the Union to become an area of freedom, security and justice", leading to "abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities" ([9]). The high level of mutual trust and cooperation existing between the EU member states – who share the same highly demanding conception of the rule of law – has made it possible to simplify the surrendering procedure to such remarkable extent as to develop the Union into a single European judicial area.

As we have already said, the basis for this achievement was the principle of *mutual recognition*: in particular, as stated by the Tampere European Council, the principle of "mutual recognition of judicial decisions and judgments", i.e. a principle which is now considered as belonging to the 25 States of the European Union. During the first meeting of the PC-TJ Committee the question was raised whether and to what extent the principle of 'mutual recognition' could be considered operating also *beyond* the limits of the European Union and *within* the limits of the Council of Europe ([10]).

In my opinion, it would be unrealistic to affirm that the same extent of *mutual recognition* operates *within* the limits of the European Union and *beyond* those limits (of course inside the CoE). However, I believe that a certain (although minor) amount of 'mutual recognition' does exist among the member States of the Council of Europe as well, as the philosophy of the New Start Report clearly shows.

Well, my opinion is that an improvement of this *lesser* mutual recognition – in order to make the European arrest warrant operative in the entire area of the Council of Europe – might be reached through a legal solution indirectly related to the issue of double criminality.

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[8] *Summary Report* cit., pages 7-10.

[9] The EAW Framework Decision is published in *Official Journal of the European Communities*, 18 July 2002, page L 190

[10] "The 'public order' constitutes the limit for the co-operation between the EU member States on execution of the European Arrest Warrant – can it be broadened to the implementation of the CoE extradition mechanisms?" (*Summary Report* cit., page 8).

We know that for a list of 32 serious offences – such as participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children, illicit trafficking in weapons, corruption, recycling the benefits of crime, etcetera – the surrender of the person requested through a European Arrest Warrant does not require the verification of the *double criminality* of the perpetrated act. This is established by Article 2, paragraph 2, of the Framework Decision (FD), which contains, on the other hand, the mere list of the 32 categories of serious crimes *without any definition* of them.

This insufficient definition of the 32 categories of serious crime under art. 2.2 FD might raise some difficulty in the execution of the European warrant. In particular, the judicial authority of the executing country, at least in some cases, might feel that the surrender of a requested person with no verification of dual criminality – and, in addition, for a category of crime insufficiently defined by the Framework Decision – might infringe the rights of the accused and the principle of legality. The high level of mutual recognition existing among the States of the EU would probably prevent this problem from becoming a *major* problem, but such an inconvenience would probably become somehow obstructing with respect to the possibility of extending the effectiveness of the EAW to countries of the CoE who are not members of the Union, because of the *lesser* degree of 'mutual recognition' that characterizes them.

Let's imagine that the judicial authorities of the executing country actually *do* raise the aforesaid problem. In this case, they would probably do that through a supplementary request of information pursuant to art. 15.2 FD, with respect to art. 8 FD. As a matter of fact, art. 8 FD provides that a European arrest warrant must contain, *inter alia*,

> *(d)* the nature and legal classification of the offence, particularly in respect of Article 2;
> *(e)* a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person.

It is rather clear that points *(d)* and *(e)* of art. 8 FD might be more easily neglected when the EAW deals with some specific crimes for which the definition given in art. 2.2 FD is frankly too vague (consider, for example, swindling, racketeering, xenophobia).

Well, is there any remedy to this in the experience of international criminal law? The answer is yes: there is a remedy which was devised and created in the year 2000 by the drafters of the Statute of Rome of the International Criminal Court (ICC). In fact, in the Statute of the ICC there is a list of offences for which the Court has jurisdiction. They are divided into three categories: crimes of genocide, crimes against humanity and war crimes (articles 6, 7 and 8 of the Statute respectively). All these offences were considered insufficiently defined. As a consequence, a supplementary and very original legal text was also devised and drafted, pursuant to art. 9 of the Statute: a legal text of a new type named "Elements of Crimes". This legal instrument defines, briefly but clearly, the elements of each one of the offences listed in the Statute of the ICC. The Oxford Commentary to the ICC Statute observes that the purpose of *Elements of Crimes* is

> to provide clarity and precision required to adequately instruct the Prosecutor and Court, to ensure respect for the rights of the accused, as well as to 'give teeth' to the principle of legality ([11]).

I believe that a similar legal instrument of "Elements of Crimes" would be desirable also for the 32 offences listed in art 2.2 FD. This work could be very useful, could improve the effectiveness of the European arrest warrant even beyond the limits of the European Union and could even turn out to be the first seed for a future common penal code. Again, such work could be carried out through the creation of a joint programme between the European Commission and the Council of Europe.

Milano-Strasbourg, January 2005

[11] POLITI, "Elements of Crimes", in CASSESE, GAETA, JONES (eds.), *The Rome Statute* cit., Vol. I, page 445.