



Website of the Conference
<http://www.coe.int/prosecutors/>

Strasbourg, 26 June 2006

CPGE (2006) 05

CO-OPERATION PROGRAMME TO STRENGTHEN THE RULE OF LAW

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE (CPGE) 7TH SESSION

organised by the Council of Europe
in co-operation with the Office of the Prosecutor General of the Russian Federation

Moscow, 5 – 6 July 2006

THE DUTIES OF THE PUBLIC PROSECUTOR IN THE CRIMINAL FIELD TOWARDS VICTIMS AND WITNESSES, AND PARTICULAR THOSE THAT ARE JUVENILES

Report

prepared by

Prof. Dr. Ivo Aertsen
Catholic University Leuven
Department of Criminal Law and Criminology
Belgium

Introduction

The 7th Conference of Prosecutors General of Europe will address the role of the public prosecutor in the protection of individuals. In preparation of the organisation of the Conference, two questionnaires have been developed and distributed by the Council of Europe to the prosecution services of its 46 member states. One of these questionnaires deals with the duties of the public prosecutor in the criminal field towards victims and witnesses, and in particular those that are juveniles. The report in hand presents the results of this questionnaire.

Replies on the questionnaire have been received officially from 30 member states. On top of this, the Dutch written answers of Belgium have been included as well. In this way, the analysis presented in this report deals with the situation in the following 31 member states of the Council of Europe:

Andorra, Austria, Azerbaijan, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Moldova, Monaco, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom (England and Wales, Scotland and Northern Ireland).

The period of data collection - when the questionnaires were distributed, answered and sent to the Council of Europe – was November 2005 - June 2006.

The questionnaire on the duties of the public prosecutor towards victims and witnesses, and in particular those that are juveniles, included the following questions:

1. What position is accorded to the victim in criminal proceedings, particularly when the victim is a minor?
2. Are victims allowed to take part in, or to initiate proceedings? Does the public prosecutor have any responsibility for representing the victim?
3.
 - a. In your system are there any means of protecting victims or witnesses who are in danger (including minors)?
 - b. What powers or responsibilities does the public prosecutor have in this area?
 - c. Is the public prosecutor empowered to impose protection measures? At what stage? And what is the position when the proceedings are over?
4. Is the public prosecutor required to take the victim's needs and wishes into account in any decision to prosecute? If so, how?
5. Is the public prosecutor empowered to mediate in criminal cases?
6. Is the public prosecutor required to inform the victim of action taken in a case concerning him or her?
7. Does the victim have the right to react to the decision of the public prosecutor not to prosecute? If so, to what authority?

As can be seen from the list, most questions were formulated in a rather general and open way. This has the advantage that a lot of information in all its diversity can be collected and that inspiring examples can be communicated. However, this broad approach has its limits as well: formulations and terms are interpreted by the respondents in different ways. There were also considerable differences between the country reports with respect to extent and detail of the information provided for: some member states delivered a report of 8 pages, others only a one page report. This, together with the European diversity of legal systems and traditions against the background of which the questionnaires for the respective countries have been answered, makes comparability of the results not self-evident. Therefore, this analysis should not be considered as a legal-comparative study. For such a study, much more in-depth legal research must be done.

Special attention in this summarising report goes to the situation of children and juveniles. However, also this dimension is dealt with by the national respondents in very different ways (from very detailed to no information at all). Also the notions of ‘juvenile’ and ‘minor’ are differently used in the respective country reports.

This report focuses on the *duties* of the *public prosecutors* towards victims and witnesses. This implies at least two restrictions, which have to be mentioned here. Firstly, not all information on victim related topics provided for by some of the national respondents has been reported here. Several country reports present information on other victim oriented initiatives (such as the availability of general victim support centres, victim assistance by the police, women shelters, child abuse centres, state compensation schemes, etc.). This kind of information is not taken into account for the analysis, unless a direct link with the duties and the role of the public prosecutor is shown.

Secondly, since the focus is on the *duties* of the public prosecutor as they are legally defined in the respective member states, the report will not analyse how *practice* is and what its limitations – for legitimate reasons - may be in some countries.

The structure of this report is based on the structure of the questionnaire. The 7 questions will be dealt with consecutively in a summarising and – where possible – structuring and comparative way for the respective countries. When (in footnotes) reference is made to particular countries, this should not be seen as exhaustive references but rather as examples.

Abbreviations used

CCP = Code of Criminal Procedure
CC = Criminal Code

1. The position of the victim in general

Nature of the position

In many countries, the two most traditional and essential positions that legally can be accorded to a victim in the context of criminal proceedings are that of a witness and of an injured party. The victim of a crime is often considered to have ‘a party-like status’, the ‘real’ parties being the public prosecutor and the defendant. This in general also applies when the victim or the witness is a minor, acting together with his or her legal guardian or representative. The party-like status implies certain rights for the victim or at least for some categories of victims (for example more serious or more violent crimes). These rights are laid down in the Code of Criminal Procedure or in separate laws.

In several states, legislation (CCP, CC or specific statutes) provides for a definition of ‘victim’¹ and/or ‘injured party’ or ‘injured person’². Most often, this definition is restricted to physical persons and to direct victims. In some countries however, legal persons³ to some extent, or indirect victims (bystanders, relatives, professional helpers⁴) fall within the definition. In some countries, a person is acknowledged or qualified as a victim by decision of the public prosecutor or the investigator.⁵ Sometimes particular associations and bodies representing interests injured by the crime can participate in the proceedings if the victim agrees.⁶ In some jurisdictions, a (factual) distinction is made between victim (the person directly affected by the crime) and complainant (the parents or legal representative).⁷ For several countries, the notion of ‘victim’ is a wider, more criminological concept than that of injured person.⁸

In jurisdictions that have developed under the influence of the French inquisitorial legal system, the victim traditionally is only a party to the proceedings if he/she has lodged a complaint *and* requested compensation for the damage suffered (*partie civile*, see further). However, also in these jurisdictions new legal positions for the victim in criminal proceedings emerge.

In this sense, in several countries an ‘injured person’ can obtain in a more explicit way the position of party in criminal proceedings. In such a case, the notion of ‘injured person’ characterises and defines the procedural position of the victim during the entire procedure, regardless of his decision to claim damages.⁹ For example in Germany, the victim as injured (aggrieved) party can join the prosecution as a private accessory prosecutor (see further). In doing so, the aggrieved person becomes an official party to the proceedings and may thus make applications and lodge his/her own appeals during

¹ Azerbaijan, Belgium, Estonia, Romania, Russian Federation, Ukraine.

² Belgium, Croatia, Czech Republic, Romania, Sweden.

³ Estonia, Russian Federation.

⁴ For example with respect to legislation on state compensation.

⁵ Latvia, Russian Federation.

⁶ Italy.

⁷ Turkey.

⁸ For example Czech Republic.

⁹ For example Belgium, Czech Republic.

the court proceedings. But even if the injured party does not join the prosecution as a private accessory prosecutor, he/she has special rights, such as the right to access the criminal file and to be present at the main hearing. In Belgium, in order to obtain the status of ‘injured person’, the victim must register at the secretariat of the public prosecutor’s office. Hence, this requires a separate action apart from reporting the offence to the police or to a judicial authority. An ‘injured person’ has some additional rights: to be assisted or represented by a lawyer; to add all documents of relevance to the file; to be kept informed by the public prosecutor of a dismissal of the case and the reasons thereof, of the initiation of a judicial examination by the investigating judge and of the date of hearing by the investigating and trial court.

By way of introduction, mention must also be made of the case of Spain, characterised by a legal system where criminal and civil proceedings are led together. This system offers a response to victims in order to compensate them, as far as possible. The victim from his/her side can exercise a private accusation and therefore not only can bring a civil action oriented to compensation but also a criminal action. In all cases, whether there is or not a party represented as private prosecution, the public prosecutor has the obligation to promote the civil compensation to any injured party, including where the victim, as a party to the case, files his/her own request for compensation.¹⁰

In Central and Eastern European jurisdictions coming from a (former) socialist legal system, the status of a victim is often more diversified. A legal distinction (CCP) is made between *victim*, *injured party* (sometimes completed with a status of civil party or civil plaintiff) and *private prosecutor*.

In Moldova, the victim has the right to ask the criminal prosecution bodies or the prosecutor to recognise him/her as a injured party in a criminal case. In that country, the public prosecutor, besides starting prosecutions *ex officio* or on the basis of a victim’s complaint, has the right to initiate civil cases against the accused person, defendant or person who is materially responsible for the deed of the accused. Moreover, according to the CCP, *the victim* has the right to file an additional complaint to the criminal prosecution body or to the public prosecutor; to request information on the settlement of his/her complaint; to submit a request to be recognised as a civil party in a criminal case; to challenge the prosecutor for the non-initiation of criminal prosecutions within 10 days of receiving a copy of the criminal complaint, until the complaint is settled, and to be informed of the evidence that led to the charges. The *injured party* in the criminal process has the right to be informed by the prosecutor or by the criminal prosecution body of any decisions adopted regarding his/her rights and interests; to get, at his/her request, copies of these decisions at no cost, as well as copies of decisions of cessation or classification of the proceeding in the respective case, of non-initiating the criminal prosecution, a copy of the sentence, of the decision or of other final court judgment; to submit complaints against actions and decisions of the prosecutor or criminal prosecution body, as well as to challenge the court judgment regarding the caused damage; to formulate objections against the prosecutor’s actions or the body that carries out the criminal proceeding; to request for his/her objection to be included in the minutes of the respective action, etc.

¹⁰ With the sole exception where the victim has expressly renounced to the redress.

In Romania, the CCP deals with, and defines, the different notions of victim, injured party and civil party. A victim can bring a civil action, but this can also be done *ex officio*, by the public prosecutor, namely when the injured person is a person with lacking or limited exertion ability (minors respectively under 14 and aged 14-18). In such a case, a report on the material or moral damage is presented and the court must resolve *ex officio* the payment of the damages (thus even when the victim didn't bring civil action). The prosecutor, when taking part in the trial, must defend the civil interests of the victim.

Victims' rights

Some countries include a catalogue of victims' rights in one article or chapter of the CCP. This is, for example, the case in the Russian Federation, where according to art. 42 CCP, the victim is entitled:

- 1) to be aware of charges laid against the accused;
- 2) to give testimony;
- 3) to refuse to give evidence against himself, his (her) spouse, and other close relative circle;
- 4) to present evidence;
- 5) to file requests and challenges;
- 6) to give testimony in his/her native language or any other language he/she speaks;
- 7) to use assistance of interpreter free of charge;
- 8) to be represented by a representative;
- 9) upon consent of the investigator and the person conducting inquiry to participate in investigative measures performed upon his request or request of his/her representative;
- 10) to familiarise himself/herself with the records of investigative measures performed with his/her participation and to submit observations in this regard;
- 11) to familiarise himself/herself with the decision on appointment of forensic examination and expert's conclusion in specified occasions;
- 12) after the end of preliminary investigation to familiarise himself/herself with all materials of the case-file, to write down any data and in any volume, to make copies of the case-file materials, also with the aid of technical means;
- 13) to receive copies of decisions on the institution of criminal proceedings, on his/her acknowledgment in capacity of victim and on refusal to do so, on termination of criminal case, on suspension of proceedings of criminal case as well as copies of sentences of the courts of the first instance and decisions of the courts of appeal and cassation instances;
- 14) to take part in trial of a criminal case in the courts of the first, second and supervision instances;
- 15) to intervene in pleadings;
- 16) to support prosecution;
- 17) to familiarise himself/herself with the records of judicial hearing and to make observations in this regard;
- 18) to make complaints against acts (omission) and decisions of the person conducting the inquiry, the investigator, the public prosecutor and the court;

- 19) to complain against sentence, ruling or decision by the court;
- 20) to be aware of complaints and representations brought forward in criminal case and to submit objections on them;
- 21) to request for application of security measures;
- 22) to exercise any other powers stipulated by the present Code.

Similar rights are listed (sometimes less extensively) in countries as Estonia and Lithuania. For example in the latter case: the victim is entitled to adduce documents and objects which are of significance for the investigation, to submit requests, to demand disqualifications, to examine the material collected in the course of pre-trial investigation, to appeal against the actions, decisions or rulings of the pre-trial investigation officer, prosecutor, or pre-trial judge, to participate when hearing the case in a court of law, to appeal against the judgment or ruling made by the court, to present his closing arguments.

Another example is Turkey, where according to one article in the law, the victim during the *investigation phase* is entitled to: ask for collecting of evidence; be handed a copy of a piece of document unless the purpose or the secrecy of the investigation appears to be jeopardized; avail himself of the assistance of a lawyer or be represented by a lawyer in criminal proceedings if he/she does not have any; inspect the files, the goods seized through his/her lawyer; and apply for remedies against decisions of the public prosecutor not to prosecute. During the *prosecution phase* he/she has the rights to: be notified about the hearing date; joining the public prosecution against the accused; be given a copy of documents in evidence through his/her lawyer; ask for witnesses to be summoned; avail himself/herself of the assistance of a lawyer or be represented by a lawyer in criminal proceedings if he/she does not have one; and apply for remedies against decisions of the court provided that that he/she has formerly joined the case.

In Ukraine, a victim – recognised as such on the basis of his/her own application (verbal or written) or on the initiative of the officer conducting the inquiry, the prosecutor or the judge – or his/her representative, has the right to, among others: participate in a trial; file objections; file complaints against the investigator, prosecutor and the court, and as applicable, for providing security; prosecute in person or by proxy in a trial, and participate in court debates.

A special statutory provision, not (yet) adopted in continental European countries¹¹, is the Victim Impact Statement (VIS). This exists in England and Wales and in Ireland. In England and Wales, if the victim makes a Victim's Personal Statement outlining how the crime has affected him/her, the prosecutor has a duty to put that to the court. He is also under a duty to claim compensation for them as appropriate. In Ireland, a VIS can be made to courts at sentencing by victims of violent or sexual offences. In determining the sentence to be imposed, a court must take into account any effect (whether long-term or otherwise) of the offence on the victim. In such cases the court may, where necessary, receive evidence or submissions concerning any such effect and must, where requested by the victim, hear the evidence of that person as to the effect of the offence on him or

¹¹ With the exception of the Netherlands (personal comment by the author).

her. It has also been the practice of the courts in Ireland to accept such evidence from a member of a deceased victim's family in homicide cases.

In several countries, an injured person may also waive their or some procedural rights through an explicit statement.¹²

And finally, for some countries, not only the rights of victims are defined and listed in law, but also their obligations.¹³

Information

In more and more countries, authorities active in criminal proceedings, including the police and public prosecutor, are legally obliged *to inform* victims about their rights, among others in relation to compensation and restitution, and psychosocial and legal support. For example in the Czech Republic, the public prosecutor in his supervising role during preparatory proceedings must see to it that the 'injured person' can exercise his/her broad procedural rights. Therefore, he is obliged to inform the *injured person* of his/her rights and to provide him/her with the possibility of enforcing them. Similarly, in criminal proceedings relating to bodily injury or death, he is obliged to inform the (indirect) *victim* of his rights and of how to enforce them.

In Romania, prosecutors, judges, police officers and agents are legally obliged to inform the victims of crimes on: services and organisations providing psychological counselling and any other forms of assistance; the prosecution body to which they may address the complaint; the right to juridical assistance and the institution which might be addressed in order to exercise this right; the conditions and the procedure for getting free assistance; the trial rights of the harmed person, harmed party and civil party; the conditions and procedure needed in order to benefit of the legal provisions on witness protection; the conditions and procedure for granting financial compensations by the state.

In the Russian Federation, for ensuring certain rights for the victim during criminal proceedings, the investigator or the person conducting the inquiry (and not the public prosecutor) is obliged to timely notify the victim regarding the completion of preliminary investigation and regarding the available opportunity to file a respective request. In case of termination of a criminal case the investigator shall serve a copy of decision on termination of the case upon the victim. In connection with the cases proceeded by the court, the victim shall be notified by the court with regard to all actions and decisions affecting his/her rights.

Another example is offered by Sweden, where the police and the prosecutor are obliged to provide victims with basic information concerning the investigation, i.e. state compensation, legal aid, victim support organisations, and the possibility of being allocated a support person or a counsellor. If the injured person can have a right to a legal counsel or visiting ban, the prosecutor shall as soon as possible inform him or her about

¹² For example Czech Republic.

¹³ Azerbaijan, Lithuania, Russian Federation.

his or her rights according to the respective laws. The prosecutor is not obliged to give the injured person the information on state compensation and legal aid if it is obvious that that measure is unnecessary or if the measure is combined with large difficulties.

Access to judicial files

In some countries, the victim has a general right of access to the public prosecutor's files and the right of getting any clarifications. For many other countries, however, this right of access to the judicial file is restricted to some phases of the criminal procedure, to some types of crimes and/or to the status of the victim (for example if the victim is a 'civil party'¹⁴ or an 'injured person'¹⁵). In some jurisdictions, the victim has the right to make excerpts from the criminal file and to request that copies be made by the public prosecutor's office.¹⁶ Eventually, the victim can be granted the right by the court to inspect court files and to make copies.¹⁷

Legal advice and assistance

The possibility – in case of economic necessity - for the victim (who has claimed damages) to get a lawyer free of charge or at a reduced fee exists in most countries as a general rule. For some countries, information on this provision is specified. For Austria, for example, free legal advice is available for vulnerable victims, if not provided with enough funds. Places where free legal advice can be obtained are (in Austria) the regional courts, services of the bar association and semi-public and non-governmental organisations. In Sweden, the injured person is entitled to a legal counsel, for example, in cases of sexual assault or abuse. In Iceland, the victim always has the right to legal representation in cases of sexual offences and in other cases concerning serious offences against the person.

As another general rule, the victim, injured person or civil party can be represented by an authorised person, in most cases a lawyer.

In many countries, *a child (a minor)* who suffered injuries or material or moral damage as a consequence of a crime, will be legally considered as an injured person or a victim and is entitled to a statutory representative or guardian in order to exercise his/her rights in criminal proceedings. The minor, for example, has the right to ask the court to appoint a counselling attorney and/or a qualified person to assist him/her both during the criminal investigation and the trial.¹⁸ In case of conflict of interest, or when there is a danger of delay of the proceedings, the judge or the public prosecutor can appoint a guardian to exercise the rights of the minor.¹⁹ In some countries the minor as victim is obliged – for

¹⁴ Belgium.

¹⁵ Czech Republic.

¹⁶ Estonia, Liechtenstein.

¹⁷ Liechtenstein.

¹⁸ For example Finland.

¹⁹ For example Czech Republic.

some types of crime - to have an attorney during all proceedings, besides his/her legal representative.²⁰

Interpreter

Foreign-language victims have the right to an interpreter from a published register during criminal proceedings.²¹ Services of interpreters in criminal proceedings are available in all countries, but on the basis of the questionnaire replies it is not clear to what extent this provision is linked to a particular type of status: victims in general, or only injured persons and/or civil parties.

Compensation

Criminal courts in many countries²² have jurisdiction to decide also on the civil liability resulting from an unlawful act and to order compensation of the victim for all or some kinds of damages. In these countries, the victim or injured party is allowed to bring a civil action separately from or in conjunction with the criminal proceedings.

In Austria and Liechtenstein, the injured party is entitled to join criminal proceedings instituted by the public prosecutor. As such, the victim is entitled to assist the public prosecutor concerning evidence and concerning his or her own claims for compensation. The victim has the right to inspect the files, to be present during the trial and to put questions to witnesses, and to appeal to the court. Victim support centres are entitled to support the privately interested party in the criminal proceedings.²³

In Latvia, the public prosecutor 'is responsible that the victim has the procedural opportunity to demand and to obtain moral and material compensation'. In Andorra, the public prosecutor is required to bring civil action if the person entitled to bring it fails to do so, unless that person expressly relinquishes this right or reserves the right to bring a civil action subsequently through the civil. Moreover, the judge may, at a party's request and after hearing the other parties and the public prosecutor, order the defendant and the persons civilly liable to pay *provisional* compensation to the victim or persons financially dependent on him or her.

In the Russian Federation, the responsibility of the justice system towards compensation is even more pronounced: reimbursement of *property* damage caused by the crime as well as of the expenses incurred in connection with *participation* in the course of preliminary investigation and trial including expenses for representative shall be ensured

²⁰ For example Slovenia.

²¹ For example Austria, Russian Federation.

²² For example Andorra, Austria, Belgium, Croatia, Czech Republic, France, Germany, Italy, Liechtenstein, Monaco, Romania.

²³ Experience learns, according to the questionnaire reply, that compensation claims by victims are only in a minority of the cases decided upon by the criminal judge, in particular if the legal and factual questions involved can be easily assessed and no additional evidence is deemed necessary; in other cases the victim is referred to the civil court with his/her claim.

to the victim. Compensation for *moral* damage can be claimed by the victim and will be decided upon by the court in the course of criminal or civil proceedings.

In the Czech Republic, the injured person should be informed by the body in charge if a *juvenile* declares willingness to compensate for the caused damages.

In Slovakia, in case of damage was caused to a *minor victim*, the prosecutor may file a motion to the court in order to oblige the convicted person to compensate the damage caused to the victim given that the victim had claimed the damages properly and timely in the course of preliminary proceedings.

Remarkable in this context is the situation in Turkey, where since the entry into force of the new CCP in June 2005 *compensation claims no longer can be brought before the criminal court*. This was legislated in order to speed up procedures and to avoid prescription. A criminal conviction can still be used by the victim as a basis for applying for compensation to the civil court. Also in Turkey, the system of private prosecution has been abolished in 2005. But when the public prosecutor formally charges the accused, the victim can join the public prosecution and thus obtain the status of party with the possibility of asking for evidence to be collected and witnesses questioned. A victim who has not joined in a formal way the public prosecution, can still be present during hearings but cannot exercise the right to apply for remedies.

Compensation paid to the victim *can affect the sentence*. This is, for example, the case in Austria, where it is a mitigating circumstance, and even can lead to the waiving of prosecution if either compensation was complete before the offence was reported, or otherwise in minor cases. Moreover (Austria), compensation is often ordered by the court as a condition for a suspended sentence. Reparation of damages to the victim in many other countries functions as a condition for different types of *conditional dismissal or discontinuance* of prosecution, and thus is of high relevance for public prosecutor's services (see further).

A system of *state compensation* of victims of violent crime is operational in many European jurisdictions, as a result of the European Convention on the Compensation of victims of violent crimes (24 November 1983) and – more recently - the EU Council Directive of 29 April 2004 relating to compensation to crime victims. In some countries, judicial authorities have the legal duty during the proceedings to instruct victims of violent crimes on the conditions of compensation by a national compensation scheme.²⁴

Specific position of minors

When the victim or witness is a minor, very often special provisions are foreseen as will be explained further in this report. They relate, among others, to:

- from a certain age, for example 15, the right to bring charges against a suspect and to exercise equal authority with their parents to act during criminal proceedings;

²⁴ For example Czech Republic.

- the right to a legal counsel; in some countries a lawyer is appointed to the minor regardless of his/her request;
- the right to be accompanied by a person of confidence during interrogations at pre-trial and trial stage;
- the possibility of holding the hearing in camera;
- procedures which prevent visual contact between the presumed offender and the minor victim (protection of the victim and at the same time safeguarding the defence rights).

As a general principle in the Russian Federation, in order to protect rights and lawful interests of victims who are minors, their (legal) representatives are to be *obligatorily* attracted to participation in criminal proceedings.

Penalties can relate to, or affect the position of the minor victim:

- It is in many jurisdictions considered as an aggravating circumstances when the victim is a minor.
- A penalty can be: the loss or suspension of the right of family authority over the minor.²⁵

2. Victims taking part in, or initiating proceedings

Initiating proceedings

Whether the victim is allowed to initiate proceedings, is interpreted and reported by the respondents to the questionnaire in very different ways. So, it is said that the victim may ‘initiate proceedings’ by bringing charges before the police or the public prosecutor.²⁶ Other countries, however, on the basis of a strict interpretation, state that victims as a matter of principle ‘cannot initiate proceedings’, apart from a very few situations.²⁷ The situation is very clear in countries where the right (and the obligation under the principle of legality) to initiate proceedings is strictly considered a part of the public action and thus the exclusive competency of the public prosecutor.²⁸

Several countries are familiar with the system where the injured person can initiate *a civil action for compensation* by joining the criminal proceedings in the pre-trial or trial phase, thus becoming a privately interested party.²⁹ In some cases, the civil party can even initiate criminal proceedings if the public prosecutor takes no action.³⁰ Normally, particular rights vis-à-vis the criminal proceedings and court hearing are accorded to this

²⁵ Andorra.

²⁶ Croatia, Germany.

²⁷ For example Denmark.

²⁸ For example Czech Republic (notwithstanding broad procedural rights for the injured person).

²⁹ Austria, Belgium, Denmark, France, Germany, Liechtenstein, Lithuania, Romania, Sweden, Switzerland.

³⁰ Belgium, France.

position, such as the right to information and assistance, to inspect the files and to question witnesses at the trial.³¹

Many countries do have *complainant offences*. These are offences which according to substantive law cannot be prosecuted *ex officio*. In these cases, the public prosecutor cannot charge the suspect without the consent of the victim, and this implies that the victim is allowed to request for initiating criminal proceedings.³² Examples of complainant offences are light assault and defamation.³³ However, in case of verdict of not guilty, in some countries the victim has to bear the costs of the trial.³⁴

In the Czech Republic, in case of a specific relationship between the accused and the injured person, the perpetrator will not be prosecuted if the injured person does not expressly give his/her consent to criminal prosecution. The injured person may withdrawn his/her consent at any time. However, this consent is not required when, among others, the injured person is under 15 years old or when the consent was refused or withdrawn under pressure or threats.

In Portugal, in the case of complainant offences, the public prosecutor may also, in cases provided for by law, initiate proceedings if the victim's interest so requires, including with respect to offences violating the freedom and sexual self-determination of a child under 16. The same applies when the minor's legal representative is the perpetrator himself.

In countries with a formal or mixed accusatorial system, judicial criminal action can be undertaken both by a public prosecutor and a private prosecutor (injured party).³⁵

In England and Wales and in Northern Ireland, victims are able to initiate their own private prosecution against a person they suspect, but this may be taken over by the Public Prosecution Service and either continued or discontinued.

In the Russian Federation, criminal prosecution may be public, private and public, and private, depending upon the nature and gravity of the committed offence. Cases of *private prosecution* concern, for example, infliction of light harm and insult; they are instituted only on the grounds of the victim's application (cf. complainant offences) and are subject to termination in case of reconciliation between the victim and the accused. Cases of *private and public prosecution* are, for example, offences as raping, sexual assault, breach of inviolability of private life, ungrounded dismissal of a pregnant women and violation of copyright; they are instituted only on the basis of application by the victim, but are no subject to termination in case of reconciliation. Cases of *public prosecution* relate to other, more serious offences. Moreover, the public prosecutor is entitled to institute private or private and public prosecution in absence of statement of the victim, if the offence was committed in respect of a dependent person or a person not

³¹ For example Austria, Liechtenstein, Belgium.

³² For example Austria and Liechtenstein: Privatanklage.

³³ Not in all countries complainant offences only involve less serious crimes. In Romania, for example, crimes as bodily injury, burglary, rape and fraudulent management do apply.

³⁴ Austria, Liechtenstein.

³⁵ Andorra, Portugal, Spain.

capable to use autonomously his/her rights. Finally, as a general rule, the public prosecutor is authorised, on the basis of application by the victim or the victim's legal representative, to cease criminal proceedings against a person suspected or accused of a crime committed for the first time due to carelessness, or of a crime entailing maximal punishment of 5 years of deprivation of liberty, if such person reconciled with the victim and rectified the inflicted damage.

In the case of Andorra, the informer or injured has to come forward formally as private prosecutor or civil claimant. More precisely, the injured party wishing to bring a criminal action must formally lodge a complaint, come forward as private prosecutor (can be done at any stage before trial), appoint a lawyer, elect domicile in the country, and finally seek a specific sentence for the offender.

In Portugal, a victim may apply to be joined to criminal proceedings as a private prosecutor ('assistente') (if he/she is over 16; if under 16, his/her legal representative may apply to become a private prosecutor). Private prosecutors acquire the status of assistants to the public prosecutor and subordinate their participation to the action taken by the prosecutor in the case concerned. In particular, they must:

- a) take part in inquiries and the pre-trial investigation by producing evidence and asking that appropriate steps be taken;
- b) independently press charges even where the public prosecutor does not do so because the prosecution is based on a private accusation;
- c) lodge appeals against decisions that directly concern them, even if the public prosecutor has decided otherwise.

In Spain, victims have the right to initiate proceedings and also to take part in the proceedings as private accusation. This allows them to produce evidence and to present all allegations and applications they have the right to file. Consequently in criminal procedure, it is not unusual to find together with public action led by prosecution, the victim, represented by lawyer, claiming an adequate conviction and, at the same time, requesting a civil compensation for damages and losses incurred.

In Sweden, the injured person is entitled to support the prosecution and may also institute prosecution under certain circumstances. If the injured person is a minor (under the age of 15), his legal representative has the same rights. When the injured person institutes a private claim³⁶ in conjunction with the public prosecution, the prosecutor, upon request of the injured person, shall prepare and present the injured person's action in conjunction with the prosecution, provided that no major inconvenience will result and that the claim is not manifestly devoid of merit.

In Monaco, for less serious offences ('délits'), the victim can initiate criminal proceedings, firstly, by bringing a private prosecution in the criminal court. By doing so, the prosecuting party is deemed a civil party by virtue of the mere fact of bringing a private prosecution; no further applications have to be undertaken in order to join the

³⁶ It is not clear from the Swedish report whether this is a private claim to compensation or a private action to prosecution.

proceedings and to claim damages before the court. Secondly, the victim can initiate criminal proceedings by applying to the investigating judge to be recognised as a civil party claiming damages. Moreover, for petty offences ('contraventions') a victim may initiate criminal proceedings by bringing a private prosecution in the police court.

In Slovenia, in cases of offences punishable up to three years of prison, the victim has the right to make a motion for the prosecution; in that situation, the prosecutor is from then on required to prosecute the case.

In Finland, victims have the right to raise charges against a suspect. However, this right of the victim is considered 'secondary': it only really comes into play when the public prosecutor decides not to bring charges.

In Ireland, there is a limited right for any person to make a complaint in relation to an offence and to conduct a private prosecution in the District Court (lower court) in their own name. However, despite this provision for the initiation of criminal proceedings by any person, victims do not ordinarily initiate criminal proceedings. Proceedings are initiated by the public prosecutor (the Director of Public Prosecutions), the Attorney General or by a member of An Garda Síochána (the Police).

In Lithuania, in private prosecution cases, a complaint will be filed and the claim upheld in court by the victim. In case of the minority of the victim, the claim may be upheld by his/her legal representative. The prosecutor shall also be entitled to present to the court at any stage of private prosecution proceedings, prior to the opening of the trial proceedings, a written application that he will prefer public charges in that particular case. In addition, the victim may, by submitting a written request to the prosecutor, initiate investigation actions. The victim and his/her representative shall have the right to be present when procedural actions are performed upon his/her request, to examine, without any reservations or restrictions, the records of such procedural actions, make comments as to the contents of the records. If the interrogation is being conducted further to the request, during such interrogation the victim and his/her representative shall have the right to pose questions to the person under interrogation.

In Italy, (only) in cases for whom the justice of the peace has jurisdiction, the victim can initiate proceedings.

Taking part in proceedings

Some countries report a whole series of general participatory rights for the victim. Azerbaijan, for example, mentions, amongst others, the right to make protests, to make inquiries, to demand his/her recognition as special prosecutor, to protest against actions of bodies carrying out the criminal process and demand the registration of this protest, to participate in the hearings of a court of first instance and the court of appeal including making personally speeches and remarks, to make an appeal or cassation against the inspector's, investigator's, prosecutor's or court's decision or actions, to reconcile with an accused by means of 'a special accusation' in the process of prosecution, to get state

compensation for the losses as a result of a criminal act, to get compensation for the expenses made in respect to the criminal case.

In Croatia, the victim as injured party or his/her representative can take part in proceedings by attending investigative actions or the main court hearing, and he/she has the right to propose evidence, to ask questions, ... In a shortened procedure (for offences punishable by a prison sentence of up to five years), if the public prosecutor is not present at the main hearing, the injured party has all the rights of the public prosecutor, including the right of appeal.

Another country where the victim, as injured person and regardless of claiming compensation, disposes of a range of explicit procedural rights, is the Czech Republic: the right to file a motion for additional evidence, to inspect documents and to attend the trial. During the trial, with permission of the judge, the injured person can ask questions to the persons being interrogated and he/she has the right to make a statement before the hearing is closed. In Romania, the victim may take part in the criminal trial as injured party or as civil party.

Participatory rights exist in an explicit way also in Estonia, as already mentioned: the right to submit requests and complaints, to examine the report of procedural acts and to give statements, to examine the materials of the criminal file, to participate in the court hearing, to give consent to the application of settlement proceedings and even to present an opinion concerning the charges and punishment set out in the charges.

Another example is Slovenia, where the victim, apart from the right to claim compensation, has the right to attend to the main hearing, to propose hearing of evidence, to examining the defendants and the witnesses, to give objections and to give other prepositions.

The public prosecutor as representative of the victim

In most countries, the public prosecutor has no responsibility or power to represent the victim directly, because of his representation of the interest of society in general and because of the principle of objectivity (giving equal care to the consideration of circumstances that serve to incriminate and to exonerate an accused person). However, some countries do report a representing role of the public prosecutor for the victim when he/she is initiating a proceeding *ex officio*³⁷ or in a general way during the whole criminal procedure³⁸. In the FYR Macedonia, the public prosecutor by taking part in the criminal case is actually representing the victim and his rights at the same time.

Still another system is in function where the public prosecutor has the obligation to represent the victim, on his/her request, during civil based claims. The prosecutor has a right to refuse such a request only if representing the victim would harm his primary

³⁷ Croatia.

³⁸ Estonia.

obligation, i.e. instigating criminal charges, or if it would be in conflict with the criminal charge or if the claim would be clearly inadmissible.³⁹

In Portugal, the public prosecutor represents victims only in so far as he or she is empowered to seek civil compensation on their behalf, but solely concerning persons and interests he or she represents by law, namely, persons lacking legal capacity, persons who are absent and homeless persons.

3. Victim and witness protection

a. Victims or witnesses who are in danger: general provisions in the system

In some countries, no specific provisions exist in the criminal justice system, but the court or the public prosecutor can request the police to provide victims and witnesses with adequate protection depending on the situation.⁴⁰ Many other countries, on the contrary, have developed specific victim and witness protection programmes, structures and procedures. Whether there are special provisions available or not, it is said in a general way that in the field of victim and witness protection, efficient cooperation between the public prosecutor's office and the police is of utmost importance.⁴¹

Some countries⁴² make the distinction between, on the one hand, *procedural means* to try to protect the victim or witness before and during trial, and, on the other hand, *non-procedural measures*, mainly to be taken by the police, if needed after consultation with or by the request of the public prosecutor (for example, in some countries, victims and witnesses may seek police protection by lodging an application with the public prosecutor).⁴³

'Protection' is sometimes understood in a broad sense, including the right to psychosocial and legal support during trial. For example in Austria, victims of sexual offences and victims of violence do have specific rights: access to specialist information, advice and support for victims and their relatives and cooperation with all involved groups of professionals. The same applies in Romania: means of protection for victims of crime as set out by law include: psychological counselling (for free for a series of violent and sexual crimes, also to minors); free legal assistance for victims of violent and sexual crime and for surviving relatives in case of death of the victim; and financial compensation by the state. It is the legal duty of the public prosecutor to inform the victims on these services and relevant organisations. The same applies in Spain, where the public prosecutor has 'to see to victim protection during legal process by promoting the mechanisms set in place for the receipt of effective victim aid and assistance'.

³⁹ Finland.

⁴⁰ Andorra.

⁴¹ Sweden.

⁴² Denmark.

⁴³ France.

Advanced provisions on victim and witness protection have been implemented in the United Kingdom. In England and Wales, under the statutory Victims' Code, victims may benefit from special measures. All prosecution witnesses receive the advantage of Witness Care Units to give them a single point of contact and tailored needs assessment. In Scotland, the Vulnerable Witness Act sets out a number of provision to assist witnesses to give their best evidence and to reduce stress and anxiety. In Northern Ireland, the Criminal Evidence Order ensures that in appropriate cases children and other vulnerable and intimidated victims and witnesses have special measures available. Whilst the law in Northern Ireland does not require victims to be informed about the proceedings and the services available to them, the Public Prosecution Service (PPS) is committed to ensuring that the interests of victims are considered at every stage of the criminal process and offers an enhanced range of services to victims (and witnesses). A specially trained staff, 'Community Liaison', provides an information line to assist with any queries a victim (or witness) may have or, if the victim requests, refer them to specialist support agencies, such as Victim Support or National Society for the Prevention of Cruelty to Children. Prosecutors themselves are trained in applying special protective measures.

In most cases, however, 'protection' relates to both protection of *privacy* and protection of the physical *safety* of the victim or witness, and measures often cover both aspects (for example: concealing the identity partly or as a whole).

Protection of privacy

- In many countries, the CCP contains special provisions in connection with victims' and witnesses' general protection in files and data during the proceedings and trials.⁴⁴ The public prosecutor and other authorities in criminal proceedings have concretely to take care of the protection of privacy of the victim, among others by not exposing personal data or photographs.
- Protection can be offered by excluding the public from trial (*in camera* hearings) for certain criminal matters, for example incest or indecent matters.⁴⁵
- In Austria, a 1992 amendment of the Mass-Media-Statute created a liability to protect victims from secondary victimisation through offensive reporting.
- In several jurisdictions, child witnesses under 18 years of age will not have their identity or personal details reported in the media.⁴⁶

Physical protection

Several countries have developed, on a legal basis, a coherent system of protection of victims and witnesses.

The Russian Federal Law on the State Protection of Victims, Witnesses and Other Parties of Criminal Proceedings obliges specially authorised state bodies to ensure protection of victims and witnesses who are in danger by the means of

⁴⁴ For example Czech Republic, Liechtenstein.

⁴⁵ For example Austria, Estonia, Iceland, Ireland.

⁴⁶ Belgium, England and Wales, Northern Ireland.

security measures, such as personal guard and guarding of dwellings or property; individual protection, communication and alerting of danger; keeping confidential data on protection of an individual; move to other place of residence; replacement of documents; change of appearance; change of place of work (service) or studies; temporary placement into safe location; and other measures of additional protection. The public prosecutor shall take decision on carrying out the state protection (by law enforcement authorities) and perform supervision. Besides this, protection of victims and witnesses in the course of criminal proceedings is regulated by the federal CCP. In case of threatening of the victim, witness, their relatives or other dear ones with murder, violence, damage of property or other dangerous illegal acts, the court, the public prosecutor or the investigators shall take security measures. They can, among others, allow judicial proceedings *in camera*, interrogations without disclosure of personal data of the protected persons, or exclusion of visual observation. Upon consent of the public prosecutor, the investigator can pass a decision in order not to indicate personal data in the record of investigation and to opt for a pseudonym. Control and recording of phone and other communications shall be allowed upon written application of the victim, witness, their relatives or dear ones.

Furthermore there is, for example, the case of Azerbaijan, where section 123 CCP and a State Protection of Participants of the Criminal Process Act (1998) deal with measures of state protection of victims and witnesses, accused and other persons participating in the criminal proceedings. The body carrying out the criminal process shall take measures of protection upon a request of one of these participants, or on its own initiative. A request or petition for protection must be considered by the responsible body within 72 hours. The petitioner will be informed about the result immediately and receives a copy of the decision. Against a rejection of the request a complaint to a court is possible within 5 days; if no decision is communicated at all within a period of 7 days, the petitioner can apply to the court for taking measures of protection. After a refusal to take protective measures, a petition or request can be refilled if the participant to the criminal process is threatened or attacked or if new facts occur. Local municipalities are commissioned to implement the protective measures as decided by the body carrying out the criminal process. The public prosecutor leading the initial inquiry or supervising the investigation is empowered to ensure carrying out the protective measures. Possible forms of protective measures, according to the law, are: to guard a person, his apartment and property, to give a person individual means of protection or to warn him/her about an existing danger, to temporarily keep a person in a safe place, to secure confidentiality of information, to change the job, work place or education and residence of the person to be protected, to change identification documents and appearance of the person, and to hold closed court hearings. Finally, the body carrying out the measures of protection informs the body carrying out the criminal process about the measures taken and their result, and files a petition to terminate them when the threatening circumstances have disappeared.

A legal system of ‘protection against criminal influence’ exists in Lithuania. Measures of protection against criminal influence may be applied with regard to witnesses and victims if, when conducting pre-trial investigation or deciding criminal cases relating to major or grave criminal offences, there is a legitimate reason for assuming that persons’ life or

health is in danger, persons' property may be destroyed or damaged, or constitutional rights and freedoms of persons may be infringed. The measures of protection against criminal influence are applied with regard to such persons and their close relatives if these persons have cooperated actively with the officers of judicial and law enforcement authorities, assisted in disclosing a criminal offence, or supplied the officers of judicial and law enforcement authorities with any other valuable information. The law provides a list of measures of protection against criminal influence, including: physical protection of a person or his/her property; temporary transfer of a person to a safe place; setting up of special regime under which personal information is provided in passport units and any other official information centres; change of place where a person resides, works or studies; change of personal and biographical data; plastic surgery changing person's appearance; and dispensing a firearm or special means of protection to a person. A request for taking such measures can be addressed to the Prosecutor General or Deputies Prosecutor General, Chief Regional Prosecutor or Deputies of Chief Regional Prosecutor, or Chief District Prosecutor.

In the Czech Republic, the law provides for means to physical protection of witnesses, for moving witnesses and their family members to new locations and for helping them with social integration in a new environment. These measures are authorised by the Ministry of Interior, after a public prosecutor or a judges makes a proposal to the Ministry of Justice.

In Moldova, witnesses and other persons who provide assistance during criminal proceedings are provided with legal, organisational, technical and other means to protect their health, lives, and property, as well as that of their families or close relatives. The Prosecutor General and subordinate prosecutors supervise the legality of the execution of these measures

In Belgium, according to the CCP distinction is made between ordinary and special protection measures for witnesses. The latter only applies to some types of crime and are, for example, re-locating the witness or changing his/her identity. Witnesses under threat who benefit from special protection measures, can be given financial support and they have the right to receiving psychological and other forms of assistance.

In Germany, victims who are in danger can be protected on two legal levels: firstly, the police may take special protective measures, including using witness protection programmes in which the witness is given a new identity and a new place of residence. Secondly, the CCP provides for certain specific measures aimed at avoiding the victims' exposure to risks during the hearing. Such measures include, for example, the exclusion of the public or the accused during the examination of the witness, examination of the witness via video conferencing link, the presentation of a record of a prior examination of the witness in order to avoid a new hearing, or the non-disclosure of the witness's place of residence.

In Ireland, in exceptional circumstances the police provides protection to witnesses. A Witness Security Unit at Garda Headquarters operates a Witness Protection Programme.

Decisions in relation to who, and in what circumstances a person, may be admitted to the Programme are made by a non statutory body under the aegis of An Garda Síochána.

Protection programmes in Portugal in cases of serious crimes may consist of one or more measures in order to protect physically witnesses, their family members and friends, to protect their privacy and to conceal their identity (see further) and to give them support if the person is especially vulnerable because of his/her age (very young or old), health, socially dependant situation, etc.

In Romania, witness protection programmes are foreseen by law, dealing with, among others, protection of identity data, protection of testimony, hearing under a different identity, protection of witnesses in detention, safety measure at their residence, change of residence. Concrete measures can be: protection of witness's movement by police supervision of his/her residence, provision of a monitored temporary residence and escort to the seat of the prosecutor's office or court. Measures under a witness protection programme are decided by the public prosecutor during the criminal investigation phase; they are implemented by the National Office for Witness Protection.

A witness protection procedure exists in Slovenia as well. The procedure for a specific witness starts with a request from the public prosecutor and will be brought to a special commission by the Prosecutor General.

In Switzerland, provisions for the protection of victims and minors are offered under a general federal law on assistance to victims (1991). The first time victims are interviewed the police inform them of the existence of these protection measures, and the public prosecutor sees that they are enforced.

Informing and protecting the victim in case of release or escape from prison

In some countries, victims as a general rule have to be informed about the release of the *alleged* offender from prison and pre-trial detention.⁴⁷ In other countries,⁴⁸ if the court, the public prosecutor or the police ascertain that the victim or witness is in possible danger as a result of the *accused* person's release or escape from prison, then they are obliged to inform the victim/witness of his/her right to demand information about the person's liberty with the court or the public prosecutor's office.

In Germany, the victim is to be informed, upon request, about the imposition or lifting of any measures involving deprivation of liberty against the accused or about any relaxation of prison conditions.

In Sweden, according to the law, the injured person must be informed in the case of an escape of a suspect who had previously been apprehended, arrested or detained.

Prohibition of contact with the victim

⁴⁷ Austria.

⁴⁸ Czech Republic.

- In Andorra, the Court can make the provisional release of a defendant conditional on an obligation to refrain from approaching or coming into contact with the victim and approaching or coming too close to the victim's home or workplace. The same obligation may be imposed on the sentenced person during the serving of his or her sentence and set as conditions for the suspension of custodial sentences.
- In Austria and Liechtenstein, the police has the power to banish presumed offenders in domestic violence cases from their home and to prohibit return for up to 10 days (20 days if a court order is applied for, up to three months when a temporary court injunction is obtained). A similar legal provision exists in Romania, where in case of domestic violence the offender can be interdicted of coming back to the family residence and moreover can be coerced to medical treatment. In Spain, the law has established a 'protection order' in cases of domestic violence, to be applied for urgent measures.

Protection of particular categories of victims/witnesses at trial and pre-trial stage

1) Children in general

General principles on the interrogation of minors are adopted in many countries. Such a principle can be the requirement that interrogation is limited to one time (a second interview being only possible in emergency cases)⁴⁹ or that minors are interrogated only if material circumstances of the case cannot be established by using any other means⁵⁰. General provisions of the CCP may apply to protection of minor victims and witnesses. Frequent examples of specific provisions are:

- Victims or witnesses who are minors are often interviewed by a special police unit or special investigator during preliminary proceedings.⁵¹ Or they can only be interrogated by a pre-trial judge and they can be summoned to appear in the court hearing only in exceptional situations.⁵² Or they can give their evidence away from the court building.⁵³ In court, they can be interviewed in absence of the defendant.⁵⁴
- In the examinations and interrogations of victims and witnesses who are minors, an expert in education (social worker or psychologist) or in child protection must or may be involved.⁵⁵
- Victims (minors) may ask for the interview to be postponed to a later date or to have it cancelled if it would have an unfavourable psychological effect.⁵⁶
- Minors are often interrogated or allowed to give evidence by using screens in court, by live television link or by video or audio recording.⁵⁷

⁴⁹ Czech Republic, Iceland, Slovakia, see also Switzerland and Turkey.

⁵⁰ Lithuania.

⁵¹ Belgium, Czech Republic, Iceland, Switzerland.

⁵² Lithuania; in Slovakia, within preliminary proceeding, any further questioning of a person under 15 years of age shall be carried out only upon consent of his/her legal representative or guardian.

⁵³ Scotland.

⁵⁴ Russian Federation, Switzerland.

⁵⁵ Czech Republic, Croatia, Estonia, Liechtenstein, Lithuania, Slovakia, Turkey, Scotland.

⁵⁶ Czech Republic, Romania, Slovakia.

⁵⁷ Belgium, England and Wales, Scotland, Northern Ireland, Iceland, Ireland, Slovakia, Spain, Turkey.

- Another measure is the removal of formal court dress from lawyers and the judiciary.⁵⁸
- According to the principle of confidentiality, the data about juvenile victims are not made public. Although this is not to be considered as an absolute prohibition, information on the contents of testimony given by a juvenile victim, detailed information on the types of injuries caused to a juvenile victim and possible consequences of such injuries shall not be spread. As a rule, the names, surnames and any other personal data of juveniles are not specified.⁵⁹

2) Children victims of violent and sexual offences

In more and more countries, for this category of victims the interrogation at trial must be carried out through the use of video and children may or must be interrogated by an expert witness (for example a psychologist).

In Austria, if a witness' testimony at trial might not be possible due to factual or legal reasons, the investigating judge has to ensure special provisions during pre-trial proceedings, in order to make participation by prosecutor and defendant in interrogation possible (for example via video recording of the testimony). Minors under the age of 14 who may be victims of sexual abuse always have to be interrogated in this way, whereas other witnesses (other minors under the age of 14, adult victims of sexual abuse or members of the family of the defendant) have the right to request such a procedure. In respect to these pre-trial proceedings at the level of the investigating judge, the public prosecutor can apply for protection measures.

Moreover in Austria (and Liechtenstein), at trial children and other victims of violent or sexual offences can be asked questions by the prosecution and the defence lawyer through the judge or an interrogation expert, or by making use of a video link with the room where the victim or witness stays.

In Denmark, child victims can be interviewed before the trial and their statement be reproduced during the trial by means of video recording.

In Romania, law no. 272/2004 on protecting and promoting child rights sets out measures for protecting the refugee children, children in case of armed conflict, against any kind of exploitation, against drugs consumption, against abuse or negligence, against kidnapping or exerting any kind of trafficking.

3) Other victims of sexual offences

- Under certain conditions, the right applies to refuse to testify at trial, for example by making use of video-testimony at the pre-trial phase.⁶⁰
- In various countries, the right exists to be accompanied during interrogation by a trusted person.

⁵⁸ Northern Ireland.

⁵⁹ Lithuania.

⁶⁰ Austria, Liechtenstein.

4) Other victims of violent offences

In Ireland, also victims/witnesses of violent offences (and sexual offences) or threat of violence may be allowed to give evidence through live television link. Where the person is under 17 years of age this may be done unless the court sees a good reason to the contrary. Where the person is over 17 years it may be done if the court permits it.

Other protective measures for victims or witnesses

a) Anonymity and concealing the victim's or witness' identity

A practice has been developed in almost all European countries in order to protect the anonymity and the identity of victims and witnesses where necessary. The same type of measures can be found in the respective member states:

- In Austria, at trial, personal data of a witness are to be recorded in the minutes in such a way that it does not come to the attention of third persons. Moreover, during the first set of questioning about his personal details, a witness is allowed to declare another address than that of his permanent residence. If a witness fears exposing himself or another person to grave danger or loss of life, health or personal liberty, he/she can be allowed by the judge to remain anonymous throughout the proceedings. Under these conditions, it is considered acceptable on a legal basis for witnesses to disguise themselves, by wearing wigs, sunglasses etc.
- In Belgium, when there is a reasonable fear for a serious threat of the witness' (private) life, the investigating judge can decide to anonymity. Anonymity can be requested, among others, by the public prosecutor, and can be offered partly (removing some personal data from the interview report) or totally (keeping the identity secret during proceedings). The investigating judge and the public prosecutor must take all measure to ensure anonymity.
- Equally in the Czech Republic, when a witness or a member of his/her family are in danger and if protection cannot be ensured by other means, than the criminal justice agency can take measures to conceal the witness' identity, including their face. Names and personal data will not be mentioned in the record but kept separately and may be disclosed only to bodies involved in the criminal proceedings in the given case. Moreover, the witness shall be informed of the right to ask to hide his/her face and to sign the record using a fictitious name.
- In Croatia, an endangered witness during trial can be examined by hiding his/her identity (vocal and visual distortion), according to the CCP. Protection outside the court can be offered on the basis of a special law, the Witness Protection Act.
- In Estonia, in serious crimes or in exceptional circumstances, the investigation judge may, at the request of the public prosecutor, declare a witness anonymous in order to ensure safety. In a court hearing, a witness bearing a fictitious name shall be heard by telephone using voice distortion equipment if necessary. Also, questions can be submitted to the witness in writing. Long-distance hearings of victims or witnesses

can be organised if the direct hearing is complicated or involves excessive costs of for safety reasons.

- In Finland, witnesses and victims can testify in court without the defendant being present or alternatively by using specific technologies such as one-way screens, videoconferences or telephone. Anonymous testifying is not possible, however. But the police can keep secret all other personal data other than names, if the suspect has the right to receive copies of the file.
- In Ireland, legislation also provides for the anonymity of victims of rape or other sexual assault offences to be protected. In such cases, no information likely to lead members of the public to identify a person as the complainant may be published in a written publication available to the public or be broadcast except as authorised by a direction given by the court in the interest of justice.
- In Lithuania, the anonymity of victim/witness may preserved following strict rules of the CCP, namely where there is a threat of real danger for the life, health, freedom or property of the victim, the witness, their family members or close relatives; where the testimony of the victim or the witness is of great importance for the criminal case; when the victim or the witness participates in the proceedings relating to grave or major crime.
- In Moldova, if a victim's or witnesses' life, physical integrity or liberty are in danger due to their involvement in a criminal case, then the judge or court may permit the hearing to be held without the presence of this witness. Instead the hearing is done using a video link. The witness' voice can also be distorted.
- In Portugal, a witness' identity may be concealed at any stage in proceedings when several conditions together are met (among others the condition of serious crime committed by members of a criminal association). During court hearings or face-to-face confrontation, the witness or private prosecutor may have his or her appearance and/or voice disguised; teleconferencing is also possible. Other measures may include: recording in the case-file of a home address other than the usual one; use of a government vehicle to transport those taking part in proceedings; provision of a closed room, possibly guarded and subject to security measures, at judicial and police premises; police protection, extended to family members and friends; prison conditions allowing the person to remain apart from other prisoners and transportation in a separate vehicle.
- In Romania, the witness, being given another identity, may be allowed not to declare data that could bring him or other persons into danger.
- In Slovenia, during court proceedings the prosecutor is empowered to submit motions to the judge for granting witnesses the right to anonymity.
- In Turkey, the identity and personal data of a witness can be kept secret by the public prosecutor and the judge, and during the court hearing the witness can be examined in the absence of certain other persons.
- In England and Wales, anonymity can be considered in appropriate cases (rare) and reporting restrictions. In exceptional circumstances the victim's statement may be read out without them giving evidence.

b) Other measures

- In Denmark, at trial the defendant – but not his counsel - may be removed from the court room during the examination of a victim or a witness.⁶¹ This and other protective measures are to be decided by the court on the initiative of the public prosecutor or after a request by the victim or the witness.
- In several countries, witnesses who are in fear or subject to intimidation may be permitted by the Court to give evidence via television link.

b. Specific powers or responsibilities by the public prosecutor

In a general way, the most important responsibility of the public prosecutor is to finally decide on criminal prosecution, even when the prosecution was initiated by the police. However, the public prosecutor in most countries supervises and ensures that the preparatory proceedings are carried out properly, protecting the human rights and fundamental freedoms of the victim.

In this sense, the public prosecutor has often a general duty of supervision over witness protection provided by the police. In several countries, specific powers or responsibilities by the public prosecutor can be exerted through the police, in so far the direction of the criminal investigations pertains to the competency of the public prosecutor.

In some countries, the public prosecutor has no direct powers in this area and his/her role remains rather passive; he/she can, for example, recommend or ask witness protection to the police or other authorities.⁶²

In various countries, however, more specific duties on protecting victims and witnesses are reserved for the public prosecutor and other judicial authorities:

- In Croatia, the public prosecutor can propose to the court a special method of questioning or a method of participation in the proceedings, whereas the Chief Public Prosecutor can put forward a proposal to the Witness Protection Commission to include a person in the ‘out-of-court witness protection scheme’.
- A similar system operates in Estonia, where according to the Witness Protection Act, the Prosecutor General grants the permission for entry into a ‘witness protection agreement’, administered by the witness protection authority and which can be applied at pre-, trial- and post-trial level. In order to be able to do so, the public prosecutor has the right to examine the protection file, to interview the person to be protected and his relatives, to consult the prosecutor competent in the given file, to make amendments to the draft protection agreement, etc. Moreover, the prosecutor grants his permission to amend the conditions of an existing witness protection agreement if needed. Finally, a witness protection agreement is terminated with the permission of the public prosecutor.
- In Latvia, during prosecution, the prosecutor has the obligation to assess requests submitted by victims, by witnesses or by other persons on the matter of how seriously their life, health or property is threatened considering the evidence they have given. If the prosecutor deems that special procedural protection should be

⁶¹ A similar system exists in Iceland and Monaco.

⁶² Finland, Germany, Italy, Monaco, Turkey.

granted, he submits his proposal to the Prosecutor General who takes the decision on special procedural protection to be provided for.

- In Lithuania, the prosecutor, upon receiving the request of victim/witness for the preservation of his/her anonymity, can decide to preserve the anonymity of victim/witness, and will take appropriate measures in order to ensure the confidentiality of information which could disclose the identity of victim/witness.
- In Portugal, it is the task of the public prosecutor to request protective measures such as testimony be given with the appearance and/or voice disguised and, if necessary, evidence be taken by teleconference. In the context of *in camera* proceedings, the public prosecutor must also request non-disclosure of the witness's identity at one or more stages in the proceedings. Some ad hoc security measures can be ordered by the public prosecutor on his/her initiative, at the request of the witness or his/her legal representative, or on the proposal of the police. During subsequent stages, they can be ordered by the court at the public prosecutor's request. With regard to the support given to particularly vulnerable witnesses, during the investigation stage the public prosecutor should take those measures considered necessary to guarantee spontaneous and sincere testimony, appointing a public official employed by the social services or any other person particularly well-qualified to support the witness; during subsequent stages, the public prosecutor may ask the court to take such measures.
- In Romania, the public prosecutor during the criminal pursuit stage disposes of or agrees with protective measures such as not hearing witnesses under the age of 16 or hearing them through video-audio recording, and he may request such measures during the court investigation stage. He also disposes of protective measures for the witness' movement and he may order, during criminal investigation, the inclusion of a family member or another person in the witness protection programme (he may propose such during the trial phase). The public prosecutor may order (impose) the protection of witness' identification data during the criminal investigation stage. Documents on the real identity of the witness may be introduced in the criminal file only with the consent of the prosecutor or the court. In respect to crimes of trafficking of human beings, the public prosecutor is obliged by law to adopt certain protective measures (information on judicial and administrative procedures, and on the right to receive mandatory legal assistance), including special provision for minor victims.
- In Spain, it is the duty of the of the prosecutor to ask the judge for the adoption of coercive measures. The law provides for a series of restraining measures, such as the prohibition to approach to the victim. The prosecutor has no power to take the measure by him/ herself.
- In the FYR Macedonia, in cases of emergency, the public prosecutor can impose protective measures, but the normal procedure is that protective measures are imposed by a special body upon receiving a proposal from the public prosecutor.
- In Ukraine, the CCP prescribes that in case there are reasons for providing security of persons who participate in criminal proceedings, the investigator or prosecutor are obliged to take over examination as appropriate within the period of time no longer than three days, and in urgent cases, immediately, and to take a decision on application or refusal of security measures. According to their decision, they adopt a motivated resolution or prescription and forward it for execution to body authorised

to provide security. This resolution or prescription is mandatory for the authorised body.

- In England and Wales, Scotland and Northern Ireland, the police is responsible for a witness protection scheme. In England and Wales and in Northern Ireland, the prosecutor has a responsibility to consider witness protection issues and can apply to the court for the various measures and orders.
- In Belgium, the public prosecutor can take the initiative to request protection measures from the Witness Protection Commission, which has decision making competency.

c. Protection measures that can be imposed by the public prosecutor

In several countries, the public prosecutor is not empowered to impose protective measures directly. This is, for example, the case in France, where public prosecutor's powers in this respect are linked to his or her general duty to assist victims and witnesses but where imposing specific protection measures are a matter for the administrative authority (Prefect) responsible for public order. In Denmark, the public prosecutor has to rely on court decisions and on the police, when it comes to the use of *efficient* protection measures. In Germany, however, the public prosecutor can impose him/her self 'procedural' measures or he can apply to the court for the imposition of such measures. Also in Portugal, the public prosecutor has a clear competency and duty to order and to request protective measures. The same applies for Romania (see above). In Slovenia, after submitting a motion for protection of a witness the Prosecutor General has the possibility to order special protective measures in urgent cases (special counselling, technical or physical security measures or temporary accommodation).

4. Taking into account the victim's needs and wishes in decisions to prosecute

In most countries, the public prosecutor *is not required to take the victim's needs and wishes into account* in his decision to prosecute.⁶³ This is certainly the case when the principle of mandatory prosecution applies⁶⁴ or in cases of prosecution *ex officio*⁶⁵: the public prosecutor is called upon to react on the basis of the law and to protect the interests of the state or society. Where the decision to prosecute or not should not be influenced by *specific* wishes and needs of the victim, the public prosecutor nevertheless has to take into account the position and needs of the victim in general as one of the elements and criteria to be applied in decision making processes.⁶⁶ The latter is for example the case in Finland, when deciding on charges, even in the context of the principle of legality. This applies clearly to minor crimes, where the public prosecutor has the right to decide not to press charges, amongst others based on the wishes of the victim. In Monaco, in cases where a minor is charged with an offence, the public

⁶³ Andorra, Denmark, Germany, Ireland, Monaco, Spain, Sweden, ...

⁶⁴ For example in Austria and Italy.

⁶⁵ Croatia.

⁶⁶ Denmark, Germany, Ireland.

prosecutor may seek a discharge only if the victim has explicitly stated his or her wish not to be joined to the proceedings as a civil party.

Different from the above is the situation in England and Wales, where the public prosecutor's office according to various legal frameworks *is required to take the victim's needs and wishes into account* in any decision to prosecute. The police and Witness Care Units should relay these needs and wishes to the public prosecutor and in appropriate cases and before trial, the prosecutor should meet with the victim. If special measures are being applied for, the prosecutor may meet with the victim to discuss their needs and wishes in relation to the measures applied for.

In Scotland, the public prosecutor will take a number of factors into consideration. He will determine whether there is a sufficient 'corroborative evidence' to support a prosecution. Then, he will consider whether the prosecution is in the public interest. The prosecutor must give careful consideration to the whole circumstances of the case before deciding whether it is in the public interest to prosecute or to adopt an alternative disposal to prosecution. The views of the victim and the likely impact of a prosecution upon the victim will be taken into account, but will not be binding on the prosecutor. The same principles apply for Northern Ireland. Moreover, when opting for diversion in stead of prosecution, the public prosecution service in England and Wales and in Northern Ireland can apply measures such as informed warning, cautioning and youth conferencing. The latter disposal concerns a restorative conference and may involve a number of parties including the defendant, the victim, support persons and the police.

In Ireland, the Director of Public Prosecutions has given, among others, the following undertakings in relation to victims of crime:

- (a) to have regard to any views expressed by victims of crime when making decisions in specific cases whether or not to prosecute;
- (b) to examine any request from a victim for a review of a decision not to prosecute and in appropriate cases to have an internal review of the decision;
- (c) that the Office of the Chief Prosecution Solicitor will work with the Police to ensure that victims are fully informed of developments in the prosecution of perpetrators of offences, especially those of a violent or sexual nature, and at the request of the victim, facilitate a pre-trial meeting with a representative from the State Solicitor's Office and counsel to discuss the case. They are also committed to ensuring that the victims will be treated with the utmost consideration and respect and to explaining, wherever possible, the court processes involved.

In various countries, as mentioned already, a (small) number of (less serious) crimes are only prosecuted if the victim asks for or agrees with (complainant offences).⁶⁷ The victim can decline to give his consent or can revoke it. A condition to exercise this power can be the age of the victim, for example minimum 15 years; under this age prosecution is mandatory in some countries.⁶⁸

⁶⁷ For example Austria, Denmark, Belgium, Czech Republic, Iceland, Liechtenstein, Romania, Slovakia, FYR Macedonia, Turkey.

⁶⁸ Czech Republic.

In some countries with a parallel system of private prosecution, the public prosecutor must obtain the consent of the victim (private prosecutor) before ordering a temporary stay of proceedings.⁶⁹

In applying measures of diversion for mainly minor offences (payment of a sum of money, probationary period, community service, restitution, victim-offender mediation, settlement – see further), the public prosecutor often takes into account the needs and interests of the victim.⁷⁰ In Germany, whether or not to terminate proceedings will be decided upon by the public prosecutor also by taking into account the victim's interest.

In Portugal, in criminal proceedings concerning ill-treatment between spouses or partners or between parents and children, the public prosecutor may decide a temporary stay of proceedings, with the investigating judge's consent, at the victim's request in view of the latter's situation.

5. Mediation by the public prosecutor

In most jurisdictions, as a rule the public prosecutor is not empowered to mediate in criminal cases.⁷¹ However, he can be empowered to request mediation, to be carried out for example by social workers⁷², by the police⁷³ or by a registered lay person⁷⁴. In France, the public prosecutor can 'initiate' penal mediation as an alternative to prosecution. In Germany, in appropriate cases the public prosecution office and the court are to work towards victim-offender mediation in every stage of the proceedings. Mediation is considered as an out-of-court settlement of the dispute between the accused and the injured person and can only be carried out when both agree.⁷⁵ Probation and Mediation Services, or special services (NGOs or local administrative authorities) are in charge of this type of mediation.⁷⁶ The objectives of mediation are manifold, including reducing harmful consequences for the victim and other persons affected by the crime. Mediation, in general, requires the intervention of a neutral, third party.⁷⁷

The latter is emphasised by the Swedish: although victim-offender mediation is legally available throughout the country, precisely because of the necessarily *impartial* character of mediation, the public prosecutor is not empowered to do so. In this context, the legal

⁶⁹ For example in Portugal, in the case of offences punishable by a custodial sentence of up to five years.

⁷⁰ Austria, Belgium, Croatia, Estonia.

⁷¹ Andorra, Azerbaijan, Croatia, Czech Republic, Denmark, Finland, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Moldova, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, FYR Macedonia, Ukraine, England and Wales, Scotland, Northern Ireland.

⁷² Austria, Belgium, Czech Republic, Finland.

⁷³ Monaco.

⁷⁴ Slovenia.

⁷⁵ Austria, Czech Republic.

⁷⁶ Austria, Czech Republic, Finland, Latvia, Sweden.

⁷⁷ See Council of Europe Recommendation R(99)19 on mediation in penal matters. Moreover, reference can be made to art. 10 of EU Framework Decision of 15 March 2005 on the status of victims in criminal proceedings, which obliges member states to promote mediation and to ensure that its results can be taken into account.

regulation's main purpose is to provide guarantees of equity and fairness. Mediation is not a criminal law sanction and is not part of the criminal justice procedure. But in some cases mediation can lead to the cancelling of prosecution. Also, the court can take into consideration the fact that mediation occurred when deciding the sanction. Mediation is available for offenders of all ages, even though its focus is on juvenile offenders. Besides the impartial character of mediation, the voluntary nature (for both parties) is stressed.

The principle that mediation is not a criminal law sanction, is also adopted in a new law on mediation in criminal cases (22 June 2005) in Belgium.⁷⁸ Mediation is deemed to be an equal offer to victims and offenders, on which the public prosecutor and other judicial authorities have the legal duty to inform the concerned persons. Under this new legal provision, mediation is not restricted to less serious offences or first offenders, but can be offered at all stages of the criminal justice process, even after the sentence. For more serious crimes, mediation will run parallel to prosecution, but may be able to influence the sentence. Apart from this new legal system of victim-offender mediation in Belgium, an older one (legally established in 1994) which is called 'penal mediation' stays operational. This type of mediation is explicitly organised as part of the criminal justice procedure, more precisely at the level of the public prosecutor. If the suspect fulfils one or more of the conditions set by the public prosecutor – reparation of damages through mediation, counselling, community service or training – the public action will 'extinguish'.

Also in Turkey, recent legislation (2005) gives competency to the public prosecutor for the institution of mediation, be it in a particular way. Mediation can only be applied for complainant offences (for example insults, non-serious injuries). The public prosecutor asks the perpetrator whether he/she takes responsibility for committing the crime. In the event that he/she takes responsibility, the public prosecutor asks whether he/she will compensate the material or other harms and/ or pay damages. If the perpetrator agrees, the public prosecutor informs the victim or his/her legal representative on the issue. If the damage has been repaired, the public prosecutor can decide not to prosecute. In order to assist in the procedure, the public prosecutor appoints one or more mediators. The mediator – always a lawyer - submits a report to the public prosecutor within 10 days stating his/her actions taken so far and the results of them. If necessary, this period can be extended by a one-off period of 30 days. Where the mediation process fails, the fact that the responsibility has been taken by the perpetrator or that he/she confessed that he/she committed the crime in question cannot be considered as evidence during the public prosecution.

Settlement proceedings are legally foreseen in many countries, but it is not always clear whether mediation is involved or not. Settlement proceedings can often be applied⁷⁹ or proposed to the judge⁸⁰ by the public prosecutor. Obviously, the consent of the victim is required. It is often the duty of the public prosecutor to inform the victim, the suspect and others involved and to explain the meaning and consequences of a settlement.

⁷⁸ Information provided by the author.

⁷⁹ Belgium, FYR Macedonia.

⁸⁰ Estonia.

Restrictions are often made in terms of gravity of the offence or maximum years of prison sentence (often 3, 4 or 5 years). Sometimes, when several persons are accused, consent by all is required.⁸¹

The settlement of damages in many jurisdictions can function as a condition for the dismissal of the case at the level of the public prosecutor or the judge. For example in Austria, compensation and redress for the victims as a precondition to discontinuing proceedings is generally provided for in the provisions on diversion.

In Spain, in cases of criminal jurisdiction about minors the prosecutor can mediate between victim and minor to obtain the most convenient sentence.

In the Czech Republic, an injured person must be instructed (among others by the public prosecutor) on the substance of the institute of *composition*. This means that the court or the public prosecutor may decide to approve a settlement and suspend the criminal prosecution (possible for criminal offences with an upper limit of 5 years imprisonment) under certain conditions: a) acknowledgement of the facts by the suspect; b) reimbursement or compensation by the offender to the injured person; c) the offender deposits the settlement fund in the court's bank account and a financial amount designated for socially beneficial projects on the account of the public prosecutor's office. The defendant, injured person and public prosecutor may lodge an appeal against these decisions.

Different from a settlement of damages is the procedure on negotiation about guilt and punishment, which can be commenced by or at the level of the public prosecutor (a type of plea bargaining).⁸²

Still another procedure can be *(re)conciliation*.⁸³ For example in Lithuania, art. 38 CC regulates the release from criminal liability when reconciliation between culprit and victim is reached. Art. 413 CCP provides for the possibility of 'court mediation': in cases of private prosecution, the victim and/or his legal representative and the accused person can be summoned before the judge 'for reconciliation'.

6. Requirement to inform the victim of action taken in his case

In several countries, there are no particular provisions that require the public prosecutor to inform systematically the victim of action taken in a case concerning him or her.⁸⁴ In practice however, the victim can on the initiative of the public prosecutor or the police in co-operation with the public prosecutor be kept (fully) informed,⁸⁵ or can be informed on

⁸¹ Estonia.

⁸² For example in Slovakia.

⁸³ Draft amendment of CCP in Estonia, where the conciliation procedure is considered a possibility to adjudicate and would require the consent of the victim, the offender, the public prosecutor and the court; available through State Probation Service in Latvia; also in Lithuania.

⁸⁴ For example Andorra, Finland, Ireland, Monaco.

⁸⁵ Ireland, Monaco.

his/her own request⁸⁶, or the prosecution department will be organised in such a way that it allows victims to get more detailed information⁸⁷, or ‘usually the victim finds out about upcoming court proceedings from the Court once charges have been pressed’⁸⁸.

In some countries, the public prosecutor is required to inform *the victim* on a decision not to follow up a complaint or not to prosecute⁸⁹, a dismissal of criminal charges⁹⁰, an exemption from criminal investigations⁹¹, or a decision to terminate criminal proceedings otherwise⁹².

In Austria (and Liechtenstein), if the victim is a *privately interested party*, the court is obligated to inform him/her about when the trial is taking place. Moreover, the public prosecutor and the court are obliged to inform the victim about decisions to refrain from prosecution, about terminating proceedings and suspending proceedings against a known perpetrator.

In Germany, if the public prosecution office terminates the investigation proceedings, the victim will be informed of this in writing. Upon request, the victim can be informed about the outcome of the court proceedings.

In France, the public prosecutor is required to inform the victim of action taken in a case concerning him/her, in particular of the date of the hearing when the victim has initiated the proceedings, so that he/she can assert his/her claims concerning the alleged damage.

In the Czech Republic, the public prosecutor must always inform the *injured person* about the way the case has been handled.

In Belgium, the public prosecutor must inform the victim of certain steps in the procedure if he/she has registered as ‘injured person’.

In Slovakia, the police and the public prosecutor have the duty to give written information to the victim at the first contact about his/her rights in criminal proceedings as well as about the organisations providing assistance. Furthermore, they have the duty to inform the injured person about the commencement of criminal prosecution as well as about the accusation. The injured person has the right to inspect the investigative file as well as to be informed about the results of the investigation. Every prosecutor’s decision not to prosecute shall be sent to the injured person within preliminary proceedings.

In Iceland, the public prosecutor shall notify the victim when indictment has been made known to the defendant. Furthermore, the public prosecutor has to inform the victim of the outcome of the court proceedings and of any further proceedings, for instance in relation to appeal.

In Italy, the public prosecutor is required to inform the victim of action taken before the beginning of the trial. If the public prosecutor is going to ask the judge to dismiss a case, the victim of the crime must be informed, if he/she asked so during the preliminary investigations.

⁸⁶ Andorra.

⁸⁷ Spain.

⁸⁸ Finland.

⁸⁹ Austria, Denmark, Switzerland, Turkey.

⁹⁰ Croatia, England and Wales.

⁹¹ Romania.

⁹² Estonia, Romania.

In Latvia, the prosecutor informs the victim about the criminal procedural activities having a direct bearing on the interests of the victim, and explains to him the right to appeal against the actions or decisions taken by the prosecutor and the procedure for doing so.

In Lithuania, a victim who has filed a complaint, application or report, is notified by the public prosecutor of the initiation of pre-trial investigations.

In Moldova, the prosecutor is obliged to inform the injured party, civil party and their representatives about the results of the criminal prosecution, as well as where and how they can receive information about the materials in the hands of the prosecution. The civil party and their legal representatives are presented only the materials regarding the civil action to which they are party.

In Turkey, if the public prosecutor decides not to prosecute, he/she shall inform both the victim and the suspect. In his/her decision he/she shall indicate the right of the victim to apply for remedies, the time limit and the authority to whom to apply.

In England and Wales, milestones in the case will be reported back to the victim and if a charge is lowered or discontinued, the prosecutor must explain this course of action to him/her. In Scotland, in certain categories of case the public prosecutor will notify the victim of decisions or actions taken. This is mandatory in all cases involving deaths and is recommended as good practice in cases involving domestic abuse, racially motivated offences, sexual offences, child victim cases and other cases involving particularly vulnerable victims. In Northern Ireland, the law does not require the public prosecution service to inform the victim of action taken in a case concerning him/her. However, the policy is that when a prosecutorial decision has been taken, whether it is to prosecute or not prosecute, the PPS will write to the victim and advise them of that decision.

In some countries, there are provisions that refer to *a more generalised information duty* by the public prosecutor. In Azerbaijan for example, the prosecutor who leads the initial inquiry informs a victim or his/her representative about the completion of the initial inquiry and specifies the venue and time for the participants of the criminal process to 'familiarise themselves with materials from the criminal case'. Afterwards, the victim or his/her representative can file a petition to carry out a further investigation or to take new procedural decisions. Within no later than 48 hours the victim is informed about the decision. A complaint about the investigator's decision to refuse a further investigation or to take new procedural decisions may be made to the prosecutor within a period of 48 hours. A rejection of the complaint by the prosecutor does not prohibit filing the petition with the court. When a case by the prosecutor is sent to the court indeed, the prosecutor immediately informs the victim or his/her representative by explaining them their rights. Moreover in Azerbaijan, the victim has the right to obtain a copy of a decision to terminate dealing with the criminal case, a decision to refuse commencing criminal proceedings, an indictment bill and a ruling or decision of court.

A general duty to inform the victim also applies in Portugal: when the preliminary inquiries have been completed, the victim in a criminal case is always informed of the public prosecutor's decision.

A general, legal duty by the public prosecutor to inform victims of any action taken in a case concerning him/her also applies in the FYR Macedonia.

A position in-between is taken by Sweden. According to the law, the police or the prosecutor shall ask the injured person if he or she wants to be informed about: a decision to initiate a preliminary investigation, a decision to discontinue the preliminary investigation, a decision not to prosecute the suspect, the time for the main hearing, and the court's judgement. But the public prosecutor must inform the injured person about the obligation of the prosecutor to prepare and present the injured person's action in conjunction with the prosecution. Moreover, the prosecutor is obliged to, as soon as possible, inform the injured person about a decision to prosecute the suspect.

7. The right of a victim to react to a decision not to prosecute

In most countries, decisions taken by the public prosecutor are not subject to formal appeal, but *some procedures 'to react'* may apply:

- In Andorra, complaints which have been lodged directly with the public prosecutor and subsequently have been waived by him, may be brought before the court again by private individuals. The same applies when the proceeding is brought by the investigating judge and the public prosecutor considers there is no criminal case.
- In Austria and Liechtenstein, as already mentioned, if proceedings are discontinued by the public prosecutor, the victim is to be informed. Following admission by the court, the victim then can act as prosecutor himself if he finds that the public prosecutor has unjustly discontinued proceedings. When the public prosecutor ceases to prosecute after the indictment has taken effect, the victim has the right to uphold the prosecution as a 'subsidiary prosecutor'. In the case of a not guilty verdict, however, the subsidiary prosecutor has to bear the costs of the proceedings. Finally, the victim and any other person who has a legal interest in the prosecution of the alleged offender, has the right to request with the higher court of appeal that proceedings be reinstated that have been discontinued by the public prosecutor.
- In Croatia, after a public prosecutor's decision to drop criminal charges, the victim can within a period of 8 days resume prosecution by making a declaration to this effect before the court, in which case he/she acquires all the rights vested in the public prosecutor (the court decides whether or not to accept).
- In Finland, the victim has a right to file a complaint against the District Prosecutor's Office for decisions not to prosecute. Such a complaint can be made either to the Office of the Prosecutor General, the Parliamentary Ombudsman or the Office of the Chancellor of Justice. The Prosecutor General can decide to revoke the District Prosecutor's decision not to prosecute.
- In Monaco, after a decision by the prosecuting authorities not to prosecute, the victim may send a further letter to the Principal State Prosecutor within the limitation period and the case may be re-examined. In a more formal way, after a decision of non-prosecution, the victim can lodge a complaint with the investigating judge along with a declaration of civil party. In this case, however, the investigating judge is obliged to conduct an investigation only where asked to do so by the Principal State Prosecutor.
- Also in Belgium, after a decision of non-prosecution, the combined system of lodging a (new) complaint and applying for civil party with the investigating judge legally

exists. In that case, the investigating judge is always obliged to start an investigation, but he may ask the victim a bail to pay. The victim may also bring a private prosecution to the court.

- In Portugal, after a public prosecutor's decision not to prosecute, a pre-trial investigation requested by a private prosecutor will be directed by a judge in order to verify the public prosecutor's decision.
- In Romania, the victim and any person whose legitimate interests are harmed may file a complaint within 20 days from the date they were informed on the resolution or ordinance for non-starting the criminal investigation, dismissing, exemption from criminal investigation or cessation of the criminal investigation. This complaint will be addressed to the court having the competence to judge the cause in first instance. The complaint may be solved by the head of the prosecutor's office, by the prosecutor general or by the prosecutor chief of section at the High Court of Cassation and Justice.
- In Slovakia, the victim can file a complaint against a public prosecutor's decision not to prosecute. The superior prosecutor shall make the decision about the complaint.
- In Slovenia, if the prosecutor rejects the criminal report, the victim has the right to start prosecution proceedings himself. In this case, the prosecutor is obliged to inform the victim that the criminal report has been rejected and is also obliged to give the victim instructions on how to start the prosecution himself. If the public prosecutor decides not to proceed the prosecution later in the proceedings, the victim has the right to take the prosecution over, but in this case the court is obliged to inform the victim.
- In Spain, there is not appeal against the prosecutor's decision, but the victim can act as accusation party, or, depending on the stage of proceedings, he/she can go to the competent judge and repeat his/her denunciation.
- In Sweden, the victim has no right of appeal to a court with respect to decisions not to prosecute, but can request that a superior prosecutor look at the decision. If a victim asks for it, the superior prosecutor is obliged to review the decision not to prosecute. The superior prosecutor may then decide whether or not to prosecute.
- In Switzerland, a refusal by the public prosecutor to follow up a criminal complaint may be challenged by the victim before the complaints court of the Federal Criminal Court.
- In the FYR Macedonia, the victim has the right to react to the decision of the public prosecutor not to prosecute, by starting proceedings themselves before the competent court.
- In England and Wales, victims can take the decision not to prosecute to the prosecutor's line management and can follow the relevant complaints procedure. They will shortly be able to take it to the Victims' Commissioner or may complain to their Member of Parliament. In Northern Ireland, a victim may request a review by the public prosecutions service, on a non-statutory basis, or he may seek a judicial review before the High Court. In Scotland, however, 'it has long been accepted that there is no right to challenge the decision of the Lord Advocate, as head of the public prosecution service, not to prosecute'.

- In Iceland, the victim may ask for reasoning of a decision not to prosecute. Decision of police prosecutors not to prosecute may be appealed to the Director of Public Prosecutions.

In some countries, however, there seems to exist *a more pronounced right of appeal* or cassation against prosecutor's decisions. The following examples can be mentioned:

- In the Czech Republic, an injured person may lodge a complaint against the decision of the police to discontinue a case, and moreover, may also appeal against a resolution to discontinue criminal prosecution or to re-classify the case as an administrative infraction.
- In Denmark, a decision not to prosecute can within four weeks be brought before a superior prosecuting authority, which can make a full review of the case.
- In Germany, if the public prosecution office terminates an investigation on the grounds of a lack of sufficient suspicion that an offence has taken place, the victim is entitled to lodge a complaint with the Prosecutor General's Office. In the case of a complaint's dismissal by the Public Prosecutor General's Office, the victim is entitled to appeal the dismissal before the Higher Regional Court.
- In Estonia, a victim may file an appeal with a Prosecutor's Office against a refusal to commence criminal proceedings and may file an appeal with the Office of the Prosecutor General against termination of criminal proceedings or dismissal of an appeal by a Prosecutor's Office. In France, the victim can appeal against a decision not to prosecute to the Principal State Prosecutor or by applying to the investigating judge to be joined to the proceedings as a civil party.
- In Latvia, the victim has the right to appeal against the prosecutor's decisions on two subsequent levels of office.
- In Lithuania, the victim - who in principle receives a copy of the decision of the prosecutor not to commence pre-trial investigation - may appeal against this decision to the pre-trial judge.
- In Moldova, the victim or the injured party has the right to challenge to the investigating judge, within a period of 10 days:
 - o the refusal of the prosecutor to receive the complaint or denunciation, or to start criminal prosecution;
 - o the cessation of the criminal prosecution, dismissal of the criminal case or withdrawing the person from the criminal prosecution;
 - o other acts and actions for which the law provides this type of remedy.

The investigating judge, considering that the complaint is well-founded, shall adopt a court order obliging the prosecutor to liquidate the violations and, depending on the case, shall declare the nullity of the challenged act or procedural action. In the other case, the investigating judge shall deliver a court order on the rejection of the submitted complaint.
- In the Russian Federation, a decision of the public prosecutor to dismiss the institution of a criminal case or to terminate a criminal case may be appealed against by the victim to the court or the superior public prosecutor.
- In Turkey, the injured person can object within 15 days to the nearest Felony Court to any decision being served not to prosecute. If the Felony Court rejects the objection, the applicant will be sentenced to the costs.

- In Ukraine, in case of refusal in initiating a criminal case, a prosecutor, investigator or judge should inform all interested parties, including the victim. A victim and his/her representative have a right to submit complaints to actions taken by these authorities. The actions taken by a public prosecutor and his decisions may be appealed to the prosecutor of higher level or to the court.

Conclusions and comments

The answers to the questionnaire demonstrate that many – not to say all - jurisdictions do recognise now the special needs of victims and witnesses and the necessity to give them a more prominent place in the course of criminal proceedings. Although in some jurisdictions the victim had gained a clear position already for a while, most criminal justice systems, both from the perspective of legal protection and effectiveness, prioritised the relationship between the suspect/offender on the one hand and the state on the other hand, and considered the victim as *quantité négligeable* for many decades. Indeed, the more the criminal justice system cared about finding appropriate ways to deal with the offenders, the less it devoted its energies to issues related to the victim and his/her interests.⁹³ But since the 1980s, the general insight has grown that ‘once a case enters the criminal court system, the victim-witness becomes susceptible to a myriad of problems and needs’.⁹⁴ Therefore, many European countries have gone through a turnabout which started in the late 1980s and developed through the 1990s until today. In 2006, this evolution of recognising and strengthening the legitimate position of the victim/witness in society at large and in criminal proceedings in particular has certainly not yet come to an end.

The foregoing sections of this report document the multitude of victim oriented realisations and reforms in all involved member states. Diversity can be found with respect to particular measures and solutions, but many legal provisions and programmes in the respective countries draw on the same underlying principles of care for victims and witnesses. The field where this homogeneity comes on the foreground most clearly, is that of victim and witness *protection*. Most jurisdictions have elaborated very similar protection measures and programmes, directed to both protection of privacy and physical protection. This is also the field where special attention for children and minors is most pronounced. Many member states – probably all – dispose of special interrogation measures and techniques to prevent minors from unnecessary psychological suffering during criminal proceedings, including court hearings. These provisions seem to be in line with the guidelines of Council of Europe Recommendation No. R(97)13.⁹⁵ On three aspects, improvement of victim and witness protection could be envisaged:

- witness assistance programmes during trial;

⁹³ KILLIAS, M., ‘Victim-related alternatives to the criminal justice system: compensation, restitution and mediation’ in KAISER, G. and ALBRECHT, H.-J. (eds.), *Crime and Criminal Policy in Europe*, Freiburg, Max Planck Institute for Foreign and International Penal Law, 1990, 249.

⁹⁴ KNUDTEN, R.D., MEADE, A., KNUDTEN, M. and DOERNER, W., ‘The victim in the administration of criminal justice: problems and perceptions’, in MCDONALD, W. (ed.), *Criminal Justice and the Victim*, London, Sage Publications, 1976, 115-146.

⁹⁵ Council of Europe Recommendation No. R(97)13 concerning intimidation of witnesses and the rights of the defence.

- protection of victims of domestic violence (in particular partner violence);
- informing and protecting victims in case of release from prison (both pre-trial release and release during, or at the end of, the execution of the sentence).⁹⁶

Against the background of many victim oriented developments in practice and policy, an important exercise remains to *understand* victims, and more precisely what their specific and legitimate needs and expectations are towards criminal justice in general and criminal proceedings in particular. New legal provisions and practises in dealing with victims and witnesses must be checked with the needs of victims in a more systematic way. Sound knowledge about these needs is of utmost importance, in order to be able to meet victims' expectations and to balance them with the requirements of due legal process and the general interest of society and the state. In victimological research a consensus exists on the most important victims' needs in relation to criminal justice, which can be summarised as follows:⁹⁷

- 1) Victims want a less formal process where their views count
- 2) Victims want more information about both the processing and outcome of their case
- 3) Victims want to participate in their cases
- 4) Victims want to be treated respectfully and fairly
- 5) Victims want material restoration
- 6) Victims want emotional restoration and apology.

The need for a personalised approach

Going back to the duties of the public prosecutor towards victims and witnesses and the answers from 31 jurisdictions which are reported above, a general comment is that victim/witness oriented initiatives and reforms in most jurisdictions are set up from a formal or rather formalistic perspective. This might appear as self-evident and even necessary in a legal environment,⁹⁸ but at the same time we should be aware of the need for a more informal approach. This more informal approach refers, among others, to the psychosocial specificity of the victimisation experience. Becoming a victim is often an emotional and highly subjective experience, contrasting with the – per definition – highly objectivated and sometimes abstract way in which a criminal justice process takes place. As we know, this confrontation often leads to experiences of secondary victimisation, where from a strict legal perspective the intervention is done in a correct way, but nevertheless causes deep disappointment and frustration on the side of the victim. Therefore, the creation of new victim oriented provisions within criminal proceedings

⁹⁶ See also Art. 4.3. of the EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, *O.J.* 22.3.2001 L.82/1-4. In addition of this, and regardless whether the public prosecutor's service in a given country has a competency or not in this domain, it should be mentioned that many victims feel the need to be better informed about the execution of the (prison) sentence in general.

⁹⁷ STRANG, H., *Repair or Revenge: Victims and Restorative Justice*, Oxford, Clarendon Press, 2002, 8-23.

⁹⁸ Moreover, the questionnaire was also designed in such a way that mainly the formal duties were enquired. Only question 4 (taking into account victims' needs and wishes in decisions to prosecute) and question 5 (mediation) could possibly refer to more informal aspects.

should also recognise, and give room to, non-formal and more personalised ways of dealing with victims. In this way, one can expect that victims will feel treated more respectfully by the criminal justice system and that their emotional redress will be facilitated as well. This more personalised approach towards victims during criminal proceedings is often considered by public prosecutors and court staff as not their (first) duty. The point of view is often defended by them that they do not (or should not) have personal contacts with victims and witnesses, and that in case of problems, they always can refer those victims with special needs to social workers or psychologists inside or outside the court system. Moreover, public prosecutors feel often not sufficiently educated and trained for dealing appropriately with emotional problems of victims and witnesses, certainly not when these are children. Nevertheless, in order to prevent feelings of secondary victimisation and in function of their own decision making, public prosecutors should achieve some knowledge and practical skills with respect to the emotional and psychological needs of victims, without becoming social workers themselves.

The duty to deal with victims during criminal proceedings in a psychologically sound and respectful way has been stressed by supranational regulation. Victims should be treated with compassion and respect for their dignity; the responsiveness of judicial processes should be facilitated by, among others, allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings and by providing assistance to victims throughout the legal process.⁹⁹ The necessity of dealing with victims and witnesses in a personalised way has been incorporated in the code of criminal procedure of several countries. It can be recommended that this should be done in other jurisdictions as well, so that a personal and appropriate treatment of victims becomes a legal duty of *each* public prosecutor (not only the ones specialised in victims' issues) and each official working in the system.

Actual implementation of victim related provisions

As already mentioned, the questionnaire used in this research mainly solicited *legal* information on the state of affairs in the respective jurisdictions. Comparative legal research of this type has an important value and should be reinforced and refined, also in respect to the public prosecutor's duties towards victims and witnesses. From a methodological point of view, however, this type of research can not reveal the *actual* implementation of legal provisions. The distinction and possible gap between legal and actual implementation should not be under-estimated. That this is in particular true for

⁹⁹ Articles 4 and 6 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Resolution 40/34, 29 November 1985); Art. 13 (d) of the UN Guidelines on the Role of Prosecutors, Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990; Article 2 ('Respect and recognition') of the EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings; Art. 23 of Council of Europe Recommendation No. R(97)13 concerning intimidation of witnesses and the rights of the defence; Art. 33 of Council of Europe Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system; see also, in a more general way, Art. III.m. of the European Guidelines on Ethics and Conduct for Public Prosecutors, Conference of Prosecutors General of Europe, 31 May 2005.

victim policies, has been demonstrated extensively by the Dutch researchers Groenhuijsen, Brienen and Hoegen, by investigating the way Council of Europe Recommendation No. R(85)11 on the position of the victim in the framework of criminal law and procedure has been implemented in 22 European jurisdictions.¹⁰⁰ Their data collection was not only based on legal materials, but also on interviews, local surveys and personal observation. Within and among European jurisdictions, we should learn from this type of research, and use similar approaches to evaluate the actual improvement of the treatment of victims by criminal justice agencies. Within a system that is under continuous pressure to perform more effectively and more efficiently, it is far from easy to re-orient the focus of the process on the needs of victims and witnesses. In such circumstances, there is an enhanced risk that victims remain a *Fremdkörper* in the structures and in the mentalities and practices of those working in the system.¹⁰¹ Therefore, it should not surprise that the actual implementation of new legal provisions on victims meet a lot of obstacles. In the replies on the questionnaire, only a few countries have made reference to the real and practical implementation of some provisions. Our conclusion is that much more attention should be given to practical implementation processes on improving the position and treatment of victims and witnesses.¹⁰² Both at the national and the European level, public prosecutors should exchange and support each other in this field. Both accompanying action-research and evaluative research in actual implementation of victim oriented provisions should be undertaken.

Victim oriented training and policy

The latter brings us to the subject of training. Although training was not one of the topics of the questionnaire, the answers at least implicitly show its importance. Exercising duties towards victims and witnesses during criminal proceedings presupposes proper education and training. The need of training has been underlined in supranational regulation as well. According to Council of Europe Recommendation Rec(2000)19, *'training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. (...) In particular, public prosecutors should be made aware of: (...) b. the constitutional and legal protection of suspects, victims and witnesses; (...).'*¹⁰³ The same Recommendation points out that international co-operation

¹⁰⁰ BRIENEN, M.E.I. and HOEGEN, E.H., *Victims of Crime in 22 European Criminal Justice Systems. The implementation of Recommendation (85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Nijmegen, WLP, 2000.

¹⁰¹ SHAPLAND, J., 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies' in CRAWFORD, A. and GOODEY, J. (eds.), *Integrating a Victim Perspective within Criminal Justice*, Aldershot, Ashgate, 2000, 147-164.

¹⁰² GROENHUIJSEN, M., 'Victims' Rights in the Criminal Justice System: A Call for More Comprehensive Implementation Theory' in VAN DIJK, J., VAN KAAM, R. and WEMMERS, J. (eds.), *Caring for Crime Victims. Selected Proceedings of the 9th International Symposium on Victimology*, Monsey, Criminal Justice Press, 1999, 85-114.

¹⁰³ Art. 7. Council of Europe Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system. And according to the Explanatory Memorandum: 'At a practical level, and in the lights of developments of crime, there is a good case for additional training in specific sectors, such as: (...) vulnerable witnesses and victims; (...).' See also Art. 2(b) of the UN Guidelines on the Role of Prosecutors.

between public prosecutors should consist of, among others, '*organising training and awareness-enhancing sessions; (...) working seminars (...)*'.¹⁰⁴

Victim oriented training at the level of the public prosecutor's service should not only consist of elements of (legal) knowledge, but should also deal with attitudes and skills. Moreover, accurate *knowledge* refers to not only legal aspects of victim related provisions, but also to awareness and information on the victimisation experience, victims' needs, secondary victimisation and possibilities to refer victims to victim support and other services. *Attitudes* refer to showing respect, understanding and patience towards victims and witnesses, and a continuous reflection on the victim's perspective when working in judicial files. *Skills* relate to appropriate decision making in the interest of victims and witnesses (for example when protection measures are needed), but also the ability to communicate information to victims in an understandable way, listening skills and skills to refer victims in a pro-active way to victim support agencies.

A consensus has grown on the important role of the public prosecutor towards victims and witnesses and his/her duties. A next step is to ensure actual implementation. Together with legal reform, training is the most important condition to realise a real improvement. It is highly recommended to further conceptualise, organise, evaluate and refine specific training modules on victim issues for public prosecutors. International exchange and co-operation (training seminars for trainers) should be encouraged. At the national level, universities should include legal and non-legal victim issues much more in their law curricula. Victimology should be an essential component of the initial training of public prosecutors, and should be offered and further elaborated as ongoing training and training-on-the-job. Furthermore, training at one of these levels will only be effective, if good practices are supported and valorised continuously by the system. The latter requires the presence of a well conceived and consistent victim policy within the public prosecutor's service at both central and local level. Also, sufficient resources in terms of time, personnel and funding must be available.

A final condition in order to make legal victim oriented reform within the criminal justice system effective, is networking.¹⁰⁵ Whereas in several documents at supranational level the importance for public prosecutors of co-operation in general with other public or governmental institutes has been mentioned, experience in several countries shows that the integration of a victim dimension and victim friendly practices in the system can benefit a lot from systematic co-operation and partnerships with external, also non-governmental organisations. In many countries, a lot of expertise on victims' needs and support is available within the voluntary sector who played a pioneer role in these matters. But it is also true that there often exists a lack of mutual confidence between the voluntary sector and criminal justice authorities. In Central and Eastern European countries the situation is still different, since non-governmental organisations did not play that important role in recent history or are associated with negative features of former political regimes. Be it as it may, victim issues and policies offer a new opportunity for

¹⁰⁴ Art 38.

¹⁰⁵ GROENHUIJSEN, *l.c.* The author discerns four essential conditions: knowledge, attitudes, resources and networking.

both the criminal justice system and society to narrow the gap between the two worlds and to build reciprocal trust and co-operation.

Informing victims and witnesses

The general duty of the public prosecutor on providing information to victims is widely acknowledged. *'The victim should be informed on the final decision concerning prosecution, unless he indicates that he does not want this information'*, says Council of Europe Recommendation No. R(85)11 in its article 6. Victims should be informed of their rights in seeking redress through formal or informal procedures, and of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, according to articles 5 and 6 of the UN Declaration of 1985. The right of the victim to receive information during criminal proceedings is dealt with in more detail by the EU Council Framework Decision of 2001 (art. 4). The information to be given – according to the Framework Decision - should not only reflect the internal processing of the case, but also external services for victims: *'the type of services or organisations to which they can turn for support'* and *'the type of support which they can obtain'*. A recently adopted Council of Europe Recommendation on assistance to crime victims (14 June 2006) also stipulates more in detail the desirable contents of information to be given, including information on legal proceedings: *'States should ensure in an appropriate way that victims are kept informed and understand:*

- *the outcome of their complaint;*
- *relevant stages in the progress of criminal proceedings;*
- *the verdict of the competent court and, where relevant, the sentence.*¹⁰⁶

The questionnaire mainly dealt with *internally oriented* information, and reveals a lot of practices and legal provisions in the respective countries on the duty of public prosecutors to inform victims and witnesses on protection measures and on action taken in their case concerning prosecution and criminal investigation. However, even taking into account the different nature of the respective criminal justice systems and legal contexts within Europe, the replies to the questionnaire show considerable differences concerning *the status* the victim should have in order to be informed and *the way of informing* him or her. In some jurisdictions, all victims, regardless of their legal position, must be informed by the public prosecutor on certain aspects such as the decision (not) to prosecute or the date of trial by the court. In other jurisdictions, only victims which have obtained the legal position of injured person or civil party must be informed on these aspects. In some jurisdictions, this information is given on the initiative of the public prosecutor *ex officio*, whereas in other jurisdictions this information is only provided if the victim has formally expressed his/her wish to be kept informed. What we know from victimological research, however, is that victims in general expect to be informed by the system itself, once they have reported the crime to the police.

But, as mentioned, the duty of the public prosecutor to inform victims should not be restricted to information on the *internal* procedures. Victims should receive appropriate information on victim support and other (social) services, on possibilities for legal advice

¹⁰⁶ Art. 6 of Council of Europe Recommendation Rec(2006)8 on assistance to crime victims.

and legal assistance and on different ways to obtain restitution and financial compensation. Depending on the respective legal responsibilities of the police and the public prosecutor in a given jurisdiction, this information should be provided by one of them (or by both), but it should be provided effectively. ‘Effectively’ implies at least two conditions: (1) information on victim support agencies and referrals to these agencies must be provided in a pro-active way, taking into account the finding that victims who have a need for further help do not contact these services spontaneously, and (2) clear working agreements should be made in each region between the public prosecutor, the police and victim support agencies.¹⁰⁷

The issue of victim participation

Whereas the overall need and duty to inform victims is not subject to discussion in most jurisdictions, the right of the victim to participate in criminal proceedings provokes more debate. In many countries, the expanding rights of victims in this respect is sensitive matter. The questionnaire replies indicate that the rights of victims to initiate or to take part in criminal proceedings differ a lot among European jurisdictions. This is due to fundamental differences in legal systems: the victim, for example, has the right to act as private or as subsidiary prosecutor, or has no right to prosecute at all. However, the present research on basis of the questionnaire is limited in this respect as well, because (1) it is not able to show the whole legal system in the different jurisdictions (which is important in order to understand in a correct way the different legal status of victims), and (2) we do not have reliable information on the way participatory rights in different countries function in reality (they can be subject to many restrictions and selective mechanisms in practice, and it might well be the case that by the end of the day these differences between countries are less pronounced).

The need of victims to participate in their cases is subject to evolution and re-formulation in recent years. What we know from research, is that victims feel alienated and that they want to be involved in the criminal justice system, whether actively or passively. Citizens in general believe that the role of the victim should go beyond that of simple witness both at the investigation and disposition stages of their case.¹⁰⁸ Moreover, it was repeatedly found that victim dissatisfaction focused on the process rather than the outcome of their cases. In this context, victim impact statements emerged in many (common law) jurisdictions, although it was found that this kind of input by victims had little effect on the criminal justice system (sentences) and on victims’ satisfaction. Victim satisfaction with the sentence (and with the criminal justice system in general) is mainly influenced by the perception of fairness in sentencing. This means that the process – and thus also the role of other actors than the judge contributing to the process – is important for the victim (procedural justice, which says that control over the process is more important than control over the outcome). Victims want to have a voice in their case, to be heard

¹⁰⁷ See also: MOYANO MARQUES, F. and FARR, F. (eds.), *Protection and Promotion of Victims’ Rights in Europe. Diké International Seminar*, Lisbon, APAV, 2003.

¹⁰⁸ KILCHLING, M., ‘Interest of the Victim and Public Prosecution: First Results of a National Survey’ in KAISER, G., KURY, H. and ALBRECHT, H.-J. (eds.), *Victims and Criminal Justice*, Freiburg, Max Planck Institute for Foreign and International Penal Law, 1991.

and to be able to present their perspective in criminal proceedings. This gives them ‘standing’ as individual in the group (which is so important after a victimisation experience), and finally refers to the feeling of being treated with respect and dignity. This all means that probably not the formal role of the victim in criminal proceedings or his/her impact on the sentence is the most important, but the extent to which the victim experiences respect and dignity.¹⁰⁹

Given that:

- 1) participatory rights for victims in criminal proceedings are regulated in very different ways within Europe,
- 2) new legislative evolutions can be expected in this regard, also in continental Europe, and
- 3) further knowledge on the psychosocial meaning of victim participation is desirable in order to understand and to meet victims’ and citizens’ experiences of ‘justice’,

it must be concluded that much more comparative research should be undertaken on the presence and the actual functioning of participatory rights for victims in the respective jurisdictions, and on the way victims, witnesses and others experience these rights. One example is the right that some victims have in some jurisdictions to have a personal meeting with the public prosecutor.

Mediation

Through participation in criminal proceedings, it has been argued that victims can obtain a more realistic and nuanced idea on both the criminal justice system and the offender.¹¹⁰ A practical way to realise this potential, is making use of victim-offender mediation. The questionnaire reveals that in almost all jurisdictions the public prosecutor is not empowered to mediate him or her self in criminal cases, but that he or she can play an active role in identifying appropriate cases and referring them to mediation services which operate within or in close co-operation with criminal justice agencies. There is, on the one hand, a general consensus that mediation can be in the interest of victims, if certain conditions are respected.¹¹¹ On the other hand, there is often a very restricted view on the applicability of mediation. Mediation is often considered as a good measure for *some* categories of offenders, namely juveniles or first-offenders who have committed a not too serious crime. Therefore, mediation is often used as an alternative or diversionary measure. Also, many restrict the mediation process to a financial settlement between the victim and the perpetrator. These assumptions must be corrected, among others because they unilaterally start from an offender perspective. Taking into account the victim’s

¹⁰⁹ JOUTSEN, M., ‘Victim Participation in Proceedings and Sentencing in Europe’, *International Review of Victimology*, 1994, 3, 57-67; see also WEMMERS, J.M., *Victims in the Criminal Justice System. A study into the treatment of victims and its effects on their attitudes and behaviour*, Amsterdam, Kugler Publications, 1996.

¹¹⁰ STRANG, H., *o.c.*, 15.

¹¹¹ Art. 13 of Council of Europe Recommendation Rec(2006)8 on assistance to crime victims. See also Art. 10 of the EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, which urges EU member states to promote victim-offender mediation and to ensure that agreements between the victim and the offender can be taken into account in criminal proceedings.

needs and perspective, there is no *a priori* reason to limit mediation to less serious crimes or to one (early) stage of the criminal proceedings. By meeting the offender face to face, victims hope to receive clarifications from him/her on the circumstances and the motives for committing the offence, and to explain to the offender the consequences of what he did to the victim and others. Research shows that these and other psychological benefits of mediation, such as receiving sincere apologies, are more important for most victims than just the aspect of financial compensation. These findings have resulted in the option not to limit victim-offender mediation to minor offences, but to make it available to all crime, and during all stages of the criminal justice process, even after sentence. The broadening of the scope of mediation implies special attention for at least the following aspects:

- the relationship between mediation and the criminal justice and sentencing process (can/should a successful or a failed mediation influence the public prosecutor's decision (not) to prosecute, as well as his requisitioning of punishment?);
- the status of the mediator and the mediation service and standards of practice;
- legal protection and safeguards before, during and after mediation, and the role of judicial authorities.

Clear guidelines for applying and implementing mediation practices are offered by Council of Europe Recommendation No R(99)19 on mediation in penal matters.¹¹² Also, the Council of Europe has published a guide on implementing the Recommendation and on developing victim-offender mediation and other restorative justice practices in a European context.¹¹³ Finally, many national mediation or restorative justice organisations have developed, often in consultation with judicial authorities, national guidelines and practice standards.

The right to react to the decision of the public prosecutor not to prosecute

According to article 34 of Council of Europe Recommendation Rec(2000)19, '*interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution*'.

In all jurisdictions (except one), the victim has a formal possibility to challenge the decision of the public prosecutor not to prosecute. In the majority of jurisdictions, this can, firstly, be done by addressing a *request or complaint* to the Prosecutor General or an other hierarchical body or to an (investigating) judge (in two jurisdictions, a parliamentary authority can be addressed). A second possibility in most of these countries is initiating a *form of private prosecution*. Lodging a new complaint or instituting a

¹¹² Council of Europe Recommendation No. R (99) 19 concerning mediation in penal matters.

¹¹³ AERTSEN, I., MACKAY, R., PELIKAN, C., WILLEMSSENS, J. and WRIGHT, M., *Rebuilding Community Connections – mediation and restorative justice in Europe*, Strasbourg, Council of Europe Publishing, 2004. See also: PETERS, T. and AERTSEN, I., 'Towards 'restorative justice': Victimization, victim support and trends in criminal justice' in X., *Crime and Criminal Justice in Europe*, Strasbourg, Council of Europe Publishing, 2000, 35-46.

private prosecution can be accompanied in some jurisdictions (two were mentioned) with the obligation to bear the costs of the proceedings in case of a not guilty verdict. The replies to the questionnaire show that in two jurisdictions another person (than the victim) with a legitimate interest can exercise these rights to challenge the decision of the public prosecutor not to prosecute. No information is obtained on the possibilities of associations to exercise these rights on behalf of the victim or victims groups (although this right obviously exists in some European jurisdictions).

Eight jurisdictions report the formal right of a victim to *appeal* with a judge or a court (judicial review) against a public prosecutor's decision not to prosecute. However, this finding should be interpreted with caution, taking into consideration the limited and often partial information we dispose of, and the eventuality of terminological and translation difficulties with regard to different notions of 'appeal'. Also in this respect, more in-depth comparative research should be done, taking into account the global context of different legal systems. In particular, attention should be given to possible thresholds and obstacles for victims in exercising their legal rights of complaint, private prosecution or appeal.